

**Enabling Soft Law Initiatives to Regulate the Environmental and Social  
Impacts of Mining Investments in Sub-Saharan Africa: A Case Study of  
Nigeria and South Africa**

**Abubakar Bature Lawal**

**Doctor of Philosophy**

**Newcastle Law School**

**November 2018**

## **Abstract**

This research explores the rise and proliferation of transnational soft law initiatives as regulatory tools in managing the environmental and social consequences of mining in Sub-Saharan Africa. The rise of such initiatives can be attributed to a governance gap within the management of mineral resource development in Sub-Saharan Africa, where hard law mining codes are weak or fail to be stringently enforced by Sub-Saharan African (SSA) countries. The continued development of soft law initiatives within the mineral resource and mining sectors such as the Global Compact, the Extractive Industries Transparency Initiative, the IFC Performance Standards, and the Equator Principles, has seen literature refer to them as a new regime which may regulate the negative consequences attributed to mineral resource exploitation in SSA and thus fill any governance gap.

The thesis argues that while transnational soft law initiatives can to an extent regulate the environmental and social impacts caused by mining companies in SSA, they are more likely to be effective where they are provided with an enabling environment by SSA countries, taking into account they are voluntary initiatives. The thesis substantiates this argument by analysing the concept of an enabling environment and demonstrating that transnational soft law initiatives applied within the mining industry are more likely to be effective in terms of compliance in regions where they are provided with an enabling environment. Using Nigeria and South Africa as case studies the research also establishes whether there is indeed a governance gap within the mining sector in SSA which needs to be filled by soft law. The research asserts that while the governance gap within the mining sector in South Africa is limited, there is indeed a governance gap in Nigeria which can be filled by transnational soft law initiatives. However, for such governance gaps to be filled by soft law in SSA mining there is a need for SSA countries to provide soft law with an enabling environment. The study found South Africa provides an enabling environment for soft law initiatives whereas Nigeria struggles in providing one. The study therefore concluded transnational soft law initiatives may not be the ideal regulatory tool that may fill the governance gap in SSA mining taking into account not all countries in SSA are as advanced and experienced in mining as South Africa. This was aptly demonstrated by Nigeria's struggle to enable soft law initiatives.

The findings of this research will contribute to the relevant literature as there has been limited research on how an enabling environment in particular can enhance the likelihood of compliance where soft law initiatives are concerned.

I dedicate this doctoral thesis to my parents: **Ambassador Bature Lawal** and **Hajiya Rahanatu Lawal**. To my father, you have been an inspiration to me and have profoundly influenced the directions I have taken in my life. You sacrificed your wealth in order to provide me and my siblings with the opportunity to be educated by some of the best institutions in the world, and for that we are all forever grateful. While we will never be able to repay your sacrifices we hope we can make you proud in our endeavours. To my mother, words do not describe how grateful I am to you. You are the kindest, most caring, most patient person I have ever known and the support you have given me throughout my life has been priceless, I hope one day to repay you ten times over. To you both, what is best in me, I owe to you, and we are the luckiest children to have you in our lives. I am eternally grateful for the strong foundation on which much that I do today is built. I thank you for your patience when dealing with me and I hope you will continue to be patient with me as I continue the journey of life after this PhD.

**Also To Dr James Upcher –**

An extraordinary supervisor and wonderful mentor



**9<sup>th</sup> December 1979 - 18<sup>th</sup> May 2017**

## **Acknowledgements**

In the name of God, Most Gracious, Most Merciful. All praises to the Almighty, for giving me the strength, ability, and determination to complete this study. I am forever thankful.

I would like to express my sincere gratitude and deepest appreciation to my supervisor Dr. Ole Pedersen, for his tireless help, advice, guidance, patience and wisdom. He always kept his door open to me regarding all matters of life during the course of my PhD, and for that I am eternally grateful. I am also grateful for his meticulous comments and constructive criticisms which made it possible for me to complete this degree. It has been a great privilege and honour to work with Dr Ole Pedersen and I hope we will collaborate further in the future.

I am also very grateful to my second supervisor, Dr James Upcher who was an extraordinary academic with a great eye for detail. He provided me with detailed comments that significantly improved this thesis. Beyond his exceptional contribution to my thesis, James was a great mentor who was always there to provide me with counsel regarding personal development and career choices, and it is unfortunate that he will not be here at the conclusion of this journey. I hope this thesis meets his very high standards and is one he would have been very proud of.

My gratitude is also extended to my colleagues and friends for their academic support and all the fun we had in the last four years of my life in Newcastle. My special thanks to Abdullah, Richard, and Samet for enlightening me on issues regarding the PhD and beyond. I am also grateful to Christel for her perseverance in reading many drafts of my chapters in the midst of completing her own PhD. I am also indebted to Rebecca for sacrificing her time to proof read my thesis, and must also thank Gugu, Buhari, and the NMFUK Newcastle chapter for making my stay in Newcastle very pleasant.

I wish to extend my warmest thanks to the Newcastle Law School and Library staff particularly Prof Christopher Rogers, Gemma, Jane, Richard, Catherine, Alison and Joanne for assisting me in many different ways during my academic study.

Outside of Newcastle a special recognition goes to my close friends, Ishaq, Sadiq, Rashid, and Saddique for their encouragement. My greatest thanks also goes to Suleiman for the stimulating discussions, encouragement, and support throughout the course of this PhD. I am also eternally grateful to the former Governor of Katsina State H.E. Barr. Shehu Shema and his family for the support and grant given to me to pursue this research.

I cannot, however, conclude these acknowledgements without expressing my greatest appreciation to my family. To my siblings, Abbas, Farida, Jamila, and Mahadi, I thank you and your families for your never ending patience and support throughout my life, you are the best siblings one could ever wish for. I would also like to especially appreciate Alhaji Aliyu Gambo, who always encouraged me to excel in my academic studies and to pursue my PhD. To my dear uncle, aunt, and cousin, Dr Usman Bugaje, Dr Mairo Mandara, and Bilal Bugaje thank you very much for your advice, kind words and support during my studies.

# Table of Contents

Abstract.....	ii
Dedication.....	iii
Acknowledgement.....	iv
Table of Contents.....	vi
List of Abbreviations.....	x
<b>Chapter 1: Introduction, Purpose and Methodology.....</b>	<b>1</b>
1.1 Introduction .....	1
1.2 The Background of the Research and Problem Statement.....	4
1.3 Research Questions .....	14
1.4 The Methodology of the Study .....	15
1.5 Conceptual Framework.....	20
1.6 Contribution to knowledge .....	22
1.7 Structure of the Thesis and Chapter Outlines.....	24
<b>Chapter 2: Soft Law and the Enabling Environment .....</b>	<b>27</b>
2.1 Introduction .....	27
2.2 Soft Law in International Law .....	29
2.2.1 What is Soft Law in International Law? .....	31
2.3 The Enabling Environment.....	39
2.3.1 Creating an Enabling Environment for Mining Soft Law Initiatives: The Role of the State and Public Sector .....	42
2.3.1.1 Mandating.....	44
2.3.1.2 Facilitating.....	52
2.3.1.3 Partnering .....	57
2.3.1.4 Endorsing.....	60
2.4 Other Actors in the Mining Industry and their Roles in Creating an Enabling Environment.....	61
2.4.1 Local Governance.....	62
2.4.2 Civil Society .....	65
2.4.3 International Community.....	67
2.5 Limitations in providing an enabling environment for the implementation of Soft law mining regulatory initiatives. ....	70
2.6 Conclusion.....	72
<b>Chapter 3: Transnational Soft law initiatives and the Enabling Environment .....</b>	<b>75</b>
3.1 Introduction .....	75

3.2 Overview of Transnational Soft Law Initiatives and an Enabling Environment .....	77
3.3 The United Nations Global Compact.....	83
3.3.1 Overview .....	83
3.3.2 The Effectiveness of the Global Compact Initiative in terms of Compliance as a Soft Law Initiative .....	85
3.3.3 Does the availability of an enabling environment affect the likelihood of compliance with the Global Compact initiative?.....	91
3.3.4 The UN Global Compact and an Enabling Environment: Rio Tinto.....	92
3.3.5 The UN Global Compact and an Enabling Environment: Barrick Gold.....	99
3.3.6 The UN Global Compact and an Enabling Environment: The Effects .....	107
3.4 The Extractive Industries Transparency Initiative (EITI).....	108
3.4.1 The Effectiveness of the EITI in terms of compliance as a Voluntary Soft Law Initiative ..	110
3.4.2 EITI and an Enabling Environment: Nigeria.....	114
3.4.3 EITI and an Enabling Environment: Ghana.....	118
3.4.4 The EITI and an Enabling Environment: The Effects .....	121
3.5 The Equator Principles .....	123
3.5.1 Overview .....	123
3.5.2 How effective are the Equator Principles on their own as a Soft Law Initiative?.....	127
3.5.3 Ensuring compliance with the Equator Principles through the provision of an Enabled Civil Society.....	134
3.5.4 The Equator Principles and an Enabling Environment: The Effects .....	139
3.6 Conclusion.....	139
<b>Chapter 4: Mining in SSA and the Provision of an Enabling Environment for Soft Law Initiatives:</b>	
<b>Nigeria.....</b>	<b>141</b>
4.1 Introduction .....	141
4.2 Overview of Mining Activities in Nigeria and Their Impact .....	143
4.2.1 Impact of Solid Minerals Mining In Nigeria.....	144
4.3 Regulating Mining in Nigeria.....	150
4.3.1 The Nigerian Environmental Impact Assessment Decree,1992.....	151
4.3.2 The Nigerian 1998 National Policy on Solid Minerals and the Minerals and Mining Decree 1999 .....	156
4.3.3 The Nigerian Minerals and Mining Act, 2007 .....	158
4.4 Providing an Enabling Environment for Soft Law Initiatives.....	173
4.4.1 The Equator Principles in Nigeria.....	173
4.4.2 Nigeria and the provision of an Enabling Environment for the Equator Principles and other Soft Law Initiatives .....	177
4.4.2.1 The Nigerian Public Sector (Central Government).....	178

4.4.2.1.1 Mandating in Nigeria .....	178
4.4.2.1.2 Facilitating in Nigeria .....	179
4.4.2.1.3 Partnering in Nigeria .....	182
4.4.2.1.4 Endorsing in Nigeria .....	184
4.4.2.2 Local Governance in Nigeria .....	186
4.4.3.3 Civil Society in Nigeria .....	191
4.5 Conclusion.....	198
<b>Chapter 5: Mining in SSA and the Provision of an Enabling Environment for Soft Law Initiatives: South Africa .....</b>	<b>201</b>
5.1 Introduction .....	201
5.2 Overview of Mining Activities in South Africa and Their Impact .....	202
5.2.1 Impact of Solid Minerals Mining In South Africa .....	204
5.3 Regulating Mining in South Africa.....	208
5.3.1 The 1996 Constitution of the Republic of South Africa .....	209
5.3.2 National Environmental Management Act (NEMA), 1998.....	220
5.3.3 The Minerals and Petroleum Development Act (MPRDA), 2002.....	229
5.4 Providing an Enabling Environment for Soft Law Initiatives.....	237
5.4.1 The Equator Principles in South Africa.....	238
5.4.2 South Africa and the provision of an Enabling Environment for the Equator Principles and other Soft Law Initiatives .....	244
5.4.2.1 The South African Public Sector (National/Central Government) .....	244
5.4.2.1.1 Mandating in South Africa .....	245
5.4.2.1.2 Facilitating in South Africa .....	247
5.4.2.1.3 Partnering in South Africa.....	250
5.4.2.1.4 Endorsing in South Africa.....	252
5.4.2.2 Local Governance in South Africa .....	255
5.4.2.3 Civil Society in South Africa.....	260
5.5 Conclusion.....	266
<b>Chapter 6: Conclusion .....</b>	<b>274</b>
6.1 Introduction .....	274
6.2 Research Questions and Findings .....	274
6.2.1 Research Question 1: Are soft law initiatives more likely to be an effective form of regulating the negative consequences of mining in SSA given the right enabling environment? .....	276
6.2.2 Research Question 1.1: What is Soft Law in International Law and what consists an Enabling Environment for them.....	277



6.2.3 Research Question 1.2: Does the existence of an enabling environment for soft law initiatives make it more likely that such initiatives will be complied with by subscribed companies? .....	280
6.2.4 Research Question 1.3: Is there a governance gap within the mining sector in SSA as a result of weak mining regulations or the enforcement of such regulation? .....	282
6.2.5 Research Question 1.4: To what extent do current policy and legal regimes in Nigeria and South Africa provide an enabling environment for soft law initiatives and what implications does it have on the application of soft law initiatives within SSA mining? .....	285
6.2 Suggestions and Recommendations .....	287
<b>Bibliography</b> .....	290

## List of Abbreviation

AMDC	African Minerals Development Centre
AMV	African Mining Vision
AP	Action Plan
ASM	Artisanal and Small Scale Mining
ATA	Akali Tange Association
BPD	Business Partners for Development
BPDP	Bangladesh Power Development Board
BEE	Black Economic Empowerment
BBBEE Empowerment policy	Broad Based Black Economic
CBOs	Community Based Organisations
CBN	Central Bank of Nigeria
CDA	Community Development Agreement
CEO	Chief Executive Officer
CIDA Agency	Canadian International Development
CIPEC Conservation	Canadian Industry Program of Energy
CLRF Fund	Contingent Liability and Rehabilitation
COP	Communication on Progress
CSO	Civil Society Organizations
CSR	Corporate Social Responsibility
DEAT Tourism	Department of Environmental Affairs and
DME	Department of Mines and Energy
DRC	Democratic Republic of Congo
DWAF	Department of Water Affairs and Forestry
EFCC Commission	Economic and Financial Crimes
EITI Initiative	Extractive Industries Transparency

EIA	Environmental Impact Assessments
EMMEP Essential Program	Environmental Monitoring/Mining
EPs	Equator Principles
EPA	Environmental Protection Administration
EPFIs	Equator Principles Financial Institutions
ERA	Environmental Rights Action
ESMP Plan	Environmental and Social Management
EWP	Environmental Work Program
FDI	Foreign Direct Investment
FIRS	Federal Inland Revenue Service
FPIC	Free, Prior and Informed Consent
GCO	Global Compact Office
GGFR	Global Gas Flaring Reduction Partnership
GHEITI Initiative	Ghana Extractive Industries Transparency
GNMC Corporation	Ghana National Manganese Marketing
GIS	Goldwyn International Strategies LLC
GRAMA minières en Afrique	Groupe de recherche sur les activités
HRW	Human Rights Watch
ICHR	Ijaw Council for Human Rights
ICJ	International Court of Justice
ICMM Metals	International Council on Mining and
IEFCL Ltd	Indorama Eleme Fertiliser & Chemicals
IFC	International Financial Corporation
IFRS Standards	International Financing Reporting

IHRHL Humanitarian Law	Institute of Human Rights and
IPIECA Association for Environmental and Social Issues	The Global Oil and Gas Industry
IUCN	International Union of Conservation
LCD	Local Contractor Development
MNEs	Multi-National Enterprises
MNCs	Multi-National Corporations
MNOC	Multi-National Oil Companies
MPRDA	Minerals and Petroleum Development Act
ND-HERO Rescue Organisation	Niger Delta Human and Environmental
NDA	National Development Agency
NDDC	Niger Delta Development Commission
NEDLAC Labour Council	National Economic Development and
NEITI Transparency Initiative	Nigerian Extractive Industries
NEMA	National Environmental Management Act
NFRC	Nigeria Flare Reduction Committee
NGO	Non-Governmental Organizations
NTPC	National Thermal Power Corporation
OECD and Development	Organization for Economic Co-operation
OISIL	OIS-Indorama Limited
PNAE d'action pour l'environnement	Republique de Guinee, Plan national
PPT	Petroleum Profits Taxes
PSC	Production Sharing Contracts
PWYP	Publish What You Pay
RTFT	Rio Tinto Fer et Titane
SA8000	Social Accountability International
SADC	South African Development Community

SAMBF Forum	South African Mining and Biodiversity
SBG	Standard Bank Group
SGMC	State Gold Mining Corporation
SO <sub>2</sub>	Sulphur Dioxide
SSA	Sub-Saharan Africa
STDs	Sexually Transmitted Diseases
TiO <sub>2</sub>	Titanium Dioxide
TNC	Transnational Corporations
TRI	Toxic Release Inventory
UK	United Kingdom
UN	United Nations
UNCTAD Development	United Nations Conference on Trade and
UNEP	United Nations Environment Program
UQAM	Université du Québec à Montréal
US	United States of America
USA	United States of America
WAGP	West African Gas Pipeline
WALHI (Indonesian Forum for the Environment)	Wahana Lingkungan Hidup Indonesia
WBCSD Development	World Business Council for Sustainable
WBG	World Bank Group
WSSD Development 2002	World Summit on Sustainable
WWF	World Wide Fund
ZNCC Commerce	Zimbabwe National Chamber of

For legal journal abbreviations, refer to Cardiff Index for Legal abbreviations:

<http://www.legalabbrevs.cardiff.ac.uk/>

For non-legal journal abbreviations, refer to Journal of Economic Literature Abbreviation:

<http://www.aeaweb.org/jel/abbrev.htm>

# Chapter 1: Introduction, Purpose, and Methodology

## 1.1 Introduction

The exploration and exploitation of solid mineral resources through mining in Sub-Saharan Africa (SSA) has over the years had a significant impact on livelihoods in SSA countries where resources are mined. On the one hand, mining has attracted much needed foreign direct investment in some of the poorest countries in the world that need such investment to develop, for instance, in 1999 alone Ghana earned \$612.9 Million in total mineral exports earnings as a result of the activities of foreign investors.<sup>1</sup> On the other hand, big multinational companies exploiting open pit mines seldom pay attention to the situation of local communities and societal issues have developed rapidly.<sup>2</sup> The main societal problem as a result of mining appears to be the loss of land and environmental degradation due to the fact that local land will be used for mining purposes. It leads not only to economic problems but also to the loosening of economic ties as temporary financial compensation seems inadequate in relation to the long-term social, environmental, and economic costs of mining activities.<sup>3</sup> For example, in Ghana displaced women following the development of mining emphasized that land loss is the worst problem affecting their normal functioning, and added that mining activities have led to the deterioration of their economic status along with, malnutrition, health problems, and lack of access to basic resources among other things.<sup>4</sup>

The societal issues and environmental degradation that occur as a result of mining in SSA suggests that regulations in SSA governing mining activities are weak or simply not enforced, thereby creating a governance gap within the industry. This gap has led to a trend of norms and standards that have their origin in the multilateral arena developing to fill this governance gap.<sup>5</sup>

---

<sup>1</sup> Thomas Akabzaa and Abdulai Darimani, 'Impact of Mining Sector Investment in Ghana: A study of the Tarkwa mining region' (2001) Structural Adjustment Participatory Review International Network (Saprin)23<[http://www.saprin.org/ghana/research/gha\\_mining.pdf](http://www.saprin.org/ghana/research/gha_mining.pdf)> accessed 18th September 2018

<sup>2</sup> Bogumił Terminski, 'Mining-Induced Displacement And Resettlement: Social Problem and Human Rights Issue (A Global Perspective)' (2012) Social Science Research Network, 8 <<http://ssrn.com/abstract=2028490>> accessed 13<sup>th</sup> May 2013

<sup>3</sup> *ibid*, 10

<sup>4</sup> *ibid*, 11

<sup>5</sup> Authors such as John Ruggie also generally characterised the rise in transnational soft law initiatives across most economic sectors not just the mining sector as a result of a governance gap caused by globalization which allows powerful multinational organizations to move across borders into areas with weak regulations, allowing them to cause wrongful acts without much regulation. See John Ruggie, 'Protect, Respect and Remedy: a Framework for Business and Human Rights'(2008) A/HRC/8/5, 3

Such norms include corporate voluntary codes of conduct, World Bank Group Performance Standards, the UN Global Compact and new local and informal areas of regulation.<sup>6</sup> These norms and standards are classified within this thesis as soft law, which this research defines as ‘rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects.’<sup>7</sup> Authors within the literature such as Campbell, Besada and Martin see the developing trend of soft law initiatives as the emergence of a new regime that seek to regulate the mining sector in SSA thereby filling the governance gap and ensuring sustainable development and environmental protection.<sup>8</sup>

However, as voluntary initiatives, numerous authors within the literature do not see soft law initiatives such as the Global Compact as viable alternatives to strong traditional legislations and have heavily criticised them, especially the ease in which they can be ignored.<sup>9</sup> Nevertheless, the development of such initiatives have become necessary, as evidenced by the rise in such initiatives as SSA countries continue to have lax regulation due to weak institutional mechanisms to enforce laws, poor resources, and the fear of losing investment as a result of the stringent enforcement of regulations. Therefore encouraging transnational corporations (TNC) to subscribe to multilateral soft law initiatives that seek to regulate environmental and social impacts of mining and ensuring they comply with them may be an

---

[http://dag.un.org/bitstream/handle/11176/269890/A\\_HRC\\_8\\_5-EN.pdf?sequence=3&isAllowed=y](http://dag.un.org/bitstream/handle/11176/269890/A_HRC_8_5-EN.pdf?sequence=3&isAllowed=y) accessed 11th November 2017

<sup>6</sup> Voluntary codes include; United Nations Global Compact (2000), Equator Principles III (2013), Extractive Industries Transparency Initiative (2003), International Finance Corporation Performance Standards on Environmental and Social Sustainability (2012), and The World Bank's environmental and social safeguards policies and procedures are: OP/BP 4.01, *Environmental Assessment*; OP/BP 4.04, *Natural Habitats*; OP 4.09, *Pest Management*; OP/BP 4.10, *Indigenous Peoples*; OP/BP 4.11, *Physical Cultural Resources*; OP/BP 4.12, *Involuntary Resettlement*; OP 4.36, *Forests*; and OP/BP 4.37, *Safety of Dams*, see The World Bank Operations Manual, ‘Operational Policies’, (March 2005) available at

<http://siteresources.worldbank.org/OPSMANUAL/Resources/OP4.00andTableA1.pdf> accessed 30<sup>th</sup> September 2017

<sup>7</sup> Francis Snyder, ‘The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques’, (1993b) 56 (1) *The Modern Law Review*, 19-54, 32

<sup>8</sup> Bonnie Campbell, ‘Revisiting the Reform Process of African Mining Regimes’ (2010) Vol 30 *Canadian Journal of Development Studies*, 197-217, Hany Besada and Philip Martin, ‘Mining Codes in Africa: Emergence of a “Fourth” Generation?’ (2013), The North-South Institute, available at: <http://www.nsi-ins.ca/wp-content/uploads/2013/03/Mining-Codes-in-Africa-Report-Hany.pdf> accessed 18<sup>th</sup> September 2018

<sup>9</sup> See for example; Jorge A. Arevalo and Francis T. Fallon, ‘Assessing corporate responsibility as a contribution to global governance: the case of the UN Global Compact’ (2008) Vol. 8(4) *Corporate Governance: The International journal of business in society*, 456 -470 , Hen Runhaar and Helene Lafferty, ‘Governing Corporate Social Responsibility: An Assessment of the Contribution of the UN Global Compact to CSR strategies in the Telecommunication Industry’ (2009) 84 *Journal of Business Ethics*, 479-495, David Vogel, ‘Private Global Business Regulation’, (2008) 11 *Annu. Rev. Polit. Sci* 261-82, 274, Surya Deva, ‘Global Compact: A Critique of the UN’s “Public-Private” Partnership for Promoting Corporate Citizenship’ (2006-2007) 34 *Syracuse J. Int’L. & Com* 107

alternative way of regulating the negative impacts of mining in the short term thus overcoming the current governance gap issue.

This leaves one questioning how compliance with voluntary soft law initiatives can be attained if traditional hard law are constantly ignored in SSA. A persuasive argument in favour of soft law initiatives usually put forward by its proponents is that soft law initiatives can be more effective than hard law because they are subscribed to voluntarily by TNCs and allows for a great deal of flexibility therefore companies are more likely to comply.<sup>10</sup> While the above is indeed persuasive as will be seen in chapter three of this thesis, a more convincing approach to ensuring compliance with soft law initiatives and thus regulate mining is the argument that soft law can work where specific measures are put in place by SSA countries to enable them. In other words they can be effective where there is an enabling environment for them.<sup>11</sup>

With the rise in transnational soft law initiatives signalling they are indeed here to stay, this thesis seeks to establish whether an enabling environment for soft law initiatives can indeed make such initiatives more likely to be effective in terms of compliance, thereby allowing them to regulate the negative environmental impacts of mining within SSA. Where it is established that an enabling environment is more likely to make soft law initiatives more effective, this research seeks to then determine whether SSA countries provide such enabling environments for soft law. This is necessary because providing such an environment would mean soft law initiatives may be effective in regulating the negative impact of mining in SSA thus filling the governance gap.

An enabling environment for soft law initiatives where this thesis is concerned is the sum of the drivers, tools, human capacities and institutions directed towards achieving the effective implementation of such soft law codes by States and the international community.<sup>12</sup>

The findings of this research will contribute to the relevant literature as there has been limited research on how an enabling environment can enhance the likelihood of compliance where soft law initiatives are concerned. There has also been few studies assessing the capabilities of SSA

---

<sup>10</sup> M. Bryane, 'Corporate Social Responsibility in International Development: An Overview and Critique', (2003), 10 Corporate Social Responsibility and Environmental Management, 115-128

<sup>11</sup> Kathleen Andersen, 'Mining, Privatization and the Environment' (1995) vol. 11 (3) Journal of Mineral Policy, Business and Environment, Raw Materials Report, published by Raw Materials Group, Stockholm, 7

<sup>12</sup> Halina Ward, 'Public Sector Roles In Strengthening Corporate Social Responsibility: Taking Stock' [2004] The World Bank available at: <<http://pubs.iied.org/pdfs/16014IIED.pdf>> accessed 15th June 2014



countries in providing an enabling environment for soft law initiatives that can enhance regulation particularly where mining is concerned.

This chapter first introduces the background of this thesis by discussing the problems faced by communities in SSA as a result of the mining activities of transnational mining corporations, the regulations SSA countries have passed to remedy the situation, and the development of soft law initiatives as a form of solving the problem. Following this, it presents the research questions to illustrate the particular domain the research seeks to explore. Next a discussion of the methodology by which the data is compiled and analysed throughout the thesis is presented. Then, the conceptual framework of the thesis is discussed to illustrate how the thesis went about answering its questions. This is followed by a section on the significance of the study, which highlights the importance of the research and identifies those expected to benefit from it. Finally, the structure of the thesis is presented for ease of reading.

## **1.2 The Background of the Research and Problem Statement**

Investment into African mining is set to reach unprecedented levels as the continent continues to attract billions of dollars in foreign investment which will result in substantial economic growth and development,<sup>13</sup> but with this comes major risks for African societies and the environment.<sup>14</sup> Such risk arise due to the fact that over the years mining companies investing in Africa have caused major environmental and societal problems all over Africa.

Just recently in 2015 it was reported that mining giant Vedanta Resources' mine in Zambia's Copper belt region has caused major environmental damage by spilling sulphuric acid and other toxic chemicals into rivers, streams, and underground aquifers used for drinking water near Chingola, a mining town.<sup>15</sup> As a result of this spill villagers are suffering from stomach pains

---

<sup>13</sup> Chinese investment in African mining has quadrupled from 2000 to 2009, from US\$25.7 Billion to US\$103.4 Billion per year. As Chinese investment continue to grow so too are the investment of the other BRIC countries and Western countries, in particular Canada and Australia, with investment growing equally fast as exemplified by the fact that more than 230 Australian mining companies are involved in over 600 projects in mining exploration, extraction, and processing across more than 42 African countries, with a total current projected investment of more than US\$45 Billion. (see D.P. Edwards, Sean Sloan, Lingfei Weng, Paul Dirks, Jefferey Sayer, William F. Laurance, 'Mining and the African Environment' (2013) Vol 7 (3), Conservation Letters, 302-311, 302)

<sup>14</sup> D.P. Edwards, Sean Sloan, Lingfei Weng, Paul Dirks, Jefferey Sayer, William F. Laurance, 'Mining and the African Environment' (2013) Vol 7 (3), Conservation Letters, 302-311, 302

<sup>15</sup> John Vidal, 'Zambian Villagers take Mining Giant Vedanta to Court over Toxic Leaks', The Guardian (Chingola, Zambia 1<sup>st</sup> August 2015)

and illnesses, devastated crops, loss of earnings and permanent injuries.<sup>16</sup> A scientist who worked for the mine for more than fifteen years claimed there had been very little maintenance of critical equipment leading to heavy spillages and massive leakages of Acid all over the place and no effort was made by Vedanta to correct the scenario.<sup>17</sup> This is a typical example of how many companies exploit mineral resources in Africa with no regard for the environmental consequences to the environment. Such environmental incidents are littered all over the continent, for instance, in South Africa mining conglomerate Rio Tinto's Palabora operation has contaminated the biodiversity of the Kruger National Park where fauna and flora have been affected.<sup>18</sup> In Ghana, there were reports of cyanide spills at Ghana's largest gold mine at Obuasi operated by major mining company AngloGold Ashanti.<sup>19</sup>

Environmental damage is not the only concern that arises as a result of the mining activities of mining corporations in Africa. Another major issue is the displacement of communities and villages for the purpose of mining their rightful lands for mineral resources. Rio Tinto in particular has displaced thousands of local people in different locations in Africa and many of these people neither received adequate compensation or any compensation at all for their customary land rights. They have lost access to the food, firewood and indigenous medicines that they relied on, which has affected their livelihoods, and grave sites have been destroyed all in the construction of mines.<sup>20</sup> In Rio Tinto's ilmenite mine on the East Coast of Madagascar thousands of local people were displaced by the mine development and received very little compensation or none at all for their customary land rights. The local people further reported that Rio Tinto failed to hire as many workers from the locals as it promised, depriving them of jobs and income they desperately need.<sup>21</sup>

Environmental damage and the displacement of locals are just some of the problems caused by mining giants in their exploration of mineral resources, as will be discussed further in chapter three. Other issues include human rights abuses, and labour law violations which continue to

---

<sup>16</sup> John Vidal, 'Zambian Villagers take Mining Giant Vedanta to Court over Toxic Leaks', The Guardian (Chingola, Zambia 1<sup>st</sup> August 2015)

<sup>17</sup> *ibid*

<sup>18</sup> Industriall Union, 'Rio Tinto in Africa: Global Citizen or Corporate Shame?' (2012) available at <<http://www.industriall-union.org/sites/default/files/uploads/documents/industriall-rio-tinto-africa-report.pdf>> accessed 04 August 2017

<sup>19</sup> BBC News, 'Mining Firms Polluting Africa' (BBC 20 November 2007) <<http://news.bbc.co.uk/1/hi/world/africa/7103114.stm>> accessed 04 August 2017

<sup>20</sup> Industriall Union, 'Rio Tinto in Africa: Global Citizen or Corporate Shame?' (2012) available at <<http://www.industriall-union.org/sites/default/files/uploads/documents/industriall-rio-tinto-africa-report.pdf>> accessed 04 August 2017

<sup>21</sup> *ibid*

occur. It is argued that such abuses continue occurring in Africa due to a weak governance system, which is hardly enforced by African governments and thus taken advantage of by TNCs.<sup>22</sup> The legal nature of TNCs allows them to take advantage of weak regulations because although TNCs such as Vedanta Resources or Royal Dutch Shell Plc are well known companies registered in first world countries with strong legal systems where claims can be successfully brought against them for legal violations, when operating outside their headquartered jurisdiction<sup>23</sup> they usually operate through a group of subsidiary companies, which limits their liability. These subsidiary companies are then only subject to the laws and regulations of the country they are registered to operate as separate legal entities, which means claims against them may only be brought in such countries thus absolving the parent companies which control them of legal liability. Where there are weak legal systems these TNCs through their subsidiaries avoid prosecution therefore allowing them to mine resources in environmental and socially detrimental ways that are cost effective to them without fear of prosecution in these jurisdictions or in the jurisdiction of the parent company.

However, more recently the case of *Lungowe v Vedanta Resources Plc* has revealed that parent companies where TNCs are concerned can indeed be held liable for the actions of their subsidiaries and claims against them can be brought at courts where the parent company is domiciled, in this case England.<sup>24</sup> In this case the respondents who are Zambian citizens brought claims against Vedanta an English company and its Zambian subsidiary KCM in English courts. The claim against Vedanta are founded in negligence while those against the subsidiary relate to breaches of applicable Zambian environmental laws. Vedanta challenged the jurisdiction of English courts to hear the claim when the offenses claimed against them took place in Zambia, through its subsidiary KCM which is also registered in Zambia. They argued that based on the doctrine of forum non conveniens English courts should not entertain the claim as Zambia was the more appropriate forum to hear the claim. However, a majority of the Court of Appeal rejected Vedanta's argument thus dismissing the appeal, and held that the claimant's case could proceed before English courts.

The court's decision was based on the reasoning that a duty of care could be established between the claimants and Vedanta, thereby allowing a claim to be brought against Vedanta in England where it is domiciled, and thus granting English courts jurisdiction. In reaching this

---

<sup>22</sup> D.P. Edwards, Sean Sloan, Lingfei Weng, Paul Dirks, Jefferey Sayer, William F. Laurance, 'Mining and the African Environment' (2013) Vol 7 (3), 302-311, 304

<sup>23</sup> The country where they are registered.

<sup>24</sup> *Lungowe v Vedanta Resources Plc* [2017] EWCA Civ 1528 [2017] B.C.C 787; [2017] B.L.R 585

decision the court examined cases which applied the three part test for establishing duty of care set out in *Caparo Industries Plc v Dickman*<sup>25</sup> i.e. (i) proximity; (ii) foreseeability; and (iii) reasonableness and found that a parent company would owe a duty of care to persons directly affected by its subsidiary if the claimant could demonstrate ‘additional circumstance’ for instance that the parent company was directly responsible for drafting and devising the policies the effectiveness of which was the subject of the claim; or the parent company may have controlled the operations which gave rise to the claim. Each of the cases analysed by the court stressed that a duty of care was more likely to arise where the parent company had superior knowledge or expertise about the operations of its subsidiary. This was the case in the widely cited *Chandler v Cape Plc*<sup>26</sup> where the parent company was found to owe a duty of care to the staff of its subsidiary due to its superior knowledge. However, in *Thompson v Renwick Group Plc*<sup>27</sup> there was no duty of care found between a parent company and the employees of its subsidiary, as no evidence showed the parent company carried out any business beyond holding shares in its subsidiaries, therefore it was not better placed because of its superior knowledge or expertise to protect the employees of the subsidiary companies.

With respect to the Vedanta case, although Vedanta being the parent in the case had argued that they did not own the mine licence nor controlled the material operation of the mine, it was nevertheless held the claimant’s claim of duty of care was arguable due to numerous actions undertaken by Vedanta. Such action include Vedanta publishing a sustainability report which emphasised how the board of the parent company had oversight over its subsidiaries; how it entered into a management and shareholder agreement under which it was obligated to provide various services to KCM, such as employee training; provided health safety, and environmental training across its group companies; provided financial support to KCM; released various public statements emphasizing its commitment to address environmental risks and technical shortcomings in KCMs mining infrastructure; and exercised control over KCM, as evidenced by a former employee. Therefore based on the test for establishing duty of care discussed in the aforementioned case it was clear Vedanta had some control over the activities of its subsidiary and a superior knowledge therefore it is this writers view that the Court was correct in deciding the claimant had an arguable case and dismissing Vedanta’s appeal.

---

<sup>25</sup> *Caparo Industries Plc v Dickman* [1990] 2 AC 605

<sup>26</sup> *Chandler v Cape Plc* [2012] EWCA (Civ) 525

<sup>27</sup> *Thompson v Renwick Group PLC* [2014] ECWA

Furthermore, regarding whether Zambia was the more appropriate forum to hear the case the court referred to the test set out by Lord Goff in *Spiliada Maritime Corp v. Cansulex Ltd*,<sup>28</sup> which is that the task of the court is to identify the forum in which the case can be suitably tried in the interest of all the parties and for the ends of justice. In the Vedanta case in applying the above test the judge posed two relevant questions: first, whether England and Wales was the appropriate place to try the claimants' claim against KCM; secondly, and if not, whether the claimants would get access to justice in Zambia.<sup>29</sup> The Judge reached three conclusions: first, removing the claim against Vedanta, it was 'plain and obvious that England is not the appropriate forum for these claims and that Zambia is the appropriate forum.'<sup>30</sup> However, secondly, taking into account the claim against Vedanta he decided that England was the most appropriate place to try the claim against KCM. Thirdly, if he happened to be wrong about this, in any event the claimants will almost certainly not get access to justice if these claims were pursued in Zambia.<sup>31</sup> The Court of Appeal agreed with the trial Judge and held England is the most appropriate forum to try the case including claims against KCM.<sup>32</sup>

The above case therefore demonstrates that TNCs may no longer be able to take advantage of their legal nature of operating in multiple jurisdictions through subsidiaries that absolve the parent company usually domiciled in first world countries of any responsibility for social and environmental infractions. Where it can be established that the parent company controlled the operations of the subsidiary or it had superior knowledge or expertise to its subsidiary a duty of care can be established between victims of its subsidiary's actions and the parent company thereby allowing them to seek justice in the jurisdiction the parent company is domiciled. This may be the case especially where it can also be demonstrated that access to justice will not be attained in an alternative forum such as Zambia as in the Vedanta case.

*Vedanta* is not the only high profile case that has recently been dealt with by English courts on the matter of whether there is jurisdiction for non-UK claimants to bring a claim in England against both the non-UK subsidiary and the English parent company over alleged human rights abuses occurring abroad, thereby challenging the status quo of TNC's using their legal nature of operating through subsidiaries in multiple jurisdictions to absolve parent companies of liability for infractions committed beyond their jurisdiction. In *Okpabi and others v Royal*

---

<sup>28</sup> *Spiliada Maritime Corp v. Cansulex Ltd* [1987] 1 AC 460, at 475-6

<sup>29</sup> *Lungowe v Vedanta Resources Plc* [2017] EWCA Civ 1528 [2017] B.C.C 787; [2017] B.L.R 585 at 103

<sup>30</sup> *ibid*

<sup>31</sup> *ibid*

<sup>32</sup> *ibid*, para 117

*Dutch Shell plc and Shell Petroleum Development Company of Nigeria Ltd*<sup>33</sup> and *AAA and others v Unilever plc and another*<sup>34</sup> the claimants brought tortious claims in the English courts against both the non-UK subsidiary and the English parent company. However, in these cases the English court held it did not have jurisdiction to hear claims against the subsidiaries in those cases, nevertheless permission to appeal has been granted in both cases as this area of law continues to develop.

The above cases in particular *Vedanta* illustrate the fact that mining and exploration TNCs that have longed used subsidiaries to operate in countries with weak regulatory systems thereby allowing them to maintain low environmental and social standards in order to maximize profits may no longer be able to take advantage of their legal nature which absolves the parent company of much responsibility or liability. This means that mining and exploration TNCs with subsidiaries operating in multiple jurisdictions must ensure the subsidiaries are operating according to group health and safety regulations even where they are operating in countries with weak regulatory systems such as in SSA. This will therefore strengthen the compliance levels of parent TNCs and their subsidiaries with soft law initiatives and environmental regulations in SSA. This is because where the parent company of TNCs subscribes to a soft law initiative such as the Global Compact and applies it to its sustainability policy and reports for the group, they must be adopted by all its subsidiaries, thereby ensuring these initiatives are applied across jurisdictions. If the parent company fails to ensure their subsidiaries are maintaining the strictest environmental and social standards in accordance with group policy, thus avoiding any potential damage to locals they may leave themselves open to claims in their domiciled jurisdiction, as in *Vedanta* the company's sustainability report which applied to subsidiaries and demonstrated the parent company had oversight functions over them was used to establish a duty of care. Therefore despite TNCs nature of operating through a group of subsidiaries, where the parent company subscribes to a soft law initiative and adopts it as part of its sustainability policy as is common it would apply to its group of subsidiaries whom it has oversight over. Soft law initiatives subscribed by TNCs are therefore applicable to all their subsidiaries.

The *Vedanta* case also clearly highlights the issue of access to justice and effective regulation in most of SSA, as the communities were left with no option but to seek justice in England as

---

<sup>33</sup> *Okpabi and others v Royal Dutch Shell plc and Shell Petroleum Development Company of Nigeria Ltd* [2017] EWHC 89 (TCC)

<sup>34</sup> *AAA and others v Unilever plc and another* [2017] EWHC 371 (QB)

they were unsure they would get justice in Zambia, which was also recognised by the court. Therefore along with taking cases to foreign jurisdictions which can prove cumbersome and costly it is necessary to find an alternative way of regulating the activities TNCs, one such way is through soft law initiatives which they are likely to subscribe to through their parent companies. And thanks to case such as Vedanta if the parent companies subscribes to them they will be followed by the subsidiary as group policy and where the subsidiary does not follow them the parent company can be held responsible, therefore they will ensure they comply with them thus improving regulation.

In comparison to studies on the impact of mining on societies and the environment in SSA the review and analysis of mining codes regulating the negative impacts of mining in SSA has been rather limited. According to Campbell mining codes in Africa have gone through some major reforms over the past 20 years, especially due to liberalization advice from the World Bank. Through her analysis Campbell identified three generation of mining code reforms in Africa which shall be discussed summarily below.<sup>35</sup>

The first generation of codes in the 1980s entailed the stringent form of State withdrawal from the mining industry, suggested as necessary to attract foreign investment and the development of the mining sector as opposed to the nationalist approach taken by most African States post-independence. While the first generation reforms successfully brought in and at times went very far in the direction of economic liberalisation, their conceptualisation, in particular the way they redefined the role of the state, made them inadequate in tackling liberalisation's side effects that include; unemployment, increasing social inequalities, de-industrialization, and environmental degradation.<sup>36</sup> By following World Bank policies and advice from donor countries to reform their codes and embrace economic liberalization in the 1980s African States withdrew from the owner-operator role in the mining industry without knowing what role they were to undertake. By handing over the owner-operator role in the mining sector to private actors through their reformed mining codes they had in fact handed over control of the mining industry to the private actors who operated the industry to their advantage. This meant focusing on gaining returns as quickly as possible and leaving the country without regard for environmental damages or social injustices caused in the process. For example, according to Akabzaa in Ghana most companies operate open pit mines with

---

<sup>35</sup> Bonnie Campbell, "Revisiting the Reform Process of African Mining Regimes" [2010] Vol. 30 Canadian Journal of Development Studies, 197-217

<sup>36</sup> Bonnie Campbell, *Regulating Mining in Africa for Who's Benefit*, (Nordic Africa Institute 2004)

relatively short lifespans, the reformed mining codes allowed them to benefit from a virtual tax holiday, therefore the moment they run out of reserves they leave before they are expected to pay corporate income tax.<sup>37</sup> Therefore the State had relatively little influence in controlling the activities of the mining investors; it had left the industry to the private actors and assumed the role of an investment facilitator. The first generation reform therefore led to State withdrawal from the industry thus creating a large governance gap and the opportunity for environmental degradation and injustices to thrive.

The first generation mining reforms led to major environmental and societal issues becoming widespread and public, therefore resulting in a need for regulation. Campbell coined this environmental awareness reform the ‘second generation’ of codes.<sup>38</sup> The second generation of mining codes in the 1990s saw the recognition of the need for certain regulation in particular with regard to the protection of the environment. However, such regulation and protection were left in the hands of private actors. This is demonstrated by the Republique de Guinee, *Plan national d’action pour l’environnement* (PNAE), 1994<sup>39</sup> Guinea’s environmental policy which presented market forces as capable of resolving environmental problems on the condition of the withdrawal of the State.<sup>40</sup> From her analysis of the 1995 Mining code of Guinea and similar codes made in Africa during that period Campbell argues that the code sees the best way of ensuring environmental and social protection as through privately owned companies acting in response to the pressures of the free market and thus setting their own standards to avoid such issues.<sup>41</sup> This view again sees economic growth and the need to attract FDI as more important than social or environmental issues. This is because the state was still withdrawn from the industry, and mining companies are less likely to be effective in regulating themselves compared to the State, especially taking into account their primary focus is to make profit. Such an approach was bound to lead to continued environmental degradation and social issues which plagued the African mining scene as societal and environmental protection were distinctly

---

<sup>37</sup> Thomas Akabzaa, ‘Mining Legislation and Net Returns from Mining in Ghana’, in Bonnie Campbell (ed), *Regulating Mining in Africa for Who’s Benefit*, (Nordic Africa Institute 2004)

<sup>38</sup> Bonnie Campbell, “Environmental Policies, Mining and Structural Adjustment in Guinea” (1998) Vol 13(1)1 Journal of Mineral Policy, Business and Environment. Raw Materials Report, Published by Raw Materials Group, Stockholm, 34-44.

<sup>39</sup> Cited in Bonnie Campbell, “Environmental Policies, Mining and Structural Adjustment in Guinea” (1998) vol. 13(1)1, Journal of Mineral Policy, Business and Environment. Raw Materials Report, Published by Raw Materials Group, Stockholm, 34-44.

<sup>40</sup> Bonnie Campbell, “Environmental Policies, Mining and Structural Adjustment in Guinea”, (1998) Vol 13(1)1 Journal of Mineral Policy, Business and Environment. Raw Materials Report, Published by Raw Materials Group, Stockholm, 34-44.

<sup>41</sup> *ibid*



placed in a secondary position compared to the emphasis on attracting foreign investments and promoting exports.

The shortcomings of the previous reforms may have been addressed by the third generation of codes developed in the late 1990s and onwards which reflected the need of States to play a major role in regulating the negative impacts of mining activities rather than leaving it to the private sector. The third generation shift in regulation is exemplified by Mali's 1999 code which was analysed by Hatcher. She notes that in Article 80 of the 1999 Malian code, mining companies applying for a mining licence or permit must accompany their application with an environmental impact study, and approval of the feasibility study is subject to acceptance of the environmental impact study.<sup>42</sup> She further adds there is a government agency that is responsible for verifying whether operators comply with the environmental requirements. This clearly demonstrates the State's new role as the regulator in these new sets of mining codes in Africa. Indeed the World Bank did note that Mali in particular has extensive and customised environmental protection through its Environmental Action Plan.<sup>43</sup> However, as Hatcher rightly pointed (using the Malian 1999 code as a reference) while there is no doubt that the 'third generation' codes are stricter in terms of environmental protection there remains the thorny issue of African government's capacity to enforce, strengthen, and evaluate the related requirements. Hatcher argues that firstly, most SSA governments do not have the financial and institutional capacity to enforce their own environmental requirements and adds that the non-implementation of such requirements can also be greatly attributed to a fear of losing investors by African governments. This therefore suggests that despite recent mining codes being stricter and therefore offering society and the environment better protection from the negative impact of mining there is still a governance gap in terms of enforcement, as countries continue to favour attracting investment rather than regulating the industry. With more investments in mining coming to Africa, this is worrying for the environment and societies in Africa.

Nevertheless, this governance gap in African mining has led to the emergence of a new legal regime which sees a number of transnational soft law initiatives which have their origins in the multilateral arena developing to address the gap.<sup>44</sup> While authors such as Szablowski and Campbell acknowledge the development of this new legal regime the analysis of these

---

<sup>42</sup> Pascal Hatcher, 'Mali: Rewriting the Mining Code or Redefining the Role of the State?', in Bonnie Campbell (ed), *Regulating Mining in Africa for Who's Benefit*, (Nordic Africa Institute 2004)

<sup>43</sup> *ibid*

<sup>44</sup> Bonnie Campbell, "Revisiting the Reform Process of African Mining Regimes" [2010] Vol. 30 Canadian Journal of Development Studies, 197-217

initiatives in terms of governing the mining sector has been limited.<sup>45</sup> However, in a recent study conducted by Besada and Martin of the North-South Institute they attempt to address this issue by arguing this new legal regime sees the possible emergence of a ‘fourth generation’ of mining codes in Africa adding to the three generations mentioned by Campbell and discussed above.<sup>46</sup> In their study Besada and Martin identify different initiatives such as the Africa Mining Vision under the auspices of the African Union, the Global Mining Initiative, the Kimberly process and the International Financial Corporation (IFC) performance standards as key regulatory mining initiatives that form a new set of mining codes which seek to regulate the mining sector in Africa and bring in sustainable development and environmental protection. With SSA countries arguably lacking the capacity and will to enforce stricter hard law regulations from the ‘third generation’ mining codes in Africa, the emergence of this new regime of soft law codes i.e. the ‘fourth generation’ may offer SSA a better opportunity to govern the negative impact of mining. However, self-regulation which some of these initiatives are, have proven unsuccessful in SSA as demonstrated by the ‘second generation’ of codes, therefore how does one expect them to be successful now? This research’s main argument is that the new regime which are mostly soft law, self-regulation initiatives are more likely to be successful in governing the negative impact of mining and thus considered the ‘fourth generation’ of codes where the State provides them with an enabling environment. As opposed to the ‘second generation’ codes which required State withdrawal and were therefore unsuccessful, these new initiatives may be successful where the State is involved in promoting and thus enabling them.

The reason this thesis is of the view that nation states can provide an enabling environment for soft law initiatives despite the proposition that nation states have not been effective regulators of the mining sector is based on the argument that the main reason they are ineffective in regulation is due to capacity issues and the fear of losing FDI. Whereas providing an enabling environment does not require major capacity and there is no perception that stringent laws are being passed and enforced thus discouraging investors. In other words nation states particularly in SSA have been selectively absenting themselves from regulating the mining industry

---

<sup>45</sup> David Szablowski, *Transnational law and Local Struggles: Mining Communities and the World Bank* (Hart Publishing 2007), Bonnie Campbell, “Revisiting the Reform Process of African Mining Regimes” [2010] Vol. 30 Canadian Journal of Development Studies, 197-217

<sup>46</sup> Hany Besada and Philip Martin, “Mining Codes in Africa: Emergence of a “Fourth” Generation? (2013), The North-South Institute, available at: <<http://www.nsi-ins.ca/wp-content/uploads/2013/03/Mining-Codes-in-Africa-Report-Hany.pdf>> accessed 18<sup>th</sup> September 2018

especially so that they do not discourage much needed FDI into the capital intensive sector and penalize their investment partners already active in the sector. For instance, Guinea's new stricter Mining Code of 2011<sup>47</sup> made long term bauxite mining investor Rusal consider divesting from Guinea as they noted: "any investor of good sense will look for investment opportunities outside of Guinea".<sup>48</sup> . However, with respect to soft law initiatives these are non-penal mechanisms therefore enabling them would not be perceived as discouraging investors from investing into the sector, it would just mean nation states are encouraging these TNCs who in some cases are richer than them to comply with best practice initiatives. Furthermore, providing such an enabling environment does not require major capacity, they simply require minimum standards of governance to be in place. For instance, sector specific legislation, endorsement of soft law initiatives by the state, facilitation of soft law initiatives through policy, a legally backed and financially capable local governance system to monitor activities of TNCs, and a legally backed and financially enabled civil society capable of regulating and monitoring the compliance of TNCs with international best practices. Therefore despite the fact that SSA nation states are not effective regulators as they continue to selectively absent themselves due to their fear of losing investment and capacity issues, they are capable and likely to provide an enabling environment for non-penal soft law initiatives which maintains their image as investment friendly destinations but at the same time promoting best practice from TNCs. Countries such as South Africa have been successful in providing an enabling environment for soft law initiatives thus illustrating nation states are indeed capable as is demonstrated in chapter five.

With the weak capacity of SSA countries to enforce hard law regulations and more mining investment coming to SSA, it has become imperative to analyse whether given the right enabling environment the emerging 'fourth generation' of mining codes can indeed regulate the negative impact of mining in Africa.

### **1.3 Research Questions**

As noted in the sections above, the main focus of this research will be on the developing trend of soft law initiatives being promoted as the new regime for the regulation of mining activities

---

<sup>47</sup> Guinea Mining Code 2011

<sup>48</sup>Kendra E. Dupuy, 'Community Development requirements in mining laws' [2014] *The Extractive Industries and Society* 1 200-215, 203

in Sub-Saharan Africa. The main aim of this research will be to establish whether given the right enabling environment the so called ‘fourth generation’ of mining codes are likely to effectively regulate the negative impact of mining in SSA, and should therefore be promoted as more effective modes of regulating mining in SSA, as previous and current mining codes have so far not had the desired regulatory effect. In accordance with this aim, the primary and four secondary research questions that the thesis intends to answer are as follows:

1. Are soft law initiatives more likely to be an effective form of regulating the negative consequences of mining in Sub-Saharan Africa given the right enabling environment?
  - 1.1 What is Soft Law and what consists an Enabling Environment for them?
  - 1.2 Does the existence of an enabling environment for soft law initiatives make it more likely that such initiatives will be complied with by subscribed companies?
  - 1.3 Is there a governance gap within the mining sector in SSA as a result of weak mining regulations or the enforcement of such regulation?
  - 1.4 To what extent do current policy and legal regimes in Nigeria and South Africa provide an enabling environment for soft law initiatives and what implications does it have on the application of soft law initiatives within SSA mining?

#### **1.4 The Methodology of the Study**

The methodology adopted in this research is a traditional desk-based approach involving two case studies in SSA and their regulatory regimes with respect to mining which will be further elaborated upon below. The desk-based approach, which focuses on documentary research, is adopted in this study because no fieldwork is required to answer the above mentioned research questions. Where there are legal analysis attached to this approach it is also known as doctrinal research amongst legal scholars, here they rely extensively on using statutes, court judgments, academic commentary, independent legal reports and policy documents as data for their research.<sup>49</sup> The approach involves the analysis of the above mentioned authoritative primary and secondary sources in order to systemise, rectify and clarify the law

---

<sup>49</sup> Mike McConville and Wing Hong Chui, ‘Introduction and Overview’ in Mike McConville and Wing Hong Chui (eds) *Research Methods for Law* (Edinburgh University Press 2007) 3-4

on any particular topic.<sup>50</sup> In doing so a legal scholar is therefore required to interpret the rules and principles within an area of law with the aim of integrating new social or legal issues into the existing legal system.<sup>51</sup>

While this research does indeed rely heavily on legislation, case law, and legal academic commentary especially in chapters four and five which analyse the regulation of mining in Nigeria and South Africa, it also relies heavily on non-legal sources such as company reports, NGO reports, and non-legal academic commentary from within the soft law literature. This therefore makes this research a socio-legal doctrinal analysis study rather than purely doctrinal in the legal sense. This approach can be seen as occupying a space between traditional socio-legal research and purely doctrinal research. On the one hand, a strict doctrinal approach relies heavily on self-informed analysis of statutes and judicial decisions from superior courts. While on the other hand, the socio-legal approach extends to observe operational and everyday legal situations, and various textual sources, disciplinary and cultural viewpoints are considered.<sup>52</sup> This research is a mixture of both the doctrinal and socio-legal approach as it relies on various textual sources in chapters two and three and then relies on a doctrinal analysis in chapters four and five.

While diverse sources are relied upon by this research, in addressing its research questions, it relies heavily on interpreting and critically analysing its sources with the aim of developing the understanding of the mining regulatory framework in SSA countries, just as in a purely doctrinal study.

In addressing this study's primary question the socio-legal doctrinal approach is adopted as first, relying on diverse authoritative academic commentary and policy documents it allows this research to clearly interpret and identify what is defined as soft law and establish whether given the right enabling environment it can effectively regulate the negative impact of mining in SSA. Secondly, it is also the most appropriate approach to adopt when seeking to establish whether there is a gap in governance within SSA mining as this researcher will be using legal reasoning to examine legislation and case law in SSA, with the aim of developing the law if it

---

<sup>50</sup> Mike McConville and Wing Hong Chui, 'Introduction and Overview' in Mike McConville and Wing Hong Chui (eds) *Research Methods for Law* (Edinburgh University Press 2007) 3-4

<sup>51</sup> Jan BM Vranken, 'Methodology of Legal Doctrinal Research: A Comment on Westerman', in Mark Van Hoecke (ed) *Methodologies of Legal Research* (Hart Publishing 2011)

<sup>52</sup> The British Library, 'Socio-Legal Studies: An Introduction to Collections' available at <http://www.bl.uk/reshelp/findhelpsubject/busmanlaw/legalstudies/soclegal/sociolegal.html> accessed 13<sup>th</sup> August 2017

is indeed established that there is a governance gap. If as suggested by literature within this field that there is indeed a governance gap, by analysing diverse policy documents, independent reports, and legislation the socio-legal doctrinal approach also allows this research to identify if SSA countries provide an enabling environment for soft law initiatives that makes them more effective in terms of regulating the negative impacts of their targets. Such a finding will foster the development of the law by either showcasing that soft law is indeed ready to be applied to regulate mining in SSA because an enabling environment may exist in SSA or that soft law should not be promoted as alternatives to traditional hard law because countries struggle to provide the necessary enabling environment to make them effective in SSA. The socio-legal doctrinal approach therefore allows this research to analyse a wide range of inter-disciplinary documents and use reasoning to effectively answer the research's questions therefore developing the area of study.

As noted in section 1.3 above, this thesis focuses on the developing trend of soft law initiatives being promoted to fill the governance gap left by globalization and countries within the mining sector in SSA. In order to clearly identify if such a gap exists and also establish whether countries in SSA possess an enabling environment for soft law initiatives to fill the governance gap where this is the case, this research undertakes a case study of two SSA countries. The countries examined in these case studies are Nigeria in chapter four and South Africa in chapter five.

Nigeria is chosen as an African case study due to the fact that the fall in oil prices in 2014 has led the Nigerian government to focus its attention on attracting more investment and developing the mining sector. As noted in section 1.2 such potential investment and focus on developing the sector brings with it major environmental risks as experienced in Nigeria's oil and gas sector. Therefore it has become imperative to review Nigeria's mining regulatory system in order to establish if it indeed is prepared to manage the risks attached to developing its mining sector. Also as the largest economy in SSA, which has received significant FDI and therefore one of the most advanced nations in terms of regulations, Nigeria is an ideal country to use as a benchmark in determining if there is indeed a governance gap in SSA and whether SSA countries do provide enabling environments for soft law initiatives.

Furthermore, this research is concerned with FDI going into SSA which can be detrimental to States because of TNCs exploiting weak regulatory systems, therefore it is necessary to choose a SSA country which receives major FDI in order to analyse whether it has an

enabling environment for soft law initiatives which can regulate the negative consequences of FDI and globalization in general. In 2015 Nigeria received \$8.6 billion in capital investments, more than any country in SSA and only second to Egypt in Africa. Therefore while this research could have assessed other mining countries in SSA such as Zambia for its case studies they do not have FDI profile of Nigeria or experience dealing with a vast number of TNCs thereby potentially limiting the amount of information and data required for this research. In contrast due to the large presence of TNCs in Nigeria particularly in the extractives industry Nigeria would provide this research with the opportunity to analyse the activities of TNCs, whether transnational soft law initiatives can regulate their negative consequences, and whether Nigeria provides them with an enabling environment to ensure compliance by TNCs that subscribe to them.

Additionally, Nigeria was also chosen as a case study due to the fact this thesis seeks to make a significant contribution to the literature by analysing a mining country where there has been limited academic discourse, and is overdue a review. A review of the regulatory mechanisms and their effectiveness in terms of compliance and providing an enabling environment for transnational soft law initiatives would aid in the development of the Nigerian mining sector where research has been limited.

In this case study the research relies heavily on primary and secondary data, particularly the Nigerian Environmental Impact Assessment Decree (1992),<sup>53</sup> The Nigerian 1999 National Mining Policy,<sup>54</sup> The Minerals and Mining Decree (1999),<sup>55</sup> and The Nigerian Minerals and Mining Act, (2007).<sup>56</sup>

It is this researcher's view that a case study on the Nigerian mining sector alone would not be sufficient to establish the true picture of the mining regulatory system in SSA, therefore this research undertakes a further case study on South Africa. South Africa is also an ideal choice as it is Africa's second largest economy but unlike Nigeria has a very long and rich history in the solid minerals mining sector. South Africa is selected based on the fact it is the most advanced mining nation in SSA, thereby also a country that can be used as a benchmark. With a rich history in mining it also presents this study with the necessary data to analyse its

---

<sup>53</sup> Environmental Impact Assessment Decree 1992, Supplement to Official Gazette Extraordinary, No 73, Vol 79, December 1992

<sup>54</sup> Nigerian National Policy on Solid Minerals (1998)

<sup>55</sup> Nigerian Minerals and Mining Decree No. 34 of 1999

<sup>56</sup> Nigerian Minerals and Mining Act, 2007

current regulatory measures, and whether, there is an enabling environment for soft law initiatives to fill any gaps. This research relies on the 1996 Constitution of the Republic of South Africa,<sup>57</sup> the National Environmental Management Act (NEMA),<sup>58</sup> the Minerals and Petroleum Development Act (MPRDA), 2002,<sup>59</sup> and major case law such as *Government of the Republic of South Africa and Others v Grootboom and Others*.<sup>60</sup>

Case studies on Nigeria and South Africa allow this research to clearly identify if there is a governance gap in SSA, as if the most advanced nations have weak governance mechanisms in their mining sector then it is hard to make a case that less advanced countries in SSA are indeed better equipped to do so. Furthermore, it is also hard to argue that soft law initiatives are more likely to fill the governance gap in SSA where they are not enabled and effective in Nigeria and South Africa, the leaders in terms of receiving FDI and development in SSA. Finally, accessing data and interpreting them in SSA can prove rather difficult due to the lack of development, differing legal systems and language barriers in some countries. As the most advanced English common law jurisdictions, access to data and interpreting them in the doctrinal sense for the purpose of this research is easier for South Africa and Nigeria as most of the primary sources mentioned above are available in electronic formats. There has also been more scholarly academic commentaries about the Nigerian and South African extractive industries, making these countries the most appropriate case studies to conduct whilst taking a desk-based approach to research from the United Kingdom.

Moreover, while this thesis is not a comparative analysis between mining in Nigeria and South Africa, comparisons are made between the two countries in order to better understand the regulatory capacity of both countries so that the research can clearly identify governance gaps in both countries. Comparisons are also made to further clarify what one can expect of an enabling environment for soft law initiatives in practical terms. By comparing both countries the research can easily identify features of an enabling environment missing in each country, and will further elaborate on how each country enables soft law initiatives thereby leading to the further development of the law.

---

<sup>57</sup>The Constitution of the Republic of South Africa, 1996, available at <<http://www.gov.za/sites/www.gov.za/files/images/a108-96.pdf>> accessed 1<sup>st</sup> August 2016

<sup>58</sup>National Environmental Management Act 1998, Act No. 107, 1998, vol 401, Republic of South Africa, Government Gazette, 27<sup>th</sup> November 1998, amended by Act 56 of 2002, Act 46 of 2003, Act 8 of 2004, Act 62 of 2008

<sup>59</sup> Mineral and Petroleum Resources Development Act No. 28 of 2002, Republic of South Africa

<sup>60</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* [2001] 1 SA 46 (CC)



These case studies will help address research question 1.3, as they will establish the type of laws that are available in the mining sectors of these SSA countries, how they work and how likely they are to protect communities from the impacts of mining. They also provide us with a practical case of what an enabling environment for soft law initiatives are and how they may be created. The case studies also help this research determine research question 1.4, which looks at the extent to which Nigeria and South Africa as leading SSA countries provide an enabling environment that make soft law initiatives more likely to enhance the regulation of mining activities.

While the research relies heavily on legislation and case law in its analysis of the Nigerian mining regulatory system due to a paucity of academic discussion, the research relies on primary and secondary data in its case study on South Africa, where data was more accessible. With respect to the definitions of soft law and an enabling environment for soft law as they were conceptual discussions the research relied heavily on a number of secondary sources, which are critically analysed and evaluated by the research. These include textbooks, electronic journals, policy documents, independent reports, academic commentaries, databases, online research guides, company reports, and many relevant websites. As will be discussed below, through the critical analysis of these sources the research was able to present its definition of soft law and its enabling environment thereby developing a conceptual framework for the thesis.

### **1.5 Conceptual Framework**

This research's main argument is that the developing trend of soft law initiatives being promoted as the fourth generation of mining codes in Africa are more likely to be effective where there is an enabling environment for them. In order to support this argument and address the research questions the thesis focuses on providing a clear definition of soft law, an enabled environment, and its features. The research applies these definitions and features throughout the thesis for ease of understanding and clarity, as elaborated below.

As there is no universally accepted definition of soft law it is necessary for this thesis to adopt a definition that applies throughout the research. Through the critical analysis of literature within the international soft law field this research adopts the clearest definition of soft law that can apply to the mining sector in chapter two. This enables the reader to clearly understand what is being referred to as soft law in discussions throughout the thesis. With

respect to its enabling environment, although literature has been rather limited, authors such as Ward in her study on strengthening Corporate Social Responsibility (CSR) initiatives were able to identify key enablers and their roles in enabling soft law initiatives.<sup>61</sup> Chapter two identifies each enabler namely, the State, Local Governments, Civil Society and the International community and how they create an enabling environment for soft law initiatives. In other words, key features of an enabling environment for soft law initiatives are identified in chapter two.

The thesis applies the above definitions and features of an enabling environment established in chapter two throughout the research. For instance, in chapter three where the research seeks to support its main argument that soft law initiatives are more likely to secure compliance given the right enabling environment, it analyses three transnational soft law initiatives and demonstrates the effects an enabled environment as defined in chapter two has on their impact.

In chapters four and five the research uses the Equator Principles as an example of a soft law initiative that can regulate mining. Using the features of an enabling environment established in chapter two it determines whether Nigeria and South Africa provide an enabling environment for the Equator Principles. This framework allows the research to effectively address the research question ‘To what extent do current policy and legal regimes in Nigeria and South Africa provide an enabling environment for soft law initiatives and what implications does it have on the application of soft law initiatives within SSA mining?’

The above framework of clearly defining key terms and features and then applying them throughout the research allows for a better understanding of the research and significantly aids the researcher in effectively addressing the research’s main question. This is because without a clear definition of soft law, their enabling environment and its features it may prove difficult to ascertain the impact of an enabling environment on soft law initiatives and whether SSA countries actually provide such environments.

---

<sup>61</sup> Halina Ward, ‘Public Sector Roles In Strengthening Corporate Social Responsibility: Taking Stock’ [2004] The World Bank, available at <<http://pubs.iied.org/pdfs/16014IIED.pdf>> accessed 15th June 2014, Laura Albareda, Josep M. Lozano, Tamyko Ysa, in ‘Public Policies on Corporate Social Responsibility: The Role of Governments in Europe’ (2007) 74 Journal of Business Ethics 391-407, Tom Fox, Halina Ward, Bruce Howard, ‘Public Sector Roles In Strengthening Corporate Social Responsibility: A Baseline Study’ [2002] The World Bank, available at: <<http://pubs.iied.org/pdfs/16017IIED.pdf?>> Accessed 20<sup>th</sup> June 2014

## 1.6 Contribution to knowledge

This section will demonstrate how the research makes a significant contribution to the literature on the regulation of the negative activities of mining companies in SSA. While authors such as Campbell<sup>62</sup> have significantly analysed the continuous reform of mining codes in Africa since the 1980s, there has been limited analysis on the developing trend of soft law transnational initiatives that seek to regulate the negative impacts of mining, which this research addresses.

In their analysis of mining codes in Africa Campbell and Hatcher highlight that the reform process of the past twenty years discussed in section 1.2 has not led to better governance in the mining sector due to the capacity issues of African countries and has led to the developing trend of transnational soft law initiatives emerging as a new legal regime to fill the governance gap.<sup>63</sup> However, while Campbell acknowledges the development of this new regime of transnational soft law initiatives within the mining sector' she focuses on the impact such a development would have on the role of the State rather than whether such a regime would effectively regulate the mining industry in Africa. Therefore while Campbell and other authors focused on mining codes in Africa do acknowledge the development of a new trend of soft law regimes, there has been limited studies on the impact of this new regime in terms of regulating mining in particular thus leaving a gap within the literature. More recently this gap has begun to be filled by authors such as Besada and Martin.<sup>64</sup> In their study, Besada and Martin were able to continue from where Campbell and her colleagues from the Groupe de recherche sur les activités minières en Afrique (GRAMA) at the Université du Québec à Montréal (UQAM), who identified three “generations” of mining frameworks in Africa stopped. They do this by analysing the emerging trend of transnational soft law initiatives and their impact in regulating mining, going as far as considering them the

---

<sup>62</sup> Bonnie Campbell (ed), *Regulating Mining in Africa for Who's Benefit*, (Nordic Africa Institute 2004), Bonnie Campbell, “Revisiting the Reform Process of African Mining Regimes” [2010] Vol. 30 Canadian Journal of Development Studies, 197-217

<sup>63</sup> Pascal Hatcher, ‘Mali: Rewriting the Mining Code or Redefining the Role of the State?’, in Bonnie Campbell (ed), *Regulating Mining in Africa for Who's Benefit*, (Nordic Africa Institute 2004) Bonnie Campbell, “Revisiting the Reform Process of African Mining Regimes” [2010] Vol. 30 Canadian Journal of Development Studies, 197-217

<sup>64</sup> Hany Besada and Philip Martin, “Mining Codes in Africa: Emergence of a “Fourth” Generation? (2013), The North-South Institute, available at: <<http://www.nsi-ins.ca/wp-content/uploads/2013/03/Mining-Codes-in-Africa-Report-Hany.pdf>> accessed 18<sup>th</sup> September 2018

‘fourth’ generation of mining codes for natural resource governance and management in Africa.

This research contributes to this literature by expanding the discussion on how based on their regulatory impact the emerging regime of transnational soft law initiatives within SSA mining can be considered the ‘fourth’ generation of mining codes in SSA. This research argues that they may only be considered the ‘fourth’ generation of mining codes in SSA where they are effective in terms of compliance and they are only likely to be effective where they are enabled through an enabling environment in SSA. The research takes this perspective based on the fact that on their own as voluntary initiatives it would be difficult to ensure mining companies comply with soft law initiatives. Indeed, despite touting transnational soft law initiatives as the ‘fourth’ generation of mining codes Besada and Martin did acknowledge that they remain limited due to the absence of regulatory enforcement and low governance capacity in general due to their voluntariness.<sup>65</sup> However, Besada and Martin failed to examine how these initiatives may be made more effective by providing them with an appropriate enabling environment this is a gap this thesis effectively fills throughout the research. It clearly identifies what should be considered as an enabling environment for soft law initiatives, analyses the impact of an enabling environment on soft law initiatives and then identifies whether SSA countries are equipped with the right enabling environments for soft law initiatives to be effective in regulating their mining industry. It is a novel approach to a study on soft law within the literature, where research tends to focus on how effective they are as regulatory tools. Whereas this research determines the features that make them more likely to be complied with and seeks to establish their presence in SSA countries. In doing so it significantly contributes to the development and understanding of using soft law initiatives to regulate the negative impacts of multi-national corporations in developing countries in particular.

The study finds that an enabling environment for soft law initiatives does in fact positively affect the probability that these initiatives will be complied with by their subscribers. Therefore where SSA countries possess an enabling environment they can indeed be

---

<sup>65</sup> Hany Besada and Philip Martin, “Mining Codes in Africa: Emergence of a “Fourth” Generation? (2013), The North-South Institute, available at: <<http://www.nsi-ins.ca/wp-content/uploads/2013/03/Mining-Codes-in-Africa-Report-Hany.pdf>> accessed 18<sup>th</sup> September 2018

promoted as alternatives to hard regulations and thus the ‘fourth’ generation of mining codes in Africa in accordance with Besada and Martin. The research further contributes to the literature by finding that the most advanced mining nation in SSA South Africa does indeed have an enabling environment for soft law initiatives, however this may be based on the fact that South Africa prioritises sustainable development and environmental protection in its Constitution and regulations. However, other SSA countries such as Nigeria despite its experience in the oil and gas sector may not have an enabling environment for soft law initiatives due to the fact it prioritises FDI in contrast to South Africa. Therefore it is too early to suggest soft law initiatives can be considered as the fourth generation of mining codes in Africa that will effectively fill the governance gap in Africa, as not all SSA States can provide them with an enabling environment as they continue to favour FDI due to their level of development.

The research’s case study on Nigeria is also an important contribution to the literature on mining regulation in Africa. While there has been numerous literature on Nigeria’s oil and gas sector research on the regulatory efforts in Nigeria’s solid minerals mining sector has been limited. This study presents a stringent analysis of Nigeria’s current mining regulations as it seeks to develop its solid minerals mining sector and expose more communities to the risks of mineral exploitation. The thesis finds that Nigeria’s current set of regulations are very strong but as with most countries in SSA there is a lack of enforcement, thus leaving a gap in terms of governance.

### **1.7 Structure of the Thesis and Chapter Outlines**

This thesis consists of six chapters, beginning with Chapter 1 (the present chapter) which provides a brief account of the main considerations that will be applied throughout this study. This is followed by Chapter 2 which is titled Soft Law and the Enabling Environment, the chapter focuses on clearly outlining the conceptual framework for this thesis by identifying the definitions of soft law and their enabling environment that will apply across all the chapters of the thesis. The chapter critically analyses the concept of soft law in international law, reviewing its development and clearly identifying a definition that fits with the theme of this thesis. Through the analysis of literature the chapter then provides a definition of what an enabling environment for soft law entails and through further analysis discerns those responsible for creating an enabling environment and how they may create such an environment. These definitions and features required to create an enabling environment are

applied throughout the thesis for ease of understanding. The chapter contributes to the thesis by addressing research questions 1.1<sup>66</sup>

Chapter 3 is titled Transnational Soft Law Initiatives and the Enabling Environment. The chapter focuses on analysing transnational soft law initiatives which are applicable to the mining sector and establishing whether their performance in terms of compliance (as voluntary initiatives) are positively impacted as a result of the provision of an enabling environment for them. The chapter contributes to the thesis by addressing research question 1.2.<sup>67</sup>

Chapters 4 and 5 are titled Mining in SSA and the Provision of an enabling environment for Soft Law Initiatives: A case study of Nigeria and South Africa respectively. Chapter 4 deals with Nigeria, while Chapter 5 focuses on South Africa. Relying mostly on legislation, case law and policy documents both chapters undertake a critical analysis of the regulatory framework governing the mining sectors in both countries in order to establish how successful they have been and to discern whether currently there is indeed a governance gap within the regulatory set up in SSA mining. Following this discussion, both chapters use the Equator Principles as a soft law initiative applicable to the mining sector in order to establish whether both countries enable them. This provides the thesis with some evidence that SSA countries do indeed provide soft law initiatives with the necessary enabling environment to make them more effective in governing the negative impacts of mining. Such a finding allows the research to argue in favour of promoting soft law initiatives as effective governance tools that can fill the governance gap within the SSA mining sector, thereby addressing the research's main question. For the purposes of a better understanding of the regulatory status of SSA countries within the mining sector and their ability to provide an enabling environment, the conclusion of Chapter 5 undertakes a comparative analysis between the findings in Nigeria and South Africa. The two chapters contribute to the thesis by answering questions 1.3 and 1.4.<sup>68</sup>

---

<sup>66</sup> What is Soft Law and what consists an Enabling Environment for them?

<sup>67</sup> Does the existence of an enabling environment for soft law initiatives make it more likely that such initiatives will be complied with by subscribed companies?

<sup>68</sup> Is there a governance gap within the mining sector in SSA as a result of weak mining regulations or the enforcement of such regulation? and To what extent do current policy and legal regimes in Nigeria and South Africa provide an enabling environment for soft law initiatives and what implications does it have on the application of soft law initiatives within SSA mining?

Finally, Chapter 6 concludes the thesis by presenting the research findings. The chapter also discusses how an enabling environment can be achieved in practices and deals with the primary and secondary questions, ensuring they have been effectively addressed. Additionally, the contribution of the research to academic literature, recommendations, and suggestions for further development within the area of study will be presented.

## Chapter 2: Soft Law and the Enabling Environment

### 2.1 Introduction

According to authors within the literature such as Campbell, the World Bank through its policy and studies have advised African Governments to restructure their mining codes over the last twenty years, which has seen the increasing retrenchment of the State in the mining industry.<sup>69</sup> Through her analysis of mining codes in Africa, Campbell identified three generations of mining codes in Africa. The first generation of codes in the 1980s entailed the stringent form of State withdrawal from the industry which was suggested as necessary to attract foreign investment and the development of the mining sector. This was contrary to the nationalist approach taken by African states in most industries after independence. In Ghana for instance, the mining industry was controlled by the state from 1957 to 1986 as after independence the government set up the State Gold Mining Corporation (SGMC) and the Ghana National Manganese Marketing Corporation (GNMC).<sup>70</sup> The SGMC in particular was established in 1961 to promote the government's nationalistic approach by acquiring five gold mines namely; Bibiani, Tarkwa, Prestea, Konongo and Dunkwa from British companies.<sup>71</sup> The Second generation of mining codes she argues began in the 1990s and saw an increasing recognition of the need for certain regulation in particular with regard to the protection of the environment. However, such regulation and protection was left in the hands of private actors. For instance, under the 1994 Guinean National Action Environmental Plan (Plan National d'Action pour L'Environment (PNAE)1994) a minimalist and managerialist view of the state in the area of environmental policy was proposed.<sup>72</sup> Indeed it specifically recommends that it be the private operators who should intervene in terms of regulation for the protection of the

---

<sup>69</sup> Bonnie Campbell, *Mining in Africa: Regulation and Development*, (First Published 2009 Pluto Press 2009), Pascal Hatcher, 'Mali: Rewriting the Mining Code or Redefining the Role of the State?', in Bonnie Campbell (ed), *Regulating Mining in Africa for Who's Benefit*, (Nordic Africa Institute 2004) See also Thomas Akabzaa, 'Mining Legislation and Net Returns from Mining in Ghana', in in Bonnie Campbell (ed), *Regulating Mining in Africa for Who's Benefit*, (Nordic Africa Institute 2004), Hany Besada and Philip Martin, "Mining Codes in Africa: Emergence of a "Fourth" Generation? (2013), The North-South Institute, available at: <<http://www.nsi-ins.ca/wp-content/uploads/2013/03/Mining-Codes-in-Africa-Report-Hany.pdf>> accessed 18<sup>th</sup> September 2018

<sup>70</sup> Thomas Akabzaa and Abdulai Darimani, 'Impact of Mining Sector Investment in Ghana: A study of the Tarkwa mining region' (2001) Structural Adjustment Participatory Review International Network (Saprin), 23, available at: <[http://www.saprin.org/ghana/research/gha\\_mining.pdf](http://www.saprin.org/ghana/research/gha_mining.pdf)> accessed 18<sup>th</sup> September 2018

<sup>71</sup> *ibid*

<sup>72</sup> Bonnie Campbell, 'Guinea: Derelgulation and Its Consequences for Environmental Protection', in in Bonnie Campbell (ed), *Regulating Mining in Africa for Who's Benefit*, (Nordic Africa Institute 2004)



environment.<sup>73</sup> And finally in the late 1990s a third generation of codes developed, reflecting the increasing recognition that states do in fact have a role to play in facilitation and regulation.<sup>74</sup>

However, recently Besada and Martin<sup>75</sup> have argued that there could be an emerging fourth generation of mining codes which sees soft law multilateral initiatives used in order to regulate the mining activities of transnational corporations (TNCs) due to the failed attempt of the aforementioned generations of mining codes to effectively regulate such corporations. Such initiatives include the UN Global Compact, the Equator Principles, the Extractive Industries Transparency Initiative and the International Finance Corporation (IFC) Performance Standards.<sup>76</sup> These initiatives are seen within the literature as attempts to fill the governance gap created by globalization and the initial retrenchment of the State where mining codes are concerned.<sup>77</sup> The emergence of this fourth generation soft law mining codes has seen debates focus on the effectiveness of soft law initiatives which has generated insights with regards to the strengths and limitations of soft law initiatives. The main strength identified is that they are easily subscribed to by corporations due to their non-penal nature. On the other hand, their non-penal nature is also their major limitation as they are easily ignored by subscribers.

This chapter will analyze the concept of soft law in order to determine whether as argued by Besada and Martin<sup>78</sup> soft law can be considered as the fourth generation of mining codes that effectively regulate mining in SSA. This thesis argues that soft law initiatives can emerge as the fourth generation of mining codes in SSA that are likely to regulate the negative effects of mining in SSA only where an enabling environment for such initiatives are provided in Sub-

---

<sup>73</sup> *ibid*

<sup>74</sup> Bonnie Campbell, "Revisiting the Reform Process of African Mining Regimes" [2010] Vol. 30 *Canadian Journal of Development Studies*, 197-217

<sup>75</sup> Hany Besada and Philip Martin, "Mining Codes in Africa: Emergence of a "Fourth" Generation? (2013), The North-South Institute, available at: <<http://www.nsi-ins.ca/wp-content/uploads/2013/03/Mining-Codes-in-Africa-Report-Hany.pdf>> accessed 18<sup>th</sup> September 2018

<sup>76</sup> United Nations Global Compact, 2000, Equator Principles III, June 2013, Extractive Industries Transparency Initiative, 2003, International Finance Corporation Performance Standards on Environmental and Social Sustainability, 2012

<sup>77</sup> John Ruggie, 'Protect, Respect and Remedy: a Framework for Business and Human Rights' (2008) A/HRC/8/5 <[http://dag.un.org/bitstream/handle/11176/269890/A\\_HRC\\_8\\_5-EN.pdf?sequence=3&isAllowed=y](http://dag.un.org/bitstream/handle/11176/269890/A_HRC_8_5-EN.pdf?sequence=3&isAllowed=y)> accessed 11th November 2017, Bonnie Campbell, "Revisiting the Reform Process of African Mining Regimes" [2010] Vol. 30 *Canadian Journal of Development Studies*, 197-217, Bede Nwete, 'Corporate Social Responsibility and Transparency in the Development of Energy and Mining Projects in Emerging Markets; is Soft Law the Answer? (2007) 8 German L.J 311

<sup>78</sup> Hany Besada and Philip Martin, "Mining Codes in Africa: Emergence of a "Fourth" Generation? (2013), The North-South Institute, available at: <<http://www.nsi-ins.ca/wp-content/uploads/2013/03/Mining-Codes-in-Africa-Report-Hany.pdf>> accessed 20th March 2017

Saharan African States. Literature on mining in SSA and soft law has been rather limited in its attempts to critically engage with the effects an enabling environment may have on the effective implementation of soft law initiatives, and the role of African governments in providing such an environment. This chapter will address this gap in the literature by analyzing the concept of an enabling environment, the actors responsible for creating such an enabling environment in the mining industry, and how they may create such an environment. The definition of an enabling environment, and the actors responsible for its creation established in this chapter will be applied throughout this thesis as it seeks to establish whether soft law mining initiatives are more likely to regulate the negative impacts of mining in SSA given the right enabling environment. The same definitions will also be used in order to establish whether SSA countries indeed possess an enabling environment for soft law mining initiatives in chapters four and five. However, before discussing what an enabling environment for soft law initiatives entail, this chapter will look to establish a definition for soft law within international law that will be applied throughout this thesis by analyzing the international soft law literature.

This chapter is divided into four sections after the introduction. Section two analyses the concept of soft law in international law. Section three analyses the notion of an enabling environment, and discusses public sector roles in providing an enabling environment. Section four discusses the roles of other actors with regards the provision of an enabling environment. Finally section five analyses limitations that may be encountered in providing an enabling environment. The chapter will then be concluded by highlighting the main findings of the chapter which include; a clear definition of what soft law entails in discussions throughout this thesis, what is identified as an enabling environment for soft law initiatives, and the actors responsible for creating an enabling environment and how they may do this. In so doing this chapter contributes to the thesis by answering research question 1.1: What is Soft Law and what consists an Enabling Environment for them?

## **2.2 Soft Law in International Law**

According to Keohane and Nye soft law began to be treated as an identifiable concept in the 1970s when new kinds of global power structures emerged, thus changing the legal analysis and above all, the political scientist's analysis of international politics.<sup>79</sup> Such global power

---

<sup>79</sup> Robert Keohane and Joseph Nye, *Power and Interdependence*, (Boston: Little Brown 1977)

structures changed from viewing power as military-State based to a more interdependent civil view of power as a result of the oil crisis of the 1970s which may have allowed for new forms of rule-making to develop within the international scene.<sup>80</sup> Likewise, in the late 1990s and the early 2000s new non- state actors in the form of non-governmental organizations and transnational corporations emerged on the international scene as a result of globalization. This led to more interest in soft law, as globalization had brought in new players on the international scene who were richer than some countries but were yet to be regulated by international law.<sup>81</sup> Indeed, O’Connell observed that soft law was recognized as a useful device for responding to the demands of globalization especially where positive or traditional international law could not respond adequately.<sup>82</sup> Traditional international law may be argued to be inadequate when responding to the effects of globalization and non-state actors such as corporations, because it does not recognize them as participants of the global public space and therefore does not regulate them.<sup>83</sup> For traditional international law, nation states and inter-governmental organizations are seen as the primary participants, subjects, and creators of international law. Furthermore, the legal nature of TNCs in particular in the sense that they usually operate through a parent company with subsidiaries registered across multiple jurisdictions and thus subject to different legal systems makes regulating them effectively on the international plane and locally rather complex as discussed in section 1.3 of this thesis.

However, while it would be incorrect to suggest that international law has made no attempts to regulate the activities of non-state actors on the international scene, it is fair to state this has yielded very little success, as will be demonstrated in the following chapter. Such limited success may be due to the fact that transnational corporations and other non-state actors that are not recognized by international law were not part of the rule making process and therefore unlikely to subscribe and comply with such rules. Therefore soft law became a viable alternative for new actors on the international scene to participate within, as it was open to transnational private actors that could not participate in the making, implementation, and enforcement of hard law. It provided an avenue for transnational corporations and NGOs to

---

<sup>80</sup> Ulrika Morth, *Soft Law in Governance and Regulation*, (Edward Elgar Publishing Limited 2004) 4

<sup>81</sup> *ibid*

<sup>82</sup> Mary Ellen O’Connell, ‘The Role of Soft Law in a Global Order’, in Dinah Shelton, *Commitment and Compliance: The Role of Non-Binding Norms In The International Legal system*, (First Published 2000 OUP, 2003) 102

<sup>83</sup> Wolfgang H. Reinicke and Jan Martin Witte, ‘Interdependence, Globalization, and Sovereignty: The Role of Non-binding International Legal Accords’, in Dinah Shelton, *Commitment and Compliance: The Role of Non-Binding Norms In The International Legal system*, (First Published 2000 OUP, 2003) 95

participate in the global public space and also be regulated.<sup>84</sup> Moreover, soft law was also used within inter-governmental settings by states as will be demonstrated below especially where a quick and flexible response is required to resolve a problem.

The aforementioned developments especially the introduction of non-state actors on the international scene made it necessary for the international legal order to develop. Traditional international law and inter-state cooperation had to be complemented by a more evolutionary approach that recognizes non-state actors within international law. Soft law provides such an approach as it is argued that it represents an important tool in bridging the growing divide between global private networks and public hierarchies constrained by territoriality.<sup>85</sup>

### **2.2.1 What is Soft Law in International Law?**

There is no universally accepted definition of the term 'soft law', indeed the very notion of soft law is disputed.<sup>86</sup> Some scholars resist the term, as they argue that it signifies a too wide and disparate set of phenomena, making any single definition or taxonomy impossible.<sup>87</sup>

Others further contend that the combination of the two words 'soft' and 'law' allows for the possibility to ascribe legality to political documents, thereby threatening to weaken the status of positive international law proper and distort the boundary between law and politics.<sup>88</sup> This has led to the definition and standing of soft law becoming a subject of substantial doctrinal debate. This debate with respect to the definition will be analyzed below in seeking a definition for this thesis to adopt.

---

<sup>84</sup> Wolfgang H. Reinicke and Jan Martin Witte, 'Interdependence, Globalization, and Sovereignty: The Role of Non-binding International Legal Accords', in Dinah Shelton, *Commitment and Compliance: The Role of Non-Binding Norms In The International Legal system*, (First Published 2000 OUP, 2003) 95

<sup>85</sup> *ibid*

<sup>86</sup> John Cerone, 'A Taxonomy of Soft Law: Stipulating a Definition', in Stephanie Lagoutte, Thomas Gammeltoft-Hansen, and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights*, (Oxford University Press 2016) 15-24, 15 see also Wolfgang H. Reinicke and Jan Martin Witte, 'Interdependence, Globalization, and Sovereignty: The Role of Non-binding International Legal Accords', in Dinah Shelton, *Commitment and Compliance: The Role of Non-Binding Norms In The International Legal system*, (First Published 2000 OUP, 2003) 94

<sup>87</sup> See J. Ellis, 'Shades of Grey: Soft Law and the Validity of Public International Law', (2012) Vol 25 *Leiden Journal of International Law*, 313-334; Salem H. Nasser, *Sources and Norms of International Law*, (Berlin: Galda and Wilch Verlag, 2008), See also Dinah Shelton, *Commitment and Compliance: The Role of Non-Binding Norms In The International Legal system*, (First Published 2000 OUP, 2003) 94

<sup>88</sup> Stephanie Lagoutte, Thomas Gammeltoft-Hansen, and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights*, (Oxford University Press 2016) 3

Within the literature general definitions of soft law have been provided by numerous authors which have some similarities, by analyzing some of these definitions it would allow this author the opportunity to identify key features of soft law that may be applied to the definition of soft law within this thesis. A simple definition is provided by Snyder who notes soft law are 'rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects.'<sup>89</sup> However, a more thorough definition is presented by Wellens and Borchardt (1989; 274), for whom soft law is:

The rules of conduct that find themselves on the legally non-binding level (in the sense of enforceable and sanctionable through international responsibility) but which according to the intention of its authors indeed do possess legal scope, which has to be further defined in each case. Such rules do not have in common a uniform standard of intensity as far as their legal scope is concerned, but they do have in common that they are directed at (intention of the authors) and do have as effect (through international law), that the conduct of States, international organizations and individuals is influenced by these rules, however without containing international legal rights and obligations.<sup>90</sup>

From the above definitions a key feature of soft law which is generally accepted within the literature is that although it may have legal scope in accordance with the intention of its authors it has a non-binding nature, which means they cannot be enforced through sanctions for non-complying parties. This is a view supported by Morth who defines soft law as a type of law that deviates from the fundamental aspects of real or 'hard law', the most important of this deviation is that it is not legally binding.<sup>91</sup> However, Morth goes further regarding the concept of legally 'binding' in doing so she raises a key feature of soft law being that soft law is usually created by rule setters who do not have the right to frame legally binding rules, or by rule setters who have that right but have chosen not to apply it.<sup>92</sup> There are numerous reasons why rule setters choose to adopt soft law, most notably its flexibility. Indeed both Snyder and Wellens and Borchardt were keen to highlight that despite their non-binding nature they may have practical effects and do indeed influence those they are directed at. However, this section will maintain its focus on defining soft law rather than the reasons why it is adopted. With respect to defining soft law the above makes it clear that soft law is non-

---

<sup>89</sup> Francis Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques', (1993b) 56 (1) *The Modern Law Review*, 19-54, 32

<sup>90</sup> Karel C Wellens and G.M. Borchardt, 'Soft Law in European Community Law', (1989) 14 *European Law Review*, 267-321

<sup>91</sup> Ulrika Morth, *Soft Law in Governance and Regulation*, (Edward Elgar Publishing Limited 2004) 171

<sup>92</sup> *ibid*

binding and can therefore be viewed as voluntary within international law. Contrary to hard law which can impose sanctions or even physical violence soft law is not coercive but rather an expression of cooperation.<sup>93</sup>

On the other hand, authors such as Ward are firmly against the commonly held view that there is a clear voluntary-legal divide that is soft law and hard law. She instead argued that soft law which aim to raise corporate social responsibility which we are concerned with in this thesis especially with respect to mining corporations, even though are considered as non-binding and thus voluntary, certainly have legal aspects.<sup>94</sup> She notes that the corporate social responsibility discourse has given rise to legislative developments concerning for instance, reporting criteria, which have affected the application of laws concerned with the aspects of interaction between corporations and society.<sup>95</sup> Corporate responsibility issues have therefore been brought into the ecosystem of regulations which shows what has been designed as soft law in the form of corporate responsibility may evolve in part into binding regulations or at least affect binding regulations.<sup>96</sup> Ward's claim that soft law is not entirely non-binding is supported by the fact that as noted by Waddock the Global compact, a soft law initiative does not have companies evenly distributed throughout the world as signatories.<sup>97</sup> In particular Waddock noted there was a small number of US companies which she suggests may fear legal reprisals.<sup>98</sup> Therefore if soft law initiatives such as the Global Compact are non-binding and voluntary why would companies fear legal reprisals? Clearly the above suggests soft law do have some legal connotations especially within the sphere of corporate social responsibility. While this author agrees with Ward that soft law is not always entirely non-binding and voluntary, it would be correct to suggest they are mostly non-binding especially in contrast to traditional hard law such as treaties in international law as authors such as Morth have suggested.

Nonetheless, Brummer makes a compelling argument in support of the view that soft law is not necessarily nonbinding. He argues that the length at which an instrument is coercive or

---

<sup>93</sup> Chris Brummer, *Soft Law and the Global Financial System*, (Cambridge University Press 2012) 128

<sup>94</sup> Halina Ward, 'Legal issues in Corporate Citizenship', (2003), Report prepared for the Swedish Partnership for Global Responsibility. Stockholm: Ministry of Foreign Affairs, available at <http://pubs.iied.org/pdfs/16000IIED.pdf> accessed 5<sup>th</sup> May 2017

<sup>95</sup> *ibid*

<sup>96</sup> Ulrika Morth, *Soft Law in Governance and Regulation*, (Edward Elgar Publishing Limited 2004) 151

<sup>97</sup> Sandra Waddock, 'Learning from Experience: The United Nations Global Compact Learning Forum 2002' (2003) 11 *The Journal of Corporate Citizenship*, 51-67, 53

<sup>98</sup> *ibid*

'binding' is less a matter of obligation than enforcement.<sup>99</sup> In this sense where best practices and standards which he views as forms of soft law are backed by mechanisms that enforce compliance, they can be perceived from a functional standpoint as species of international law, albeit created by means other than the traditional hard law treaty-making processes.<sup>100</sup> Again, while this author agrees with Brummer's argument that soft law can be considered as binding where they have strong enforcement mechanisms, generally they seem to have weak enforcement mechanisms as one of the major attraction to soft law in International law is its flexibility and ability to promote cooperation between its subjects, rather than hard law which is rigid and coercive. If soft law were to have strong enforcement mechanisms it would lose its flexibility. Therefore this author is of the view that Soft law has a generally non-binding and voluntary nature in contrast to traditional hard law.

Nevertheless, as Morth notes the issue is not so much how to distinguish soft law from hard law based on the fact soft law is usually non-binding but how to distinguish soft law from itself with various forms available as the above paragraphs demonstrate.<sup>101</sup> For example, to Cerone, corporate social responsibility and best practices standards are not considered as soft law in international law<sup>102</sup>, whereas to Ward mentioned above corporate social responsibility initiatives can be seen as soft law. Therefore distinguishing soft law from itself has become a difficult issue with various perspectives developing. In adopting a definition of what encompasses soft law Cerone has classified authors within the literature in three main camps, and for the sake of clarity such classification will be adopted here.

The first group of authors within the literature see soft law as a type of law, which is soft in some sense. This group is then divided between those who adopt a binary approach between law and non-law, and those who see law as more of a continuum.<sup>103</sup> For those who adopt a binary approach they see a rule as either law or not law, this is a more positivist approach which refers to soft law as rules of positive law that are recognized as such, but are

---

<sup>99</sup> Chris Brummer, *Soft Law and the Global Financial System*, (Cambridge University Press 2012) 5

<sup>100</sup> *ibid*

<sup>101</sup> Ulrika Morth, *Soft Law in Governance and Regulation*, (Edward Elgar Publishing Limited 2004) 5

<sup>102</sup> John Cerone, 'A Taxonomy of Soft Law: Stipulating a Definition', in Stephanie Lagoutte, Thomas Gammeltoft-Hansen, and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights*, (Oxford University Press 2016) 15-24, 23

<sup>103</sup> John Cerone, 'A Taxonomy of Soft Law: Stipulating a Definition', , in Stephanie Lagoutte, Thomas Gammeltoft-Hansen, and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights*, (Oxford University Press 2016) 15-24, 16

nevertheless considered soft in their commands.<sup>104</sup> The softness refer to rules that for instance have vague language, non-justiciable formulations or a significant reliance on auto-interpretation by the subjects of the rule.<sup>105</sup> Those within the literature that adopt this approach do not believe in the existence of a soft law instrument, as for them it is not the character of the instrument that makes it soft, for a rule to be called soft law, it must be existing international law according to established sources.<sup>106</sup>

Others within this camp that see soft law as a type of law which is soft, reject the binary approach and rather see a broader spectrum of law than what is formulated in Article 38 of the ICJ Statute.<sup>107</sup> This group argues that soft law does not have to be established in accordance with the traditional doctrine of sources. As such they contend that soft law may not be legally binding in the technical sense, although they are quick to highlight that the binding/non-binding dichotomy is not significant in determining whether a rule is soft law. Rather they focus more on the behavior influencing capacity of a rule and even where the rule does not come from traditional sources of international law it can be viewed as soft law. Therefore when referring to soft law as a type of law which is soft, the softness of a rule or norm could be in terms of enforceability, normativity, specificity, onerousness, justiciability or 'bindingness'<sup>108</sup>

The third approach put forward by Cerone which he supports and this thesis is inclined to adopt does not see soft law as a type of law, in fact it does not regard soft law as law at all. This approach also adopts a positivistic, binary viewpoint in that only traditional forms of law that are created through the established sources of law are law and anything else is non-law. However, this approach is the opposite of the positivistic standpoint mentioned above as it entirely excludes positive law from the ambit of soft law and includes only rules that do not

---

<sup>104</sup> P. Weil, 'Towards Relative Normality in International Law', (1983) vol. 77 *American Journal of International Law*, 413-42, 414

<sup>105</sup> John Cerone, 'A Taxonomy of Soft Law: Stipulating a Definition', , in Stephanie Lagoutte, Thomas Gammeltoft-Hansen, and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights*, (Oxford University Press 2016) 15-24, 16

<sup>106</sup> *ibid*

<sup>107</sup> See Dinah Shelton, *Commitment and Compliance: The Role of Non-Binding Norms In The International Legal system*, (First Published 2000 OUP, 2003) 94

<sup>108</sup> John Cerone, 'A Taxonomy of Soft Law: Stipulating a Definition', , in Stephanie Lagoutte, Thomas Gammeltoft-Hansen, and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights*, (Oxford University Press 2016) 15-24, 16



have the status of existing international law according to the established sources.<sup>109</sup> Under this school of thought a rule is described as 'soft' because it is not itself law, but is referred to as 'law' because it may or does exert an influence on law or may achieve some of the effects that law is aiming to realize.<sup>110</sup>

This author is more inclined to support the third approach to defining soft law by excluding positive law entirely from the ambit of soft law because it makes it clear that soft law is a different form of regulation to traditional international law which is created by States and Inter-Governmental organizations on behalf of states and applies to States and their citizens in some cases. Rather it is simpler and clearer to state that soft law is a form of regulation which is called 'law' because it may or does indeed exert an influence on law or may realize some of the results law seeks to achieve. This way initiatives such as the Extractive Industries Transparency Initiative (EITI) which is discussed in the next chapter can be described as soft law because it exerts influence and seeks to achieve the results that positive law has found difficult to achieve with respect to the regulation of transnational corporations. Indeed, by taking this approach it clearly demonstrates that soft law initiatives in contrast to traditional international law are usually able to regulate the activities of transnational corporations who are new actors on the international plane yet to be regulated by international law.

Yet if this thesis were to adopt the first approach outlined, initiatives as important as the Global Compact or the World Bank Operational Standards would not be considered soft law as they do not emanate from established international law instruments under Article 38 of the ICJ Statute. This is contrary to some views within the literature which indeed view the Global Compact and similar initiatives as soft law.<sup>111</sup> Furthermore, by viewing soft law as a type of law that is tied into the established framework of international law, despite a regulation's ability to influence behavior on the international plane if some key characteristics are missing they will not be considered as soft law. Characteristics such as the author, addressee, formulation, and most importantly acceptance by states in terms of practice and a sense of

---

<sup>109</sup> John Cerone, 'A Taxonomy of Soft Law: Stipulating a Definition', in Stephanie Lagoutte, Thomas Gammeltoft-Hansen, and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights*, (Oxford University Press 2016) 15-24, 16

<sup>110</sup> *ibid*

<sup>111</sup> See Ulrika Morth, *Soft Law in Governance and Regulation*, (Edward Elgar Publishing Limited 2004) 193, see also Goran Ahrne and Nils Brunsson, 'Soft Regulation from an Organizational Perspective', in Ulrika Morth (ed), *Soft Law in Governance and Regulation*, (Edward Elgar Publishing Limited 2004) 171

legal obligation would come into play. Therefore a set of human rights standards developed by NGOs and accepted and implemented by corporations without state involvement and acceptance would not qualify as soft law, regardless of the impact they have on changing the behavior of the subjects of the initiative.<sup>112</sup> This would leave numerous regulations or norms on the international plane without standing and create a great deal of confusion if they are not classed as soft law. This is why this writer is of the contention that removing soft law from the ambit of positive law, and viewing it as non-law but regulations that are similar in their purpose to law allows for better clarity in the standing on numerous initiatives and norms on the international plane. Therefore this thesis will adopt an approach which sees soft law as norms or rules described as 'soft' because they are not law but are referred to as law because they seek to achieve similar results to law. Under this definition rules, norms and standards such as the International Finance Corporations' (IFC) performance standards, the World Bank's operational directives, corporate social responsibility (CSR) schemes with a human rights dimension and other principles developed under the auspices of international organizations such as the International Council on Mining and Metals would be considered as soft law. Such a definition is also in line with Snyder's definition mentioned above that soft law are 'rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects.'<sup>113</sup> This writer's view is also supported by Charney who notes that non-binding agreements are not within the realm of international law and should thus be classified as 'soft' norms.<sup>114</sup>

No matter what definition one adopts, soft law within the international legal order seems to be here to stay as they seem to be growing in number and preferred over legally binding rules especially when there is a need for flexibility, rapid reactions, and cost saving.<sup>115</sup>

---

<sup>112</sup> John Cerone, 'A Taxonomy of Soft Law: Stipulating a Definition', in Stephanie Lagoutte, Thomas Gammeltoft-Hansen, and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights*, (Oxford University Press 2016) 15-24, 23

<sup>113</sup> Francis Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques', (1993b) 56 (1) *The Modern Law Review*, 19-54, 32

<sup>114</sup> Jonathan L. Charney, 'Compliance with International Soft Law', in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms In The International Legal system*, (First Published 2000 OUP, 2003) 94

<sup>115</sup> Dinah Shelton, 'Introduction: Law, Non-Law and the Problem of "Soft Law"', in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms In The International Legal system*, (First

Indeed, as will be discussed in the following chapters they seem to be the chosen rule making approach when dealing with transnational mining corporations whose mining activities have had a negative effect on the environment and society in sub-Saharan Africa. This has led to arguments about whether this is a correct approach to address this issue, especially taking into account the seriousness of the damages caused, and the non-binding nature of soft law. In other words, can non-binding regulations ensure TNCs comply with provisions that limit their negative activities?

With regards to this question which will be discussed in more detail over the following chapters, it must be noted here that most soft law initiatives do not exist in a vacuum. They usually derive their legitimacy with reference to international conventions and regulations. For instance, the United Nations Guiding Principles on Business and Human Rights refers to the Universal Declaration on Human Rights, and requires transnational corporations to respect and protect such rights. Where they fail to comply with the principles they may be sanctioned if a nation state upholds its human rights obligation and enforces rights contained within the Universal Declaration on Human Rights which is customary international law. Therefore soft law initiatives are not necessarily an alternative to international hard law or inter-state cooperation, rather they complement each other, by enabling one another.<sup>116</sup> Additionally, Sahlin-Andersson notes that soft law initiatives in international law despite their non-binding nature, form communities with common interests where actors monitor each other. She further notes that such rules are embedded in and supported by broader systems of regulations, monitoring and reporting.<sup>117</sup> In this sense she also agrees that soft law initiatives do not exist in a vacuum they have an enabling environment which ensures compliance either through hard international law or communities of actors with the same interest regulating one another, despite their non-binding nature. It is therefore this research's key contention that soft law initiatives can have an impact in the regulation of the negative activities of transnational mining corporations in Sub-Saharan Africa where there is an enabling environment for soft law initiatives in Sub-Saharan Africa. However, in order for

---

Published 2000 OUP, 2003) 1-42, Kenneth Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance', (2000) 54(3) *International Organization*, 421-456

<sup>116</sup> Wolfgang H. Reinicke and Jan Martin Witte, 'Interdependence, Globalization, and Sovereignty: The Role of Non-binding International Legal Accords', in Dinah Shelton, *Commitment and Compliance: The Role of Non-Binding Norms In The International Legal system*, (First Published 2000 OUP, 2003) 76

<sup>117</sup> Kerstin Sahlin-Andersson, 'Emergent Cross-sectional Soft Regulations: Dynamics at Play in the Global Compact Initiative', in Ulrika Morth (ed), *Soft Law in Governance and Regulation*, (Edward Elgar Publishing Limited 2004) 143

such an argument to be proved later in this thesis this research must analyze what is an enabling environment where soft law is concerned, which this chapter addresses in the next section.

### 2.3 The Enabling Environment

It is this research's key argument that in order for soft law initiatives to become the fourth generation of mining codes that solve the governance gap in the mining industry in SSA, an enabling environment for the implementation of such soft law codes may be required in SSA countries. Despite the literature on soft law being dominated by discussions on the effectiveness or non-effectiveness of soft law initiatives as regulations<sup>118</sup> some within the literature have highlighted the importance of an enabling environment in support of this research's key argument.<sup>119</sup> Indeed, It stated that soft law initiatives particularly under the corporate social responsibility heading are more likely to be followed where there is an enabling environment.<sup>120</sup> This was further supported by Idemudia and Ite whose study on the activities of oil companies in the Niger-Delta region of Nigeria led them to conclude that the absence of an enabling environment resulted in oil companies setting their own standards due to the poor regulation and dearth of incentives for CSR initiatives within Nigeria.<sup>121</sup> This absence of an enabling environment for soft law initiatives afforded companies the temptation to break soft law commitments with little or no associated risk for doing so as they

---

<sup>118</sup> See John Ruggie, 'Protect, Respect and Remedy: a Framework for Business and Human Rights'(2008) A/HRC/8/5 <[http://dag.un.org/bitstream/handle/11176/269890/A\\_HRC\\_8\\_5-EN.pdf?sequence=3&isAllowed=y](http://dag.un.org/bitstream/handle/11176/269890/A_HRC_8_5-EN.pdf?sequence=3&isAllowed=y)> accessed 11th November 2017, DaanSchoemaker, 'Raising the Bar on Human Rights: what the Ruggie Principles Mean for Responsible Investors' [2011] Sustainalytics available at: <[http://www.sustainalytics.com/sites/default/files/ruggie\\_principles\\_and\\_human\\_rights\\_0.pdf](http://www.sustainalytics.com/sites/default/files/ruggie_principles_and_human_rights_0.pdf)> accessed 18<sup>th</sup> September 2018, Catherine Coumans, 'Alternative Accountability Mechanisms and Mining: The Problems of Effective Impunity, Human Rights, and Agency'(2011) 30:1-2, Canadian Journal of Development Studies 27-48, Bede Nwete, 'Corporate Social Responsibility and Transparency in the Development of Energy and Mining Projects in Emerging Markets; is Soft Law the Answer?' (2007)8 German L.J 311, Steven Bernstein and Benjamin Cashore, 'Can non-state global governance be legitimate? An analytical framework'(2007) 1(4) Regulation & Governance, 347-371

<sup>119</sup> See Uwem E. Ite, 'Multinationals and Corporate Social Responsibility in Developing Countries A Case Study of Nigeria'(2004) vol 11(1) Corporate Social Responsibility and Environmental Management, 1-11, see also Uwafiokun Idemudia and Uwem E. Ite, 'Corporate-Community Relations in Nigeria's Oil Industry: Challenges and Imperatives'(2006), 13 Corporate Social Responsibility and Environmental Management,194-206, 203

<sup>120</sup> Uwem E. Ite, 'Multinationals and Corporate Social Responsibility in Developing Countries A Case Study of Nigeria'(2004) vol 11(1) Corporate Social Responsibility and Environmental Management 1-11, 8

<sup>121</sup> Uwafiokun Idemudia and Uwem E. Ite, 'Corporate-Community Relations in Nigeria's Oil Industry: Challenges and Imperatives' (2006), 13, Corporate Social Responsibility and Environmental Management,194-206, 203

are in fact responsible for setting their own standards and therefore regulating themselves.<sup>122</sup> Therefore in accordance with this research's key argument it would appear there is a need for an enabling environment for soft law initiatives to regulate the activities of corporations especially in SSA, this will be discussed in greater detail in chapter three, as this thesis seeks to substantiate its key argument.

Focus on the enabling environment for soft law initiatives allows this thesis to establish whether, despite their non-binding nature, an enabling environment can ensure soft law initiatives have the desired impact of their authors, which is effective governance. A study into the enabling environment of a particular regulation or soft law initiative allows for a deep understanding of the nature and dynamics of the relationship between a capable soft law initiative and its effectiveness in governing the activities of mining corporations where there is an encouraging environment. So what is an enabling environment where soft law initiatives are concerned?

Simply put, in this thesis the enabling environment where mining soft law codes and performance standards are concerned is the sum of the drivers, tools, human capacities and institutions directed towards achieving the effective implementation of such soft law codes by States and the international community.<sup>123</sup> This definition clearly highlights nation states and the international community that includes non-state actors such as NGOs as key actors in providing an enabling environment for soft law initiatives. However, as this thesis later focuses on establishing whether SSA countries possess the enabling environment required for soft law initiatives to regulate mining corporations this research will pay more attention to identifying the State's role in creating an enabling environment. In accordance with this a nation state may for instance, first endorse a soft law initiative that regulates the activities of

---

<sup>122</sup> *ibid*

<sup>123</sup> Halina Ward, 'Public Sector Roles In Strengthening Corporate Social Responsibility: Taking Stock' [2004] The World Bank <http://pubs.iied.org/pdfs/16014IIED.pdf> accessed 15th June 2014. This definition is also supported by Laura Albareda, Josep M. Lozano, Tamyko Ysa, in 'Public Policies on Corporate Social Responsibility: The Role of Governments in Europe' (2007) *Journal of Business Ethics* 74:391-407 who noted that with regards to the enabling environment for soft law key factors that must be considered within an environment are; the political and institutional structure; political style and processes; social structure; emphasis on a voluntary approach or acceptance of state guidelines and control; local and national views of the role of companies; the role and posture of NGOs and civil associations in society; the kind of educational system and the values it transmits; what is expected of their leaders; and historical traditions.

mining companies. But in order to enable this initiative it then passes a law which makes the initiative mandatory in the nation state and also creates a body with able human capacity to monitor the implementation of the soft law initiative. A typical example of this is seen in Nigeria with regards to the Extractive Industries Transparency Initiative (EITI) which tries to maximize economic gains where natural resources are concerned through more transparent dealings; this initiative is examined in chapter three.

An analysis of what an enabling environment for soft law initiatives entails therefore leads this research to look into contextual issues affecting a country's environment such as the approach taken by national governments to implement soft law initiatives either through passing a law to codify the initiative or simply endorsing a soft law initiative by issuing a public statement. As noted in the section above on soft law, despite the fact that international soft law initiatives may be created without the input of nation states, as with most international instruments they are nevertheless key to their implementation. This is because most of the violations that soft law initiatives seek to limit are committed within their jurisdictions, therefore their approach to soft law initiatives by for example, providing it with an environment to thrive may prove critical to the success of any initiative. It is therefore this research's contention that nation states are critical in the provision of an enabling environment for soft law initiatives as stated in the definition.

This is in line with this research's key argument that sees the need for SSA states to provide an enabling environment for soft law initiatives if they are to regulate the negative activities of mining corporations. Consequently, the development of international soft law mining initiatives sees the emergence of a new role for government and the public sector i.e. creating an enabling environment for soft law mining initiatives. Which leaves one with the question how does a nation state create an enabling environment for soft law initiatives, and what are the key features of an enabling environment. By addressing these questions this thesis will provide a better understanding of what encompasses an enabling environment for soft law initiatives in practice. This will be addressed in the next section as this chapter seeks to create a framework that will assist in identifying whether SSA States possess an enabling environment in chapters four and five by highlighting the features of an enabling environment.

### 2.3.1 Creating an Enabling Environment for Mining Soft Law Initiatives: The Role of the State and Public Sector

In her analysis of mining codes in Africa, Campbell argues that the World Bank through its policy and studies advised African Governments to restructure their mining codes leading to a retrenchment role for African governments in their mining industries.<sup>124</sup> For instance, in the 1992 World Bank document 'Strategy for Mining in Africa' the World Bank advised African governments to privatize parastatal mining companies; update mining and investment legislation and tax regulation to attract investments.<sup>125</sup> In other words the World Bank was encouraging less state participation in the sector in favor of liberalization of the sector to encourage more private participation. However, with the development of the 'fourth' generation mining codes borne out of numerous transnational soft law initiatives, there is a need for State Governments to take a more active role especially in creating an enabling environment for these initiatives. This is because as noted above the successful implementation of international soft law initiatives despite their global nature may require the support of nation states to achieve their objectives, which is to fill the governance gap identified by Professor John Ruggie,<sup>126</sup> where mining is concerned. According to authors such as Ruggie a governance gap was borne as a result of globalization which allowed transnational corporations to venture into developing countries with lax regulatory laws to carry out activities such as mining that have detrimental consequences to society.<sup>127</sup> However, it could also be argued that the governance gap particularly in African mining was as a result of the retrenchment role of African States due to the World Bank drive for liberalization in order to encourage foreign investment in Africa.<sup>128</sup> Indeed authors such as Susan Strange observed that African states had reduced autonomy and authority of states as well as reduced capacity to influence the evolution of their own structures.<sup>129</sup> It is the

---

<sup>124</sup>Bonnie Campbell, "Revisiting the Reform Process of African Mining Regimes" [2010] Vol. 30 Canadian Journal of Development Studies, 197-217

<sup>125</sup> World Bank, 'Strategy for African Mining' [1992] World Bank Technical Paper Number 181, African Technical Department Series, available at:

<http://documents.worldbank.org/curated/en/722101468204567891/pdf/multi-page.pdf> accessed 11<sup>th</sup> November 2017

<sup>126</sup>John Ruggie, 'Protect, Respect and Remedy: a Framework for Business and Human Rights'(2008) A/HRC/8/5 <[http://dag.un.org/bitstream/handle/11176/269890/A\\_HRC\\_8\\_5-EN.pdf?sequence=3&isAllowed=y](http://dag.un.org/bitstream/handle/11176/269890/A_HRC_8_5-EN.pdf?sequence=3&isAllowed=y)> accessed 11th November 2017

<sup>127</sup> ibid

<sup>128</sup> Bonnie Campbell, "Revisiting the Reform Process of African Mining Regimes" [2010] Vol. 30 Canadian Journal of Development Studies, 197-217

<sup>129</sup> John M. Stopford, Susan Strange and John S. Henley, *Rival States, Rival Firms: Competition for World*

researchers view that by opening up their mining sectors and withdrawing as advised by the World Bank African States allowed TNCs to run the industry with unparalleled authority thereby diminishing the governance capability of the States which may have also created a governance gap. Therefore it is this writer's view that in order to create an enabling environment for mining soft law initiatives State Governments in SSA must become more active in governance as will be demonstrated below.

According to Ward, creating or enhancing an enabling environment for soft law mechanisms requires human capacity and institutions to be in place to enable such initiatives to work in their particular sectoral or geographic context.<sup>130</sup> Human capacity involves understanding of the capacity to engage with the soft law initiatives whether as citizens, consumers, regulators, workers, or businesses. With regards to institutions these include government inspectorates and enforcement agencies, key departments or teams within local and national government and corporate social responsibility teams within the business environment.<sup>131</sup> Additionally, another important pillar for creating an enabling environment for soft law transnational initiatives includes hard law legislation and regulations that recognize the soft law mechanisms.

Most of the aforementioned human capacity, institutional and legislative needs required for the creation of an enabling environment for transnational soft law initiatives in the mining industry are those within the sphere of State governmental control. Therefore it is mainly the responsibility of governments to tailor their policies to meet these requirements for creating an enabling environment for soft law transnational mining initiatives. It is with this in view that the following sections will focus on the roles played by central governments in providing an enabling environment with regards to soft law mechanisms for mining. Such discussion allows this thesis to better understand what an enabling environment for mining soft law is and how it is created.

The analysis of the role of government in encouraging soft law initiatives that promote CSR in particular has been analyzed by numerous authors under the new forms of public-private

---

*Market Shares*, (Cambridge: Cambridge University Press, 2001) 14

<sup>130</sup>Halina Ward, 'Public Sector Roles In Strengthening Corporate Social Responsibility: Taking Stock' [2004] The World Bank <http://pubs.iied.org/pdfs/16014IIED.pdf> accessed 15th June 2014

<sup>131</sup>ibid



partnerships linked to CSR who also agree that government is important when creating an enabling environment.<sup>132</sup> There are numerous explanations on how governments aid in creating an enabling environments for soft law initiatives. Fox et al argued that public sector activities to enable soft law initiatives can be divided into four broad categories; mandating, facilitating, partnering, and endorsing.<sup>133</sup> Lepoutre et al observed that governments play critical roles in providing an enabling environment through strategic roles that see them pass laws, promote public information campaigns, organizational reporting, labelling, contracts, agreements, and incentives.<sup>134</sup> Joseph in 2003 found the role of government to be collaborative and facilitating through the use of soft tools and means, always in collaboration with the private sector.<sup>135</sup> The above suggests that most explanations of government and public sector roles in creating an enabling environment fall within the four broad categories mentioned by Fox et al, therefore in order to get a clearer picture of the role of government in creating an enabling environment this section will analyze the four categories in detail for a better understanding of what an enabling environment is and how it is created. Indeed, Ward also argued that understanding government's role in creating an enabling environment through the aforementioned categories of mandating, facilitating, partnering and endorsing allows for simplicity.<sup>136</sup>

### 2.3.1.1 Mandating

The mandating role of government generally relates to the passing of legislation, regulations, penalties, and associated public sector agencies that control some aspect of business

---

<sup>132</sup>See Enrico Guarini and Claudio Nidasio, 'CSR Role in Public – Private Partnership: Models of Governance' [2003] European Academy of Business in Society, Copenhagen available at:

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2379382](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2379382) accessed 18<sup>th</sup> September 2018, Laura Albareda, Josep M. Lozano, TamykoYsa, 'Public Policies on Corporate Social Responsibility: The Role of Governments in Europe' (2007) *Journal of Business Ethics* 74:391-407, 392

<sup>133</sup> Tom Fox, Halina Ward, Bruce Howard, 'Public Sector Roles In Strengthening Corporate Social Responsibility: A Baseline Study' [2002] The World Bank, available at <http://pubs.iied.org/pdfs/16017IIED.pdf?>> Accessed 20<sup>th</sup> June 2014

<sup>134</sup>Laura Albareda, Josep M. Lozano, TamykoYsa, 'Public Policies on Corporate Social Responsibility: The Role of Governments in Europe' (2007) *Journal of Business Ethics* 74:391-407, 392

<sup>135</sup>Ella Joseph, 'A new Business Agenda for Government', [2003] Institute for Public Policy Research, London, available at:

[https://www.ippr.org/files/images/media/files/publication/2011/05/a\\_new\\_business\\_agenda\\_full\\_1293.pdf](https://www.ippr.org/files/images/media/files/publication/2011/05/a_new_business_agenda_full_1293.pdf) accessed 11<sup>th</sup> November 2017

<sup>136</sup>Halina Ward, 'Public Sector Roles In Strengthening Corporate Social Responsibility: Taking Stock' [2004] The World Bank available at <http://pubs.iied.org/pdfs/16014IIED.pdf> accessed 15<sup>th</sup> June 2014

investment or operations. Using the above tools government defines minimum standards for those participating in certain industries and also sets enforcers and inspectorates to support citizen legal action.<sup>137</sup> Examples of such mandating activities of state governments include establishment of emission limit values for particular categories of industrial installations, or the requirement that all company directors must take certain factors into account in their decision-making.<sup>138</sup>

With respect to mining soft law initiatives, which tend to focus on promoting CSR and preventing environmental damage, providing an enabling environment for them through mandating requires governments to pass laws that provide minimum standards for mining activities. Such laws would for instance require Environmental Impact Assessments (EIA) to be conducted before mining commences or may require local communities are compensated for their land and properties before mining can begin. This section will assess practical examples of mandating according to Ward's definition mentioned above for a better understanding of what mandating entails. The Nigerian Minerals and Mining Act 2007, which shall be analyzed in chapter four presents a good illustration of creating an enabling environment through mandating under Section 71 of the Act.<sup>139</sup> Under this section the act provides conditions a mining rights holder must provide which include; an environmental impact assessment, a community development agreement approved by the Mines Environmental Compliance Department and the holder must have duly notified, compensated, or offered compensation to all users of the land within the mining lease areas.<sup>140</sup> Through the mandate of this Act, requiring an environmental impact assessment and community agreement the Nigerian government clearly sets a standard for mining companies to uphold. Such standards create an enabling environment for soft law community development mechanisms and environmental protection mechanisms because they may use this Act as a source of legitimacy in further developing and applying stricter soft law standards for mining corporations to adhere to, thus enabling soft law.

---

<sup>137</sup>ibid

<sup>138</sup> Tom Fox, Halina Ward, Bruce Howard, 'Public Sector Roles In Strengthening Corporate Social Responsibility: A Baseline Study' [2002] The World Bank, available at: <<http://pubs.iied.org/pdfs/16017IIED.pdf?>> accessed 20<sup>th</sup> June 2014

<sup>139</sup> Nigerian Minerals & Mining Act 2007, Section 71

<sup>140</sup> Nigerian Minerals & Mining Act 2007, Section 71

When mandating laws that enable mining soft law initiatives, it however, appears to this writer that some African governments usually take a cautious approach, while others take a stricter approach that require specific capital contributions to communities from mining companies in the spirit of CSR. For the cautious countries, rarely does one find mandated laws requiring that investors must contribute a specific amount of capital to a fund that would aid in local community development and rehabilitation, which in theory would help in the promotion of local relations and peaceful co-existence. For example, although Section 71 of the Nigerian Minerals and Mining Act requires investors to have a community development agreement, it does not specify what should be included in the agreement or bench marks that must be met, therefore allowing for a broad spectrum of discretion for the investors and stakeholders. It is argued that developing countries rarely provide onerous laws especially when it comes to mining because it may discourage foreign investors as the cost of investment may become too expensive.<sup>141</sup> While this is a valid argument it must also be argued that government's primary role is to protect their citizens from potential abuse that can arise from overly flexible laws, therefore they should focus more on this aspect of their duty. However, it is also necessary for governments to attract investment for the economic development of their citizens, therefore a balance must be struck. Such a balance can be struck by creating minimum standards which are not too stringent to discourage investment but strong enough to act as minimum standards within the industry, that will enable soft law initiatives companies have signed up to which are stricter than the hard laws. This is because these minimum standards provide soft law initiatives with a source of legitimacy and through other enabling activities described below government can further encourage their use. This way countries do not discourage investment but at the same time are encouraging stricter mining practices by enabling soft law mining initiatives that require strict social and environmental commitments from their subscribers. Therefore where countries mandate minimum standards for mining they create an enabling environment for soft law initiatives which compliment them by having stricter standards, thereby affording citizens more protection.

On the other hand, it could be argued that the best approach is for governments to put the interests of local communities affected by mining first and mandate the strictest possible form

---

<sup>141</sup> Kendra E. Dupuy, 'Community Development requirements in mining laws' [2014] *The Extractive Industries and Society* 1, 200-215

of laws that ensure environmental and societal protection. Despite the fact that the cost of investments may increase and discourage investors, such laws would see clauses requiring specific capital contributions for community development and rehabilitation purposes in contrast to the Nigerian example. Indeed, as noted above this is the approach of some Sub-Saharan African countries for instance, Ethiopia. Here a mining license holder is required to participate in a community development plan in the license area and is further required to allocate specific funds for this.<sup>142</sup> In Guinea, community development agreements are required to be more specific in that conditions for the implementation of local development are specified in its legislation. Specifically, a company is required to contribute 0.5% of the company's turnover achieved on the mining title of the area for bauxite and iron ore for the purpose of community development and 1% of such turnover for other mineral substances.<sup>143</sup> Clearly such mandated regulations in these countries offer more backing to mining soft law initiatives as compliance to such initiatives becomes easier because mining companies are under a legal obligation to partake in CSR. In other words by mandating clauses that specify community contributions, soft law initiatives with similar clauses become mandatory thereby giving them more teeth to achieve their aims of regulating the mining industry, due to higher minimum standards provided by the State. For instance, Performance Standard 5 of the International Finance Corporation is quite similar to the clauses found in the Guinean mining law; such a law therefore enables it by making most of its tenets mandatory. The main theme behind Performance Standard 5 is ensuring that the needs of the poor and vulnerable are catered for. Under this standard clients are required to offer displaced persons choices among feasible resettlement options, including replacement housing or cash compensation where appropriate. They are also required to offer relocation assistance such as cash where displaced persons are unable to work to begin with. Additionally, where the displacement involved is only economic in nature not physical the client is required to develop a Livelihood Restoration Plan to compensate affected persons and/or communities and offer assistance that meet the objectives of the IFC Performance Standards which is mainly that living conditions of those affected by IFC projects are better than they were prior to the implementation of an IFC supported project.<sup>144</sup>

---

<sup>142</sup> Stephen De Backer, 'Mining Investment and Financing in Africa: Recent Trends and Key Challenges, Africa's Mining Industry: The Perceptions and Reality' [2012] available at: <http://www.mineafrica.com/documents/2%20-%20Steve%20De%20Backer.pdf> accessed 11<sup>th</sup> November 2017

<sup>143</sup> Guinea Mining Code 2011

<sup>144</sup> Performance Standard 5, International Finance Corporation Performance Standards 2006

This leads this author to question whether soft law initiatives are at all necessary in countries with such strict laws, as there would be no governance gap for them to fill. Indeed, in countries such as Guinea while stricter laws definitely enable soft law initiatives they do not necessarily need them to protect their citizens from the negative impacts of mining as their laws are strong enough to cater to that. However, it is this author's view that while the stricter approach to regulations would satisfy the governance gap in SSA mining only a few countries such as Guinea, Ethiopia, and South Africa as will be discussed in chapter five subscribe to such an approach. Furthermore, having strong laws and actually enforcing them are two different matters and SSA has a poor record of enforcing laws as noted by Schwartz with respect to Sierra Leone.<sup>145</sup> Therefore soft law is still required to fill the governance gap in many SSA countries where mining regulations are not as stringent as those found in Guinea and even where they are stringent enforcement remains an issue as such countries strive to attract FDI. This is because most developing SSA countries are in support of the argument mentioned above that strict mining laws may discourage the investments they need for economic development.

Indeed, authors such as Dupuy argue that such stricter laws that specify contributions to protect society in SSA may be counterproductive for mining countries in SSA that are poor as they are detrimental to attracting investors.<sup>146</sup> She argues that laws as in the case of Guinea requiring specific contributions by investors and community development provisions deter investment because the conventional wisdom is that financial globalization which leads to the cross-border flows of goods, services, and financial resources should lead to a regulatory race to the bottom through the loosening of domestic laws so as to invite foreign investment.<sup>147</sup> Additionally authors such as Ite have noted that counterarguments on mandating the use of soft law initiatives such as corporate social responsibility (CSR) mechanisms have shown that CSR distorts the market by removing business from its main role which is quite simply profit

---

<sup>145</sup> Priscilla Schwartz, 'Corporate activities and environmental justice: perspectives on Sierra Leone's mining', in Jonas Ebbesson and Phoebe Okowa (eds), *Environmental Law and Justice in Context* (Cambridge University Press 2009)

<sup>146</sup> Kendra E. Dupuy, 'Community Development requirements in mining laws' [2014] *The Extractive Industries and Society* 1 200-215

<sup>147</sup> Kendra E. Dupuy, 'Community Development requirements in mining laws' [2014] *The Extractive Industries and Society* 1 200-215, 202

making.<sup>148</sup> They further base their argument on the premise that the role of business determines its responsibilities and as such, beyond compliance with the law business has no social responsibility.<sup>149</sup> Therefore one might argue if mining corporations find it too unprofitable to do business due to regulations they would seek to invest elsewhere. Indeed in response to Guinea's new mining code of 2011<sup>150</sup> which as noted above increased the amount of state control exerted over the mining industry, Rusal, the world's largest aluminum company and an operator of bauxite mines in Guinea stated: "any investor of good sense will look for investment opportunities outside of Guinea".<sup>151</sup>

However, others such as Besada and Martin argue that stronger standards of regulation in Africa's extractive sector may not necessarily affect investment.<sup>152</sup> They highlight that increased competition for mineral resources in Africa can increase the negotiating power for host governments which enables them to seek higher social development standards from their investors. Indeed Dupuy does also acknowledge that attracting foreign direct investment does not always require states to adopt lower regulatory standards, on the contrary in certain circumstances it may lead states to adopt higher standards as in the circumstance noted above by Besada and Martin.<sup>153</sup> Additionally, The World Bank Group 2003 Business Survey Report; 'Race To The Top'<sup>154</sup> found that 61% of the multinational enterprises interviewed indicated that it is strong laws on corporate social responsibility that they seek when investing in countries, contrary to the "race to the bottom" argument noted above.

While the above suggests that it is no longer the race to the bottom with respect to laws for investors, it is this researcher's contention that where mining is concerned there is still a need for flexibility when mandating laws. Strict laws that require onerous terms such as those found in the Guinean law while a positive approach for society and the environment loses

---

<sup>148</sup> Uwem E. Ite 'Multinationals and Corporate Social Responsibility in Developing Countries: A Case Study of Nigeria' (2004) Corporate Social Responsibility and Environmental Management, 1-11

<sup>149</sup> *ibid*

<sup>150</sup> Guinea Mining Code 2011

<sup>151</sup> Kendra E. Dupuy, 'Community Development requirements in mining laws' [2014] *The Extractive Industries and Society* 1 200-215, 203

<sup>152</sup> Hany Besada and Philip Martin, "Mining Codes in Africa: Emergence of a "Fourth" Generation? (2013), The North-South Institute, available at: <<http://www.nsi-ins.ca/wp-content/uploads/2013/03/Mining-Codes-in-Africa-Report-Hany.pdf>> accessed 18<sup>th</sup> September 2018

<sup>153</sup> Kendra E. Dupuy, 'Community Development requirements in mining laws' [2014] *The Extractive Industries and Society* 1 200-215, 204

<sup>154</sup> The World Bank Group, Corporate Social Responsibility Practice, 'Race to The Top: Attracting And Enabling Global Sustainable Business' [2003] Business Survey Report 1-28, 25

investment and economic development as mentioned by mining company Rusal above. Therefore where mining is concerned poor developing countries are likely going to continue to mandate less stringent laws such as under section 71 of the Nigerian minerals and mining law. Such laws can then enable soft law initiatives which will complement the hard laws by filling the governance gap they fail to address in the fear of losing investment. While this research would prefer the stricter approach to mandating is adopted by most SSA countries the reality is that most SSA countries are in need of investment to improve their economic situations. Therefore as noted earlier finding a balance between having strong laws and attracting investment must be found, and such balance can be met by mandating strong enough laws that will enable soft law transnational initiatives with stricter regulations that mining companies themselves committed to.

Moreover, the government role of creating an enabling environment for soft law initiatives through mandating is also illustrated by the activities of the Philippines government in its mining sector. Under the Mining act of 1995<sup>155</sup> the Philippines government provided more stringent environmental requirements, just as in the Nigerian Act, it required an environmental work program (EWP) but went further in requiring a mine decommissioning plan and contingent liability and rehabilitation fund (CLRF). The legislative mandates provided by the Philippine government demonstrate its support for CSR and other soft law initiatives by creating an enabling environment within its legislation that include; making it mandatory for civil society consultation before decisions on environmental impacts are made, giving access to, and transparency of government documents, active engagement and partnership with communities and civil society groups.<sup>156</sup> Through such actions the Philippines government is creating an enabling environment, for example by making it mandatory to consult civil society before decisions on environmental impacts are made, the government enables soft law initiatives and standards. This is because through such consultation with civil society who are the architects and campaigners of most soft law initiatives, soft law and international best practices will be enabled by civil societies ensuring their initiatives and standards are complied with. Support to claims civil society are the architects of most soft law initiatives are illustrated for example through the work of NGOs

---

<sup>155</sup> The Philippine Mining Act of 1995

<sup>156</sup> Edwin G. Domingo, 'Public Policy And Initiatives on Institutionalizing CSR in the Philippine Mining Industry' [2003] International Conference on Public Policy for Corporate Social Responsibility 8-9 October 2003, Washington DC

such as Global Witness whose activities led to initiatives such as the Kimberly Process being developed to put a halt to the sale of conflict diamonds.<sup>157</sup> However, one might argue that "consultation" does not necessarily mean that the Philippines government has to adhere to the consultation offered by civil society. On the other hand, it provides NGO's the opportunity to provide an impartial oversight function that will ensure mining corporations are upholding all the international soft law commitments they are signed up to, thereby enabling soft law.

Moreover, a very strong example in Africa of how through mandating a government can enable a soft law initiative is that of the Nigerian Extractive Industries Transparency Initiative (NEITI) Act.<sup>158</sup> NEITI was passed as a result of Nigeria's membership to the Extractive Industries Transparency Initiative (EITI) which 'aims to strengthen governance by improving transparency and accountability in the extractive sector. The EITI sets a global standard for companies to publish what they pay and for governments to disclose what they receive.'<sup>159</sup> The EITI is based on twelve principles<sup>160</sup> that capture the international consensus on the importance of transparency by governments and non-state actors, and the need for collaboration between the public and private sectors as well as civil society in ensuring accountability and good governance.<sup>161</sup> By mandating the NEITI Act the Nigerian government enabled the voluntary provisions of EITI to become more effective by becoming mandatory under NEITI. Indeed, as soon as the NEITI was created on February 19, 2004 Nigeria began to require all oil companies to publish what they pay and government officials to make public where the money goes.<sup>162</sup> The EITI and NEITI are analyzed in more detail in chapter three of this thesis.

---

<sup>157</sup> J. Andrew Grant and Ian Taylor, 'Global governance and Conflict diamonds the Kimberley Process and the quest for clean gems', (2004) Vol 93, No.375, *The Commonwealth Journal of International Affairs*, 385-401, 389

<sup>158</sup> Nigerian Extractive Industries Transparency Initiative Act 2007

<sup>159</sup> Sarah Bracking, 'Hiding Conflict over Industry Returns: A Stakeholder Analysis of the Extractive Industries Transparency Initiative' (2009) BWPI Working Paper 91 < file://tower6/home32/a7906930/Downloads/bwpi-wp-9109%20(2).pdf> accessed 31<sup>st</sup> August 2014

<sup>160</sup> See (2005) EITI Source Book available at < <http://eiti.org/files/document/sourcebookmarch05.pdf>> Page 8 Accessed 1<sup>st</sup> September 2014

<sup>161</sup> Paul D. Ocheje, 'The Extractive Industries Transparency Initiative (EITI): Voluntary Codes of Conduct, Poverty and Accountability in Africa' [2006], available at: <[https://www.researchgate.net/publication/266333694\\_The\\_Extractive\\_Industries\\_Transparency\\_Initiative\\_EITI\\_Voluntary\\_Codes\\_of\\_Conduct\\_Poverty\\_and\\_Accountability\\_in\\_Africa](https://www.researchgate.net/publication/266333694_The_Extractive_Industries_Transparency_Initiative_EITI_Voluntary_Codes_of_Conduct_Poverty_and_Accountability_in_Africa)> accessed 18<sup>th</sup> September 2018

<sup>162</sup> Mary Ella Keblusek, 'Is EITI Really Helping Improve Global Good Governance? Examining the Resource Curse, Corruption, and Nigeria's EITI Implementation Experience' [2010], Leadership Initiative for



In sum the above makes it clear that mandating usually involves State governments passing legislation and policies that offer legal backing and support to transnational soft law initiatives, thereby enabling them in achieving their purpose, which where mining is concerned is to fill the governance gap where such a gap exists.

### **2.3.1.2 Facilitating**

Governments may also take on facilitating activities that enable soft law initiatives to fill the governance gap in the mining industry in Africa. In their facilitator role government agencies enable investors to engage and follow soft law initiatives that drive social and environmental improvements. While the mandating role of government is most often in the form of legislations passed, the facilitator role of government can be through legislation, government policy, government incentives or other mechanisms as will be discussed below. Where government is able to play a facilitator role it is said to play a catalytic, secondary, or supporting role.<sup>163</sup> For instance, in the UK an amendment to the 1995 Pensions Act<sup>164</sup> requires pension funds to disclose whether they take social, environmental and ethical issues into account, but it does not go further to require fund managers to adopt any particular policy.<sup>165</sup> This is similar to the Nigerian example given above under the mandating role of government that enable soft law initiatives to go further by giving stricter policy options for investors or fund managers, as in the latter example. But what is clear here is that by mandating laws to promote social and environmental protection, government lays the foundation that enables or facilitates the development of further regulations but in the form of soft law so as not to discourage the private sector with regards to cost of investment as discussed in the above section.

---

Transformation and Empowerment available at: <<http://nidprodev.org/EITI%20-%20Nigeria%20Analysis.pdf>> accessed 11<sup>th</sup> November 2017

<sup>163</sup> Tom Fox, Halina Ward, Bruce Howard, 'Public Sector Roles In Strengthening Corporate Social Responsibility: A Baseline Study' [2002] The World Bank, available at: <<http://pubs.iied.org/pdfs/16017IIED.pdf?>> Accessed 20<sup>th</sup> June 2014

<sup>164</sup> Laura Albareda, Josep M. Lozano, Tamyko Ysa, 'Public Policies on Corporate Social Responsibility: The Role of Governments in Europe' (2007) 74 Journal of Business Ethics, 391-407, 402

<sup>165</sup> Tom Fox, Halina Ward, Bruce Howard, 'Public Sector Roles In Strengthening Corporate Social Responsibility: A Baseline Study' [2002] The World Bank, available at: <<http://pubs.iied.org/pdfs/16017IIED.pdf?>> Accessed 20<sup>th</sup> June 2014

The UK example of facilitation is described as the business in community model by Matten and Moon in their 2008 study.<sup>166</sup> Under this model government activities in relation to CSR in particular focus on providing support to the private sector, in facilitating sustainable development and economic regeneration. They may do this by giving incentives such as public endorsements to private companies who strictly adopt soft law social development strategies or only working with private companies who have demonstrated a strong zeal for economic regeneration of communities. It is argued that the UK government adopts what is known as 'soft intervention' to facilitate corporate action with regards to soft law, particularly corporate social responsibility measures. As facilitators of soft law the governments seeks mechanisms that provide incentives, whether through 'soft regulation' to encourage corporate CSR actions or through tax measures.<sup>167</sup> Put simply in order to facilitate and thus enable the use of soft law by businesses, government pass their own 'soft regulation' as opposed to mandating what is usually hard regulation. This demonstrates that government not only plays an important role in mandating hard laws that enable soft law initiatives but also facilitating a soft approach through soft regulations that can also enable soft law initiatives as the UK example illustrates. Indeed, according to Claverdon regulation is not the most effective measure of delivering positive impact to society especially by enabling soft law, as he argues through government leadership and creativity, positive impact may be created for society.<sup>168</sup> Therefore it would seem that through strong leadership or innovation government can facilitate an enabling environment for soft law initiatives. Through its policies Albereda et al argue the UK government has been one of the most innovative in the facilitation of soft law.<sup>169</sup> For instance, it links CSR to the main challenges in societal governance faced by developed countries thereby developing the concept 'business in community' which requires businesses to play a fundamental role in the economic development of communities. Clearly government policies are key to facilitating an enabling environment as the UK illustrates. Authors such as Claverdon in fact argue the better approach to enabling soft law initiatives and thus corporate compliance by governments is through soft law regulations and policies as hard government regulation in the form of mandating may interfere with corporate freedom

---

<sup>166</sup> Dirk Matten, Jeremy Moon, 'Implicit and Explicit CSR: A Conceptual Framework for A Comparative Understanding of Corporate Social Responsibility' (2008) Vol.33, No.2, *Academy of Management Review*, 404-424

<sup>167</sup> Laura Albareda, Josep M. Lozano, Tamyko Ysa, 'Public Policies on Corporate Social Responsibility: The Role of Governments in Europe' (2007) 74 *Journal of Business Ethics*, 391-407, 402

<sup>168</sup> Cited in Uwafiokun Idemudia, 'Conceptualising the CSR and Development Debate' (2008) 29 *Journal of Corporate Citizenship* 91, 93

<sup>169</sup> Laura Albareda, Josep M. Lozano, Tamyko Ysa, 'Public Policies on Corporate Social Responsibility: The Role of Governments in Europe' (2007) 74 *Journal of Business Ethics* 391-407, 402

and undermine efficiency. They further argue that mandatory regulation will hurt corporate profit and undermine ongoing voluntary initiatives.<sup>170</sup>

Moreover, as noted earlier the role of the government in providing an enabling environment is critical. Therefore, having a clear set of policies and regulations in itself may be considered as facilitating an enabling environment for soft law initiatives. For instance, the former Managing Director of the World Bank and CEO of the International Finance Corporation Peter Woicke (2003) noted that "for business to continue to improve their social and environmental performance, the public sector needs to provide two key contribution: (1) Clarity in its regulations, the base-line standards it recognizes of all firms, and (2) predictability of government intervention."<sup>171</sup> It may be argued that it is with respect to the issue of clarity of regulation and predictability of government intervention that developed and developing countries differ. While the former have a good record as the UK example illustrates, the latter's record remains wanting, as they seem to pick and choose which laws to enforce. Furthermore, Ward argues in order to create an enabling environment for CSR government does not only have a critical role to play in ensuring the availability of clear and certain regulation but must also be a facilitator of soft law initiatives through the education sector first by setting a clear overall policy framework for national education on corporate social responsibility and other soft law initiatives.<sup>172</sup> For example in El Salvador the ministry of education has worked towards developing an overall national plan for corporate social responsibility and education which will surely facilitate the creation of an enabling environment for soft law initiatives as more people become aware of such initiatives through education.

Furthermore, in its role as a facilitator, government can create an enabling environment for the use of transnational soft law mechanisms by providing funding for research or by leading campaigns, training government staff and civil society to the use of soft law initiatives, information collation and dissemination, or awareness raising.<sup>173</sup> In addition, they can also

---

<sup>170</sup>Uwafiokun Idemudia, 'Conceptualising the CSR and Development Debate' (2008) 29 *Journal of Corporate Citizenship* 91, 93

<sup>171</sup> Halina Ward, 'Public Sector Roles In Strengthening Corporate Social Responsibility: Taking Stock' [2004] *The World Bank*, 7 available at: < <http://pubs.iied.org/pdfs/16014IIED.pdf>> accessed 15th June 2014

<sup>172</sup>ibid

<sup>173</sup> Tom Fox, Halina Ward, Bruce Howard, 'Public Sector Roles In Strengthening Corporate Social Responsibility: A Baseline Study' [2002], *The World Bank*, available at: <<http://pubs.iied.org/pdfs/16017IIED.pdf?>> Accessed 20<sup>th</sup> June 2014

develop or support soft law initiatives including benchmarks and guidelines for community development especially where mining is concerned. More interestingly, Fox et al argue that they can promote a pro-CSR soft law market environment in countries by creating fiscal incentives and applying its public procurement and investment leverage.<sup>174</sup>

An impressive example of government in its facilitator role is demonstrated by Proudly South African, a non-profit company set up by the government led National Economic Development and Labour Council (NEDLAC).<sup>175</sup> Proudly South African's directive is to promote South African companies' products and services in order to support job creation and economic growth. Through its logo schemes, companies are required to demonstrate their commitment to social responsibility and if successful a logo is issued to them. The logo signifies to consumers that the company satisfies its criteria on local content, a rigorous environmental protection scheme, quality, and commitment to fair labour standards.<sup>176</sup>

The above is an excellent example of a government in its facilitator role creating an enabling environment for further soft law initiatives to develop. By dedicating an agency to promote south African services, products, environmental protection and social development it creates the necessary environment for companies to take on board what is required of them and therefore apply other transnational soft law initiatives more suitable to their sector. The above logo scheme can also be very effective in enabling soft law initiatives as without demonstrating for instance, social redevelopment or environmental protection a company may not be able to successfully bid for a project as it would not have a logo and thus not be South African friendly. Therefore government facilitation of such schemes which are not laws that compel companies can clearly promote and thus enable transnational soft law initiatives thereby promoting social development and environmental protection in the mining sector without losing investors.

Another example of government in its facilitator role which although not as successful as the South African case was the establishment of the Niger Delta Development Commission

---

<sup>174</sup> ibid

<sup>175</sup> <http://www.proudlysa.co.za/>

<sup>176</sup> Tom Fox, Halina Ward, Bruce Howard, 'Public Sector Roles In Strengthening Corporate Social Responsibility: A Baseline Study' [2002] The World Bank, available at: <http://pubs.iied.org/pdfs/16017IIED.pdf?>> Accessed 20<sup>th</sup> June 2014

(NDDC) by the Nigerian government to facilitate community development in oil producing communities in Nigeria.<sup>177</sup> This initiative by the Nigerian government was however thwarted by poor funding on the part of the government themselves as although multi-national oil corporations (MNCs) met their funding obligations to the NDDC, the Commission has been unable to deliver development.<sup>178</sup> However, if initiatives such as the NDDC were to receive effective government backing they would facilitate the creation of an enabling environment critical for the use of soft law initiatives for the betterment of society. This is because by encouraging community development and rehabilitation by corporations, governments facilitate the compliance of transnational corporations with soft law initiatives they have subscribed to that primarily seek the same objectives.

Moreover, the UK has also facilitated the use of soft law and CSR initiatives by attaching ministerial responsibility to CSR and has introduced policies to encourage CSR, both domestically and within the global business of UK companies.<sup>179</sup> For example, the UK local government procurement policy sees local governments pledge to use procurement to promote socially and environmentally friendly practices, fair employment practices, ethical sourcing practices, and environmental sustainability wherever possible.<sup>180</sup> This clearly reflects the shift from the reliance on government authority toward the endorsement, facilitation, partnership, and soft regulation of CSR thus creating "The enabling State"<sup>181</sup> This section has demonstrated that in order to further enhance the creation of an enabling environment government must go beyond its traditional role of simply mandating laws and regulations. Government must be innovative in facilitating soft law through incentives, policies, and even government backed soft regulations as in the UK.

---

<sup>177</sup>Uwafiokun Idemudia, 'Conceptualising the CSR and Development Debate' (2008) 29 *Journal of Corporate Citizenship* 91, 98

<sup>178</sup>Uwafiokun Idemudia and Uwem E. Ite, 'Corporate-Community Relations in Nigeria's Oil Industry: Challenges and Imperatives' (2006) 13, *Corporate Social Responsibility and Environmental Management*, 194-206, 203

<sup>179</sup> Dirk Matten, Jeremy Moon, 'Implicit and Explicit CSR: A Conceptual Framework for A Comparative Understanding of Corporate Social Responsibility' (2008) Vol.33, No.2, *Academy of Management Review*, 404-424

<sup>180</sup> UK Procurement Pledge for Local Authorities, <http://www.local.gov.uk/documents/10180/5878079/Procurement+Pledge+for+Local+Authorities+-+final+19.7.12.pdf/9a63faae-2f03-47df-97c4-fba7cca54e7f> accessed 11th September 2014

<sup>181</sup> Dirk Matten, Jeremy Moon, 'Implicit and Explicit CSR: A Conceptual Framework for A Comparative Understanding of Corporate Social Responsibility' (2008) Vol.33, No.2, *Academy of Management Review*, 404-424

### 2.3.1.3 Partnering

Another way in which governments can create an enabling environment for the use of soft law initiatives to fill the governance gap in the mining industry is through partnerships. Partnerships are key tools for the creation of enabling environments for soft law initiatives that target community development and environmental protection in particular. This is because strategic partnerships can bring the complementary skills and inputs of the public and private sector in tackling complex social and environmental problems.<sup>182</sup> It is this research's view that partnerships between stakeholders within an industry, that develop soft law initiatives enable such initiatives due to the fact that all parties participated and agreed to the establishment of the initiative and will monitor one another to ensure compliance. Governments should therefore seek to create initiatives in partnerships with mining companies that promote social and environmental soft law initiatives thus enabling them. In recent times this will not prove difficult in the mining industry, as for reasons discussed below partnerships have become common.

Ruggie noted that, while unthinkable ten years ago, regulatory partnerships between stakeholders in the mining industry are now common, in contemporary times there has been an influx of multi stakeholder, public-private hybrid regulations combining mandatory with voluntary measures, as well as industry and company self-regulation.<sup>183</sup> It is argued that such a multitude of partnership interactions may better achieve the desired socially and environmentally beneficial outcomes.<sup>184</sup> This is because it allows for all actors within the mining industry, to a greater or lesser extent, to set a relatively comparable or parallel "responsible" agenda and objectives, even if conceived as opposing viewpoints. Such an enabling or disabling environment of actors and inter-relations could be seen as a network of social and environmental value.<sup>185</sup> In other words, by working together stakeholders within

---

<sup>182</sup>Tom Fox, Halina Ward, Bruce Howard, 'Public Sector Roles In Strengthening Corporate Social Responsibility: A Baseline Study' [2002] The World Bank, available at: <http://pubs.iied.org/pdfs/16017IIED.pdf?>> Accessed 20<sup>th</sup> June 2014

<sup>183</sup>Julia Sagebien, Nicole Lindsay, Peter Campbell, Rob Cameron and Naomi Smith, 'The Corporate Social responsibility of Canadian mining companies in Latin America: A systems perspective', (2008) 14:3, Canadian Foreign Policy Journal, 103-128, 118

<sup>184</sup>Julia Sagebien, Nicole Lindsay, Peter Campbell, Rob Cameron and Naomi Smith, 'The Corporate Social responsibility of Canadian mining companies in Latin America: A systems perspective', (2008) 14:3, Canadian Foreign Policy Journal, 103-128, 118

<sup>185</sup>ibid, 119

an industry can understand the problems encountered by each other and thus together find solutions to social and environmental problems.

With respect to government participation in partnerships, the 2003 World Bank Business Survey Report, 'Race to The Top' which surveyed the views of over 100 multi-national enterprises (MNEs) found that national governments are especially important partners for the extractive sector in meeting soft law commitments.<sup>186</sup> Such partnerships are necessary so that MNEs can partner closely with the national government to ensure that human and civil rights are maintained in a manner that is consistent with the policy and commitments of the MNEs.<sup>187</sup> This therefore clearly supports the argument that by engaging in partnerships with mining companies, the soft law commitments of such companies are enabled.

A further illustration of the effects of partnerships can be demonstrated by the Business Partners for Development (BPD) program.<sup>188</sup> BPD was set up to study, support and promote strategic examples of partnerships involving business, civil society and government working together for the development of communities around the world. It was established based on the premise that tri-sector partnerships could provide long-term benefits to the business sector and at the same time meet the social objectives of civil society and the state by helping to create stable social and financial environments, therefore in effect targeting what most transnational soft law mining initiatives seek to achieve.<sup>189</sup> Thirty "focus projects" (i.e. pilots) in 20 countries were undertaken which found out that partnerships between local or central government, companies, and civil society organizations, can provide business benefits, enhanced community developmental impact, and positive outcomes for public sector governance. The studies also found that public sector officials played critical roles in drafting contract provisions and concessions designs, endorsement, dispute resolution, awareness raising, and making sure of the long term sustainability of investments and infrastructure resulting from the partnerships. However, a major setback was public sector capacity issues which must be overcome to enable this kind of engagement.<sup>190</sup>

---

<sup>186</sup> The World Bank Group, Corporate Social Responsibility Practice, 'Race to The Top: Attracting And Enabling Global Sustainable Business' [2003] Business Survey Report 1-28, 22

<sup>187</sup> *ibid*

<sup>188</sup> Business Partners for Development, 'Tri-Sector Partnership Results and Recommendations: Putting Partnering to Work', 1998-2001 available at <<http://www.oecd.org/unitedkingdom/2082379.pdf>> accessed 15<sup>th</sup> May 2017

<sup>189</sup> *ibid*

<sup>190</sup> *ibid*

However, such capacity issues can be overcome through more partnerships as it is reported that even companies with limited community development funds are expressing an interest to partner with governments in order to plan programs that are directly related to their operations.<sup>191</sup> For example, apparel companies in Europe and the United States are interested in working with trade ministries in order to educate local suppliers on the importance of CSR, thereby enabling CSR. Indeed, companies in all sectors have indicated a desire to partner with government in order to support education measures that would lead to a more viable workforce that can implement CSR.<sup>192</sup>

Moreover, governments around the world are also becoming more open to the idea of partnering with different stakeholders to enable soft law initiatives, especially those pertaining to human rights. In their study of public policies on CSR soft law initiatives Laura Albareda et al found that Scandinavian countries had a preference for cooperative agreements and consensus between different types of organizations; thus necessitating the use of partnerships as a tool to design and implement CSR public policies in Scandinavian countries, thereby enabling soft law.<sup>193</sup> For instance, in Norway the government set up the Consultative Body for Human Rights and Norwegian Economic Involvement Abroad in 1998 to promote dialogue, information sharing, and mutual understanding between the human rights community, the private sector and the Norwegian authorities. Utting rightly argues that the above multi-stakeholder collaborations are necessary in an increasingly integrated and globalized world. Due to the fact that not only do governments on their own lack the power to shape current patterns of economic development, but many of their powers have been weakened, therefore partnerships are critical.<sup>194</sup>

However, it must be highlighted that partnerships between government and mining companies to enable soft law initiatives should not be borne out of necessity. In order for them to be successful they should be established to promote better understanding and peaceful co-existence within an industry. When established under these conditions strategic partnerships between government and stakeholders in an industry leaves no party feeling left

---

<sup>191</sup>The World Bank Group, Corporate Social Responsibility Practice, 'Race to The Top: Attracting And Enabling Global Sustainable Business' [2003] Business Survey Report, 1-28, 22

<sup>192</sup>ibid

<sup>193</sup> Laura Albareda, Josep M. Lozano, Tamyko Ysa, 'Public Policies on Corporate Social Responsibility: The Role of Governments in Europe' (2007) 74 Journal of Business Ethics 391-407, 401

<sup>194</sup> Peter Utting, 'Business Responsibility for Sustainable Development' [2000] Geneva 2000 Occasional Paper No.2, United Nations Research Institute for Social Development



out or having laws imposed on them without their input and brings mutual understanding between stakeholders. This makes it easier to implement soft law transnational initiatives as all parties understand each other and are already on board to solving the common issues such as environmental damage and social injustices. Therefore soft law initiatives are enabled to be adopted or created and thus implemented in furtherance of the aims of such partnerships. In addition, Ward notes that effective partnerships must also be grounded in local stakeholder interests and needs and also capable of tackling and transcending real or perceived power imbalances among the different players in order for a successful partnership.<sup>195</sup>

The above has thus demonstrated that where partnerships between governments and industry stakeholders are established they may play a key role in enabling soft law initiatives.

#### **2.3.1.4 Endorsing**

Another effective way of creating an enabling environment for soft law initiatives is by State governments endorsing such initiatives. Endorsements can take various forms, for instance, through policy documents, public sector management practices, or the direct recognition of the efforts of individuals through award initiatives.<sup>196</sup> For example, in Taiwan, the Taiwan Environmental Protection Administration (EPA) has run an annual Green Business Award scheme since 1992. By exhibiting the practices of the award winning companies the EPA creates a demonstration effect for other companies. The EPA holds a prestigious award ceremony with the winners meeting the president and receiving a personal word of praise from him.<sup>197</sup> Furthermore, the government of Taiwan believes that Taiwan's ranking in ISO14000 certification in which they are fifth in the world with over 560 organizations certified can be linked to the promotion effect of the Green Business Award.<sup>198</sup>

---

<sup>195</sup>Halina Ward, 'Public Sector Roles In Strengthening Corporate Social Responsibility: Taking Stock' [2004] The World Bank, 24 available at: <<http://pubs.iied.org/pdfs/16014IIED.pdf>> accessed 15th June 2014

<sup>196</sup>Tom Fox, Halina Ward, Bruce Howard, 'Public Sector Roles In Strengthening Corporate Social Responsibility: A Baseline Study' [2002] The World Bank, available at: <<http://pubs.iied.org/pdfs/16017IIED.pdf?>> Accessed 20<sup>th</sup> June 2014

<sup>197</sup> Tom Fox, Halina Ward, Bruce Howard, 'Public Sector Roles In Strengthening Corporate Social Responsibility: A Baseline Study' [2002] The World Bank, available at:

<<http://pubs.iied.org/pdfs/16017IIED.pdf?>> Accessed 20<sup>th</sup> June 2014

<sup>198</sup> *ibid*

Another aspect of a government endorsement which creates an enabling environment for soft law initiatives is the endorsement of multilateral soft law initiatives on the international plane. For instance, the African Union Heads of State and Government all support and endorsed the African Mining Vision (AMV) and are now working with other partners to establish the African Minerals Development Centre (AMDC) to provide strategic operational support for the AMV and its action plan.<sup>199</sup> The UN Global Compact, launched by Kofi Annan in 1999 which shall be discussed in chapter three also received major endorsements from both developing and developed countries.<sup>200</sup>

Overall, from the above it is clear that a government's role in the mining industry has changed from mere bystander leaving the industry in the hands of the private sector to an active participant that is required to create an enabling environment for soft law initiatives. As demonstrated above, a government creates such an enabling environment through mandating, facilitating, partnering and endorsing activities where soft law is concerned. However, it must be noted that these enabling roles of a government must be taken conjunctively by a government if it is truly to create an enabling environment. In fact some enabling roles of a government are very similar or inter-link, for instance, by mandating legislation governments may facilitate the enabling of soft laws, and by facilitating such initiatives it means they are endorsing them. Therefore a government must partake in all roles in order to create a viable enabling environment for soft law mining initiatives.

## **2.4 Other Actors in the Mining Industry and their Roles in Creating an Enabling Environment**

Creating an enabling environment for soft law initiatives does not stop at nation states mandating, facilitating, partnering, and endorsing soft law initiatives through government. There are further actors involved when creating an enabling environment for soft law that the State must enable. As will be demonstrated below other actors such as local government authorities, traditional rulers and civil society play an important role in enabling mining soft

---

<sup>199</sup> Jesse Salah Ovadia, "Local content and natural resource governance: The cases of Angola and Nigeria" (2014) 1, *The Extractive Industries and Society*, 137-146, 140

<sup>200</sup> Tom Fox, Halina Ward, Bruce Howard, 'Public Sector Roles In Strengthening Corporate Social Responsibility: A Baseline Study' [2002] The World Bank, available at: <<http://pubs.iied.org/pdfs/16017IIED.pdf?>> Accessed 20<sup>th</sup> June 2014

law initiatives in particular. This is because they have more contact with mining communities as well as what they require in terms of social development and environmental protection, thereby giving them a better understanding of how best to implement soft law initiatives relating to them. Therefore to create an enabling environment for soft law a nation State must also empower local governance; civil society and work with the international community in order to develop the best soft law initiatives that can fill their governance lapses, these will be discussed in greater detail below.

#### **2.4.1 Local Governance**

Globalization and the information revolution in particular are encouraging a growing number of countries around the world to re-examine the roles of various levels of government and their partnership with the private sector and civil society. These reforms involve shifting responsibilities to local governments with the objective of strengthening local governance.<sup>201</sup> Local governments are important because they have institutional strengths such as facilitating alliances, partnership associations, and provide networks for developing social capital and improving social outcomes.<sup>202</sup> Local Governments are also the closest system of government closest to the people thereby better positioned to ensure the peoples interests are protected especially with regards the activities of extractive industry TNCs within a locality. This is supported by Stigler who noted ‘the closer a representative government is to the people the better it works’.<sup>203</sup> Therefore for soft law initiatives which seek to protect those in vulnerable areas where mining or other major activities take place to be effective there is a need for an enabled local governance system. This is so that as mentioned above they can use their institutional strengths to facilitate an alliance between TNCs and local communities that will see TNCs comply with soft law initiatives they have subscribed to in order to improve the social outcomes of their activities within a locality.

Hamann et al found that the complexity of the local governance context particularly in developing countries contributes to a vicious cycle of interaction characterized by low

---

<sup>201</sup> Anwar Shah and Sana Shah, ‘The new vision of Local governance and the evolving roles of local governments’ in Anwar Shah (ed), *Local Governance in Developing Countries* (The World Bank 2006)

<sup>202</sup> *ibid*, 25

<sup>203</sup> George Stigler, ‘The Tenable Range of Functions of Local Government’ in Joint Economic Committee, Sub-Committee on Fiscal Policy, US Congress, 213-19 (ed) *Federal Expenditure Policy for Economic Growth and Stability* (Washington DC: US Government Printing Office 1957)

collaboration potential and high levels of unpredictability thereby limiting the contributions of private sector voluntary initiatives.<sup>204</sup> They therefore suggested that companies must actively seek creative ways to enhance collaboration potential and respond to complexities in developing countries.<sup>205</sup> One such creative way would be for companies to ensure that the local government authority of developing countries are enabled by the state, i.e. they are adequately funded, they are supported with strong institutions that are backed with adequate human capacity and are given some regulatory power. Such enabling would reduce the complexity and unpredictability Hamann et al referred to.

It is reported that Local Governments can take a weak and ineffective dimension within a State particularly in federal systems where they are hand maidens of States or provinces and given a strait jacket mandate.<sup>206</sup> In other words they are given limited powers, they get crushed under a regime of intrusive controls by higher levels of government, thus rendering them ineffective in discharging duties in the interest of their localities.<sup>207</sup>

Local government empowerment by the state is critical to the creation of an enabling environment for mining soft law initiatives in particular. This is because the local government is the authority that is most able to represent the needs of communities affected by mining activities. It is also the authority that can more readily monitor and ensure agreements between multinational mining companies and local communities are being complied with. Therefore, in order for soft law initiatives to be implemented successfully there is a need for an enabled local government that monitors interactions between communities and TNCs. It is these local government authorities that will ensure the interests of local communities are represented in stricter soft law initiatives as they are the closest to them, thereby enabling the creation of initiatives. They will also be the best to monitor the activities of TNCs in their local communities and ensure they are complying with their soft law commitments, again enabling soft law mining initiatives.

---

<sup>204</sup> Ralph Hamann, Paul Kapelus, Dan Sonnenberg, Andrew Mackenzie, and Paul Hollesen, "Local Governance as a Complex System" (2005) No. 18, *Journal of Corporate Citizenship*, 61-73

<sup>205</sup> *ibid*

<sup>206</sup> Anwar Shah and Sana Shah, 'The new vision of Local governance and the evolving roles of local governments' in Anwar Shah (ed), *Local Governance in Developing Countries* (The World Bank 2006) 21

<sup>207</sup> *ibid*

An example of an enabled local government is demonstrated by the Philippines' remodeling of its local government system to cater to its mining industry governance matters. In the Philippines, local government agencies are given important policy functions which ensure responsible mining. For instance, they are responsible for allocating mining tax revenues that are specifically allocated to the regions, therefore directly impacting on the lives of local communities. They also have powers with respect to environmental regulations and have expressed strong policies against mining, in particular where companies have created environmental damages.<sup>208</sup> Such remodeling as in the Philippines allows local government authorities to be more active in ensuring TNCs are upholding soft law commitments and where they are failing to do so take necessary action. Therefore as locals within the mining communities, an enabled local government authority would cater to the implementation of soft law initiatives that seek to govern mining activities within its region.

The local governance system adopted in any given mining region may bring issues with regards to creating an enabling environment for voluntary initiatives especially in regions where the tribal authority may have been replaced with elected officials. For instance, in the rural Kayes region of western Mali the local governance context presented major challenges to the implementation of corporate citizenship principles such as the World Bank's involuntary resettlement guidelines.<sup>209</sup> The major issue here was that the traditional village leadership structures were being usurped by the imposition of central government institutions which were motivated by state interest in the region due to mining royalties. These new government structures have been locked into a battle with the traditional authorities and also have limited capacity and resources.<sup>210</sup> These local issues have made the community relations between corporate managers who try to implement soft law standards extremely difficult as there are no clear definitions of the roles and responsibilities of all the actors.

Therefore it is clear that a functioning local governance system with the responsibilities and roles of actors clearly defined are required for the effective implementation of transnational soft law initiatives as demonstrated by the difficulty in implementing World Bank

---

<sup>208</sup> Halina Ward, 'Public Sector Roles In Strengthening Corporate Social Responsibility: Taking Stock' [2004] The World Bank, 23, available at: <<http://pubs.iied.org/pdfs/16014IIED.pdf> accessed 15th June 2014

<sup>209</sup> Ralph Hamann, Paul Kapelus, Dan Sonnenberg, Andrew Mackenzie, and Paul Hollesen, "Local Governance as a Complex System" (2005) No. 18 Journal of Corporate Citizenship, 61-73

<sup>210</sup> Ralph Hamann, Paul Kapelus, Dan Sonnenberg, Andrew Mackenzie, and Paul Hollesen, "Local Governance as a Complex System" (2005) No. 18 Journal of Corporate Citizenship, 61-73

resettlement guidelines in Mali due to the ongoing difficulties within the local governance context.

#### **2.4.2 Civil Society**

Just as an enabled local governance system is key to enabling soft law initiatives especially those concerned with the extractive industry, so too is an enabled civil society. In particular civil society have a significant role in raising awareness with regards to the availability of soft law mechanisms that protect locals in any given country affected by mining development. For instance, within the South African Development Community only South Africa is familiar with the concept of CSR, due to the lack of an enabled civil society in African countries. Civil society in the form of NGOs mostly drive the concept of CSR with government coming in at a later stage, therefore such unfamiliarity amongst African countries is unsurprising.<sup>211</sup> More importantly, the presence of an able civil society within a State enables the use of soft law initiatives, as by relying on such initiatives and company commitments civil society may protect and monitor the interests of locals affected by mining development, as will be discussed below.

Civil society's ability to enable soft law initiatives through awareness campaigns has been noted by Utting who argues that the capacity of civil society to put TNCs under the spotlight and mount national and international campaigns has increased significantly. For example, he notes that it was NGO and consumer pressure that encouraged companies like BP and Shell to act differently in terms of environmental protection and social development in compliance with their commitments.<sup>212</sup> This is evidenced by the fact that in 1997 Shell revised its statement of general business principles to endorse the UN's Universal Declaration of Human Rights, which can be argued to be soft law as it is not a treaty, thereby demonstrating that

---

<sup>211</sup> Tom Fox, Halina Ward, Bruce Howard, 'Public Sector Roles In Strengthening Corporate Social Responsibility: A Baseline Study' [2002] The World Bank, 23, available at: <http://pubs.iied.org/pdfs/16017IIED.pdf?>> Accessed 20<sup>th</sup> June 2014

<sup>212</sup> Peter Utting, 'Business Responsibility for Sustainable Development' [2000] United Nations Research Institute for Social Development available at [http://www.unrisd.org/80256B3C005BCCF9/httpNetITFramePDF?ReadForm&parentunid=1CA8A49E3513DE1C80256B610059BA0D&parentdoctype=paper&netitpath=80256B3C005BCCF9/\(httpAuxPages\)/1CA8A49E3513DE1C80256B610059BA0D/\\$file/utting.pdf](http://www.unrisd.org/80256B3C005BCCF9/httpNetITFramePDF?ReadForm&parentunid=1CA8A49E3513DE1C80256B610059BA0D&parentdoctype=paper&netitpath=80256B3C005BCCF9/(httpAuxPages)/1CA8A49E3513DE1C80256B610059BA0D/$file/utting.pdf) accessed 16<sup>th</sup> May 2017

civil society pressure do enable soft law initiatives.<sup>213</sup> Additionally, civil society also inform consumers around the world of global issues regarding the products they purchase thereby ensuring consumers exert more pressure on companies to ensure good corporate behavior, in compliance with soft law commitments.<sup>214</sup>

Such civil society pressure has indeed resulted in enabling and creating soft law initiatives within the mining industry such as the Kimberly Process which aims to stop the trade in 'conflict diamonds' and ensure that diamond purchases are not financing violence.<sup>215</sup> The establishment of the Kimberly Process initiative is a good practical example of how civil society enables development and compliance with soft law initiatives. Frustrated by the diamond industry's lack of concern of where diamonds came from or their roles in many conflicts in Africa, NGOs took matters into their own hands. In 1997 Global Witness launched an investigation into the buying and selling of diamonds in Angola in the hope of revealing the industry's darkest secret.<sup>216</sup> Global Witness and further NGO investigations showed that illegal diamonds were being exported through African countries and into Europe.<sup>217</sup> As a result of such NGO work raising public and consumer awareness, the Kimberly Process and further initiatives were developed to put a halt to the sale of conflict diamonds. This again illustrates the importance of civil society in enabling the development and implementation of initiatives such as the Kimberly Process in developing countries in particular.

One of the most important enabling factors of civil society superbly argued by Utting is that together with soft law initiatives civil society in itself is a regulator.<sup>218</sup> This is because just as in the conflict diamonds example above civil society can act as regulators by launching investigations into the activities of the corporate world. They may then publicize the malpractices of companies who despite signing up to initiatives still engage in malpractices,

---

<sup>213</sup> *ibid*

<sup>214</sup> *ibid*

<sup>215</sup> The Kimberly Process, <http://www.kimberleyprocess.com/en/about> accessed 10th September 2014

<sup>216</sup> J. Andrew Grant and Ian Taylor, 'Global governance and Conflict diamonds the Kimberley Process and the quest for clean gems', (2004) Vol 93, No.375, *The Commonwealth Journal of International Affairs*, 385-401, 389

<sup>217</sup> J. Andrew Grant and Ian Taylor, 'Global governance and Conflict diamonds the Kimberley Process and the quest for clean gems', (2004) Vol 93, No.375, *The Commonwealth Journal of International Affairs*, 385-401, 389

<sup>218</sup> Peter Utting, 'Corporate Responsibility and the Movement of Business' (2005) Vol. 15, No. 3/4, *Development in Practice*, 375-388

thereby harming the corporate image and even the revenue of such companies. He further argues that non-governmental systems of regulation and multi-stakeholder initiatives are often seen as innovative institutional mechanisms that go some way towards filling the governance gap associated with globalization.<sup>219</sup> Therefore soft law initiatives and an enabled civil society complement one another towards filling the governance gap.

However, it must be noted that reliance on civil society as a tool for the creation of an enabling environment does have its drawbacks. The lack of legitimacy is arguably the biggest limitation on NGOs and other civil society groups. This is due to the fact that although they may pressure organizations they cannot penalize them by banning their activities or fining them, because they lack legitimacy unlike nation states.

Furthermore, it is argued that through their activism and close relation with business organizations civil society have been drawn into both the financial circuits and corporate culture of TNCs therefore leading to a dilution of radical or alternative agendas.<sup>220</sup> Indeed, it is argued that some of the new multi-stakeholder voluntary initiatives are seen as excessively close to business as a result of funding ties and the degree of corporate influence exercised through governance mechanisms.<sup>221</sup> This has become a common occurrence in SSA as will be demonstrated in chapter five with respect to civil society in South Africa.

Therefore although a functioning and able civil society community is required within a State in order to create an enabling environment for soft law initiatives that protect communities from environmental degradation and social injustices, it is necessary to ensure that the civil society is not overly close with the business community.

### **2.4.3 International Community**

The international community here refers to countries around the world that through their activities and policies may influence the creation of an enabling environment for soft law initiatives in other countries. For instance, a United States (US) – Vietnam textiles agreement, signed in May 2003, includes a clause obligating Vietnamese authorities to encourage the

---

<sup>219</sup> *ibid*

<sup>220</sup> *ibid*

<sup>221</sup> *ibid*



implementation of CSR soft law initiatives in return for access to the US market. This was the first time that an international agreement included a government obligation to encourage CSR codes, as opposed to requiring additional regulation or enforcement, as in an earlier US – Cambodia textile agreement.<sup>222</sup> Therefore, trade agreements may be used as incentives to encourage the use and acceptance of soft law initiatives especially in developing countries that are more interested in investments rather than regulation.

Furthermore, another action by States that may enable the use of soft law initiatives in poorer developing countries is to require transnational companies registered in developed countries to sign up to mandatory corporate responsibility standards that would be monitored and enforced by their home State. This way if they fail to comply with soft law initiatives promoting CSR while conducting business in developing countries with poor governance mechanisms, victims can seek enforcement abroad, thus enabling soft law initiatives. Indeed, The National Roundtables on Corporate Social Responsibility and the Canadian Extractive Industry in Developing Countries (National Round Tables, 2007) advisory group advised the Canadian government to work towards creating a mandatory Canadian CSR standards based on existing international standards. The recommendations also urged the creation of an independent ombudsman office so that complaints are easily attended to, and a compliance review committee that would assist companies in reaching mandatory CSR standards and monitor their compliance.<sup>223</sup> If such an approach were adopted by developed nations it would significantly enable soft law initiatives as it would be mandatory for companies to comply with soft law initiatives especially those promoting CSR, thereby increasing compliance.

Additionally, the roundtables noted that, since numerous Canadian mining companies operate in countries with serious governance gaps and weak, to non-existent, state supported human rights and environmental regulations, the Canadian government should be under a responsibility to assist host-state governments in developing policy and regulatory frameworks designed to ensure they reap the benefits of mining projects. More importantly, the report also suggested advancing the rights of indigenous peoples, enhancing revenue

---

<sup>222</sup> Halina Ward, 'Public Sector Roles In Strengthening Corporate Social Responsibility: Taking Stock' [2004] The World Bank, 15 available at: <<http://pubs.iied.org/pdfs/16014IIED.pdf>> accessed 15th June 2014

<sup>223</sup> Julia Sagebien, Nicole Lindsay, Peter Campbell, Rob Cameron and Naomi Smith, 'The Corporate Social responsibility of Canadian mining companies in Latin America: A systems perspective', (2008) 14:3, Canadian Foreign Policy Journal, 103-128, 109

transparency, assisting in host-country judicial system improvements, and working with other countries to strengthen the CSR requirements at the World Bank Group and other banks that offer financial assistance to private sector clients.<sup>224</sup> All these are enabling activities that can and should be done by the international community however, States rarely go against the wishes of TNCs who are hugely influential and contribute to the economies of the countries in which they are registered. For instance, to date the Canadian government is yet to implement the recommendation of the National Roundtables on CSR that a mandatory CSR standard for Canadian companies should be adopted. However, it must be highlighted that the Canadian government did make an effort to implement some of the recommendation noted above, thereby demonstrating the international community is capable of enabling soft law initiatives in poorer developing countries where they seek to fill the governance gap. The government released the policy document 'Building the Canadian Advantage: A CSR Strategy for the International Extractive Sector'<sup>225</sup> which focuses on;

- I. Supporting initiatives in order to improve the capacities of developing countries to manage the development of minerals and oil and gas and to benefit from these resources to reduce poverty.
- II. Promoting international CSR performance guidelines such as the International Finance Corporation Performance Standards
- III. Setting up the office of the extractive sector CSR counsellor to assist stakeholders and Canadian extractive sector companies operating abroad in the resolution of CSR issues.
- IV. Supporting the development of a CSR Centre of Excellence that will encourage the Canadian international extractive sector to implement soft law initiatives by developing and disseminating high quality CSR information, training and tools.<sup>226</sup>

---

<sup>224</sup> Julia Sagebien, Nicole Lindsay, Peter Campbell, Rob Cameron and Naomi Smith, 'The Corporate Social responsibility of Canadian mining companies in Latin America: A systems perspective', (2008) 14:3, Canadian Foreign Policy Journal, 103-128, 109

<sup>225</sup> Natural Resources Canada, 'Building the Canadian Advantage: A CSR Strategy for the International Extractive Sector' (2011) available at <http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/mineralsmetals/pdf/mms-smm/pubr-pubr/pdf/bca-rac-eng.pdf> accessed 16/05/2017

<sup>226</sup> Natural Resources Canada, 'Building the Canadian Advantage: A CSR Strategy for the International Extractive Sector' (2011) available at <http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/mineralsmetals/pdf/mms-smm/pubr-pubr/pdf/bca-rac-eng.pdf> accessed 16/05/2017

With respect to building the governance capacity of host-states which is important for enabling soft law initiatives as mentioned above, the Canadian government has already made some progress. For instance, there is the Canadian International Development Agency's (CIDA) Peru-Canada Mineral Resources Reform Project (Percan), which provides technical assistance for policy reform in Peru's Ministry of Energy and Mines.<sup>227</sup> The above is a good illustration of how the international community can create an enabling environments for soft law initiatives in developing countries with weak governance structures in the extractive industries.

The American trade agreement and Canadian CSR policy examples demonstrate that the international community can play a key role in establishing an enabling environment in developing countries with weak governance structures especially through policy reform and capacity building.

## **2.5 Limitations in providing an enabling environment for the implementation of Soft law mining regulatory initiatives.**

The above sections have looked at different stakeholders and ways in which they may assist in the creation of an enabling environment, which this research argues is necessary if soft law mining regulations are to become an effective set of fourth generation mining codes, however, there are some limitations to creating an enabling environments which must also be considered below.

One of the biggest limitations in creating an enabling environment for developing countries is the lack of institutional, financial and human capacity to understand and implement soft law initiatives. For instance, in the Business Partners for Development (BPD) program discussed above under the partnering heading, public officials and institutions were raddled with incapacity issues which threaten partnerships of that nature. Indeed, inadequate funding, maladministration, or insufficient consumer demands which all stem from capacity matters can and do frustrate promising initiatives such as the BDP. For instance, the NDDC initiative

---

<sup>227</sup>Julia Sagebien, Nicole Lindsay, Peter Campbell, Rob Cameron and Naomi Smith, ' The Corporate Social responsibility of Canadian mining companies in Latin America: A systems perspective', (2008) 14:3, Canadian Foreign Policy Journal, 103-128, 110

in Nigeria mentioned in section 2.3.1.2 (Facilitating) failed due to lack of government support through funding. Therefore, soft law initiatives will not work unless human capacities and institutions are in place to enable them to work in their particular sectoral or geographic context.<sup>228</sup> Key institutions include government monitoring units and enforcement agencies, key departments within local and national government, and CSR-related teams within businesses. Failure to address the human capacity issues and institutions may limit the creation of an enabling environment within a geographical context.

Moreover, another limitation that may inhibit the creation of an enabling environment for soft law mining initiatives that are to be applied especially in developing countries, is where initiatives are designed without the input of stakeholders from such developing countries. This is because despite the positive intention of the initiatives developing countries may feel initiatives are being imposed on them. They would therefore be less likely to provide an environment for such initiatives to thrive, as they did not participate in their creation. Indeed Ward argues that, challenges in soft law corporate responsibility concern a need to localize such initiatives so that they are rooted in local sustainable development concerns, not imposed from above by the "fourth party" stakeholders.<sup>229</sup> She further argues that the needs to build local ownership of soft law issues support the emergence of soft law initiatives that are tailored to the local circumstances of particular sectors.<sup>230</sup>

Therefore, new initiatives are required which have developing countries as effective players in setting the terms of soft law initiatives that will be tailored to their local conditions. This applies to international initiatives such as the UN Global Compact as well as private standards-setting processes so that the creation of an enabling environment is not inhibited by trade related tensions and accusations of 'privatized neo-colonialism'.<sup>231</sup>

The above point leads to the next limitation of the concept of creating an enabling environment which is that just as in the case of defining soft law it is extremely difficult to

---

<sup>228</sup>Halina Ward, 'Public Sector Roles In Strengthening Corporate Social Responsibility: Taking Stock' [2004] The World Bank available at: < <http://pubs.iied.org/pdfs/16014IIED.pdf>> accessed 15th June 2014

<sup>229</sup> ibid

<sup>230</sup> ibid

<sup>231</sup> Tom Fox, Halina Ward, Bruce Howard, 'Public Sector Roles In Strengthening Corporate Social Responsibility: A Baseline Study' [2002] The World Bank, 25, available at: <<http://pubs.iied.org/pdfs/16017IIED.pdf?>> Accessed 20<sup>th</sup> June 2014

create a guide line for an ideal general enabling environment for soft law initiatives. This is due to the fact that different localities have different issues peculiar to them and would therefore require different enabling factors peculiar to their situation. This chapter provides key features that are generally common and one would expect to find within an enabling environment for soft law initiatives, which will be used to address research question 1.4.

## **2.6 Conclusion**

Overall, this thesis seeks to establish whether the right enabling environment can aid soft law initiatives in filling the governance gap within the mining industry in SSA and whether SSA countries possesses such an environment. Therefore it is imperative that a framework for identifying what can be classed as soft law and their enabling environment was established first in this chapter for ease of understanding this thesis. In so doing this chapter addresses research question 1.1, i.e. What is Soft Law and what consists an Enabling Environment for them?

The analysis of the concept of an enabling environment for soft law within this chapter is also important due to the fact that literature on the concept has been scarce, this chapter therefore makes an important contribution in its attempt to define and elaborate on the concept.

With respect to what is 'soft law' in this thesis having reviewed the literature where there is no single widely accepted definition of the term, this chapter concludes that soft laws are 'rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects.'<sup>232</sup> They are referred to as 'soft' because they are not law, but are referred to as law because they seek to achieve similar results to law. Under this definition rules, norms and standards such as the International Finance Corporations' (IFC) performance standards, the World Bank's operational directives, corporate social responsibility (CSR) schemes with a human rights dimension and other principles developed under the auspices of

---

<sup>232</sup> Francis Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques', (1993b) 56 (1) *The Modern Law Review*, 19-54, 32

international organizations such as the World Bank and the UN will be considered as soft law.

With regards to the definition of an enabling environment for soft law initiatives in this thesis, this chapter concludes that an enabling environment is the sum of the drivers, tools, human capacities and institutions directed towards achieving the effective implementation of such soft law codes by States and the international community.<sup>233</sup>

In realizing such an enabling environment, this chapter was able to be more specific than the literature and demonstrate that nation states would have to partake in mandating regulations, facilitating, partnering, and endorsing initiatives. Therefore in establishing whether SSA countries have the enabling environments to enable soft law initiatives in chapters four and five this thesis will seek to establish whether they partake in the aforementioned activities.

Additionally, this chapter also established that an enabling environment for soft law initiatives requires an enabled local governance system and civil society as they are critical to implementing soft law initiatives. Therefore SSA countries must possess enabled versions of these key institutions if they are to provide an enabling environment for soft law initiatives that will fill the governance gap in the mining industry. Again, the availability of these enabling institutions will help determine whether SSA countries are capable of providing an enabling environment for soft law initiatives in chapters four and five.

While the chapter was also able to demonstrate that the international community in terms of developed nation states are also capable of creating an enabling environment for soft law initiatives in poorer developing countries, this thesis is more concerned with the ability of SSA governments to provide such an environment. This thesis will therefore focus more on the capacity of SSA nations to provide an enabling environment for soft law mining initiatives that are touted to be the fourth generation of mining codes in Africa. Such focus by this thesis is necessary because if no such enabling environment exist this author believes that soft law initiatives should not be touted as the solution to the governance gap in the SSA mining industry. This is because without an enabling environment corporations will find it

---

<sup>233</sup>Halina Ward, 'Public Sector Roles In Strengthening Corporate Social Responsibility: Taking Stock' [2004] The World Bank available at: < <http://pubs.iied.org/pdfs/16014IIED.pdf>> accessed 15th June 2014

easier to ignore these voluntary initiatives than they do hard laws in SSA making them inadequate for the regulation of mining in SSA. But before this thesis goes further into such discussions in chapters four and five, this thesis will demonstrate that an enabling environment indeed makes a difference to compliance with soft law initiatives in the next chapter. Thereby supporting the argument that soft law initiatives are likely to be effective where there is an enabling environment.

# Chapter 3: Transnational Soft law initiatives and the Enabling Environment

## 3.1 Introduction

Corporate governance scholarship have highlighted the rise of a new wave of natural resource soft law governance initiatives which seek to address the shortcomings of previous generations of mining code regulations.<sup>234</sup> It is argued that the decline in the capacity of developing countries in particular to effectively govern natural resource exploitation by selectively absenting themselves from their regulatory roles<sup>235</sup> has led to new forms of private and soft law transnational governance. This is in order to promote what is known as “socially responsible capitalism” wherein markets and civil society work together with states to fill any governance gaps left.<sup>236</sup> These alternative social responsibility soft law initiatives include various private, voluntary, and regional initiatives, which apply to transnational corporations (TNCs) in general. Examples of such initiatives and governance codes, which are considered as soft law here include: the United Nations (UN) Global Compact, the UN “Protect, Respect, and Remedy” Framework and Guiding principles, the Global Mining Initiative, The Africa Mining Vision, The Extractive Industries Transparency Initiative (EITI), the Kimberley Process, The Organization for Economic Co-operation and Development (OECD) Principles of Corporate Governance, and the Equator Principles.<sup>237</sup>

---

<sup>234</sup> Hany Besada and Philip Martin, “Mining Codes in Africa: Emergence of a “Fourth” Generation? (2013) The North-South Institute, available at: <<http://www.nsi-ins.ca/wp-content/uploads/2013/03/Mining-Codes-in-Africa-Report-Hany.pdf>> accessed 18<sup>th</sup> September 2018

<sup>235</sup> Pascale Hatcher, "Casting The New Rules of Engagement: The World Bank Group & The Politics of Mining In Papua New Guinea", International Conference Mining & Mining Policy in the Pacific: History, Challenges and Perspectives, 22-25 Nov 2011

<sup>236</sup> Hany Besada and Philip Martin, “Mining Codes in Africa: Emergence of a “Fourth” Generation? (2013) The North-South Institute, available at: <<http://www.nsi-ins.ca/wp-content/uploads/2013/03/Mining-Codes-in-Africa-Report-Hany.pdf>> accessed 18<sup>th</sup> September 2018

<sup>237</sup> See, The UN Global Compact available at <<https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-1>> accessed 29<sup>th</sup> May 2017. The Global Mining Initiative was established by the International Council on Mining and Metals and seeks to address societal issues faced by the industry, available at <<https://www.icmm.com/en-gb/about-us/our-organisation/our-history>> accessed 29<sup>th</sup> May 2017. The Africa Mining Vision is a pathway that puts the Continent’s long term and broad development objectives at the heart of all policy making concerned with mining, it is available at <<http://www.africaminingvision.org/>> accessed 29<sup>th</sup> May 2017. For information on the EITI please see <<https://eiti.org/about/how-we-work>> accessed 29<sup>th</sup> May 2017. See also The Kimberley Process, available at <<https://www.kimberleyprocess.com/en/what-kp>> accessed 29<sup>th</sup> May 2017, The OECD Principles of Corporate Governance, available at <<https://www.oecd.org/corporate/ca/corporategovernanceprinciples/31557724.pdf>> accessed 29<sup>th</sup> May 2017, and The Equator Principles, available at <[http://www.equator-principles.com/resources/equator\\_principles\\_III.pdf](http://www.equator-principles.com/resources/equator_principles_III.pdf)> accessed 29<sup>th</sup> May 2017.



As discussed in chapter two private regulations in the form of soft law can be beneficial to all stakeholders as corporations are given the flexibility to implement measures that develop the communities in which they operate without the stringent financial burdens of State hard laws. However, this allows for potential abuse by corporations due to the voluntary aspect of soft law initiatives. On the other hand, it has been argued that the social sanctions of soft law sees a blurring of the distinction between hard law and soft law especially when considered against the background that soft law encourages the use of social sanctions, which to some extent are no less effective than hard law.<sup>238</sup> This therefore leaves one to question whether an enabling environment as discussed in chapter two is actually necessary for soft law initiatives to be complied with, thereby making them more likely to regulate the activities of mining multinationals. This chapter will address this research question (question 1.2)<sup>239</sup> by analyzing three soft law initiatives, with the aim of demonstrating that an enabling environment can make soft law initiatives more likely to be complied with. Such a finding will support the argument that there is a need for soft law initiatives to be provided with an enabling environment in SSA for them to be effective in filling the mining sector governance gap.

As in chapter two this chapter describes an enabling environment where soft laws are concerned as the sum of the drivers, tools, human capacities and institutions directed towards achieving the effective implementation of soft law codes.<sup>240</sup> In order to further simplify this definition chapter two further identified the main drivers and enablers of soft law as; a) the government; through mandating laws, facilitating initiatives, endorsing initiatives, and partnering with initiatives, b) civil society, c) local governance, and d) International Community. Again, this section will adopt the above as the features/actors that enable soft law initiatives and as such provide them with the enabling environment to thrive.

This chapter is divided into five parts, the first section provides an overview of the structure and rationale for the selection of the three soft law initiatives and how this research intends to demonstrate whether an enabling environment is necessary for soft law compliance, and thus effective regulation of mining activities. The following three sections analyze select

---

<sup>238</sup> Bede Nwete, 'Corporate Social Responsibility and Transparency in the Development of Energy and Mining Projects in Emerging Markets; is Soft Law the Answer?' (2007)8 German L.J 311

<sup>239</sup> Does the existence of an enabling environment for soft law initiatives make it more likely that such initiatives will be complied with by subscribed companies?

<sup>240</sup> Halina Ward, 'Public Sector Roles In Strengthening Corporate Social Responsibility: Taking Stock' [2004] The World Bank available at < <http://pubs.iied.org/pdfs/16014IIED.pdf>> accessed 15th June 2014

transnational soft law initiatives and the effects of an enabling environment on them. The final section concludes the chapter by discussing how the availability of an enabling environment affects compliance with these initiatives. The chapter concluded that soft law initiatives are more likely to be complied with where they are provided with an enabling environment as described in chapter two. Therefore if soft law is indeed the fourth generation of mining codes in Africa they will need SSA countries to provide them with an enabling environment.

### **3.2 Overview of Transnational Soft Law Initiatives and an Enabling Environment**

Within the literature it is generally accepted that the rise of soft law initiatives in the development of energy and mining projects especially in developing countries is seen as a way around the age long issue of environmental degradation, infrastructure decay, human rights abuses, corruption and stagnated development that has become synonymous with resource rich developing countries in SSA.<sup>241</sup> This is a view indeed subscribed to by Ruggie who also characterize the rise of soft law initiatives as a response to a global "governance gap":

The root cause of the business and human rights predicament today lies in the governance gaps created by globalization - between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation.<sup>242</sup>

Three soft law initiatives which seek to address the 'governance gap' are; the United Nation's Global Compact, The Extractive Industries Transparency Initiative (EITI), and the Equator Principles, which shall be analyzed in the following three sections with regards to their effectiveness in terms of compliance, with or without an enabling environment as described in chapter two.

An analysis of the Global Compact is required within this research as according to the Global Compact Office (GCO), the Global Compact is the world's largest global corporate citizenship

---

<sup>241</sup>Bede Nwete, "Corporate Social Responsibility and Transparency in the Development of Energy and Mining Projects in Emerging Markets; Is Soft Law the Answer?" (2007) Vol 8 (4), German Law Journal 311, see also David Vogel, "Private Global Business Regulation" (2008) Annu. Rev. Polit. Sci. 11:261 – 82, Dilek Cetindamar and Kristoffer Husoy, "Corporate Social Responsibility Practices and Environmental Responsible Behavior: The Case of The United Nations Global Compact" (2007) 76 Journal of Business Ethics 163-176, 164

<sup>242</sup> John Ruggie, "Protect, respect and remedy: A framework for business and human rights. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises" (2008) A/HRC/8/5.7 (April), 3

initiative, with participants from 145 countries.<sup>243</sup> It is larger than initiatives such as the World Business Council for Sustainable Development (WBCSD), Prince of Wales International Leaders Business Forum, Global Reporting Initiative, and SA8000.<sup>244</sup> Since its inception in 2000 the initiative has grown to have over 12,000 participants of which 8,000 are businesses.<sup>245</sup> Therefore it is an ideal initiative to assess whether an enabling environment affect's its implementation.

Just like the Global Compact the EITI is an appropriate initiative to use as an example to analyze the effect of enabling environments on soft law initiatives. This is because currently over 80 of the world's largest oil, gas, and mining companies support and actively participate in the EITI process, either in implementing countries, through their industry associations or endorsements and commitments declared internationally.<sup>246</sup> The EITI is touted as one of the more successful soft law initiatives by its proponents and its numbers are compelling indeed. Within a short space of time it has attracted 46 countries with almost 1.5 billion people, with some of the world's largest oil and mineral producing nations as implementing nations, and with more than 50 reports produced by these countries.<sup>247</sup> It is also a peculiar initiative as, rather than focus on companies and ensuring they maintain high social and environmental standards, it is a multi-stakeholder initiative that also focuses on State participation that will ensure the initiative is successfully complied with by all stakeholders as opposed to the Global Compact. Therefore it is necessary to establish how successful this form of soft law has been, and whether an enabling environment can make it more successful.

The Equator Principles are analyzed in this chapter due to the fact that they are also a novel set of principles which in contrast to the above initiatives focus on the financiers of high impact projects such as mining that may have negative environmental consequences. The EPs recognize that banks have an indirect impact on the environment due to the finance they provide, so the EPs aim to ensure banks only provide finance to the least environmental and socially damaging projects. In terms of scope the EPs have become widely applied in project

---

<sup>243</sup> See The Global Compact <<http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html>> accessed 21<sup>st</sup> August 2014

<sup>244</sup> Dilek Cetindamar and Kristoffer Husoy, "Corporate Social Responsibility Practices and Environmentally Responsible Behavior: The Case of the United Nations Global Compact" (2007) 76, *Journal of Business Ethics*, 163-176, 166

<sup>245</sup> See The Global Compact <<http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html>> accessed 21<sup>st</sup> August 2014

<sup>246</sup> EITI, Stakeholders, <<http://eiti.org/supporters/companies?page=2>> accessed 1<sup>st</sup> September 2014

<sup>247</sup> Susan Ariel Aaronson, 'Limited Partnership: Business, Government, Civil Society, and the Public in the Extractive Industries Transparency Initiative (EITI)' (2011) 31 *Public Admin Dev* 50, 54

finance globally. According to Infrastructure Journal, in 2007 around 71% of total project finance debts in developing country economies were subjected to the EPs, i.e. US\$52.9 billion out of a total of US\$74.6 billion.<sup>248</sup> Therefore it is essential for this research to analyze how effective they have been so far in terms of banks complying with them and whether they are likely to be more effective given an enabling environment.

While there are numerous other transnational soft law initiatives which could have been analyzed by this thesis such as the Kimberly Process or the OECD guidelines for multinational enterprises, the aforementioned initiatives analyzed in this chapter were specifically chosen to aid in effectively addressing the research questions mentioned in the introduction of this chapter. In addressing these questions, soft law initiatives selected require a global reach, i.e. are applied and recognized throughout the world. This allows the research to analyze whether transnational soft law initiatives are more effective in regions where they are provided with an enabling environment by comparing the compliance of TNCs subscribed to them in different regions. Based on this criteria the Global Compact is an appropriate soft law initiative as the largest corporate responsibility initiative under the auspices of the United Nations, and with participants from over 145 countries.<sup>249</sup> While the OECD guidelines for multinational enterprises were considered by this research as an initiative that may be analyzed under this criterion the researcher opted for the Global Compact because the OECD guidelines are actually addressed to enterprises operating in OECD countries, although they are encouraged to extend good practice throughout the world.<sup>250</sup> Additionally, OECD guidelines only apply to 36 members of the OECD and twelve other States that have signed up to it and only TNCs registered in these countries, therefore the Global Compact has more reach than it.<sup>251</sup> However, it is worth noting that most of the world's largest corporations have OECD countries as their home states so the initiative does cover a significant percentage of the world's major TNCs.<sup>252</sup> Nevertheless, in terms of global reach the global compact covers all regions and all countries, for instance, China has become a major investor in the African mining sector yet they are not

---

<sup>248</sup> Richard Macve and Xiaoli Chen, 'The "equator principles": a success for voluntary codes?' (2010), Vol. 23 (7) Accounting, Auditing & Accountability Journal, 890-919, 899

<sup>249</sup> See The Global Compact <<http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html>> accessed 21<sup>st</sup> August 2014

<sup>250</sup> OECD, 'Annual Report on the OECD Guidelines for Multilateral Enterprises' [2017] available at <<http://mneguidelines.oecd.org/2017-Annual-Report-MNE-Guidelines-EN.pdf>> accessed 4<sup>th</sup> September 2018

<sup>251</sup> *ibid*

<sup>252</sup> Jernej Letnar Cernic, 'Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises' (2008), Vol. 4 (1) Hanse Law Review, 71

an OECD country therefore the principles wouldn't apply whereas the Global Compact applies to companies there.

Secondly, the soft law initiative selected needed to be one which can be incorporated into the local laws of a State through the passing of a legislation thereby enabling the initiative. In chapter two it was established that one of the ways to create an enabling environment for soft law initiatives is by the public sector mandating laws or passing an enabling act that will make soft law initiatives more effective in terms of compliance. In establishing whether an enabling environment affects the likelihood of compliance with soft law initiatives this chapter seeks to establish whether creating an enabling environment in the form of mandating laws for soft laws can enhance compliance, therefore it is necessary to analyze a soft law initiative that can be incorporated into local laws. Based on this criteria the researcher chose the EITI as a soft law initiative that can be incorporated into local legislation thus enhancing performance as will be demonstrated later by the Nigerian Extractive Industries Transparency Initiative (NEITI) Act.<sup>253</sup> While the Kimberly Process initiative was also considered by this researcher for analysis as it requires Member States to implement national legislation regulating the trade of rough diamonds in accordance with the minimal standards set by the initiative and is a multi-stakeholder initiative just like the EITI it has limitations. Its major limitation in contrast to the EITI is that the initiative is limited to the diamond industry and focused more on developed countries where conflict diamonds are sold passing legislation to ensure all diamonds purchased are not conflict diamonds, whereas this researched is focused on developing countries particularly the SSA mining sector in general passing laws that will enable soft law initiatives and their effect. With this in mind the researcher was of the view that the EITI which is similar to the Kimberly Process is the more appropriate initiative to analyze whether creating an enabling environment through mandating an enabling Act for soft law is likely to enhance its effectiveness in terms of compliance.

Finally, a third soft law initiative was chosen to be analyzed in this chapter to provide the research with more depth in establishing whether an enabling environment increases the likelihood of compliance with soft law initiatives thus enhancing their effectiveness in filling the governance gap in SSA. Where the mining industry is concerned finance is critical therefore another way of regulating the industry is ensuring that banks only provide finance to corporations that apply sustainable development principles and legislations in their mining

---

<sup>253</sup> NEITI Act 2007

activities thus avoiding the negative consequences of mining. Soft law initiatives have been developed to achieve this, and as a developing field it is the researcher's view that soft law within this field should be included in this research's analysis so that the thesis could further contribute to this developing field of soft law initiatives. While the research could have analyzed the IFC Performance Standards or the World Bank Operational Policies it chose the Equator Principles due to their global reach, as they applied to all banks and incorporated the IFC performance standards, whereas the World Bank Operational Policies and the IFC Performance Standards mainly applied to corporations mining or conducting projects with funds from those institutions.

The final section concludes the chapter by discussing how the availability of an enabling environment as described in chapter two affects compliance with these initiatives. The discussion is derived from the findings of the enabling environment section for each of the soft law transnational initiatives. For each initiative assessed in this chapter the researcher analyses whether having an enabling environment in the terms discussed in chapter two to complement soft law initiatives, may affect the success of such initiatives. With regards to the first initiative i.e. the UN Global Compact, to establish the effect of an enabling environment, the researcher will analyze the activities of two transnational mining companies (Rio Tinto and Barrick Gold), to see whether their compliance with the initiative depends on where they are operating geographically. In other words, are they more willing to comply with soft law initiatives in developed countries where there is a strong enabling environment for them in the form of strong environmental and social protection local legislations, an organized civil society and generally other strong civil institutions, as opposed to developing countries where these are lacking. The companies, Rio Tinto and Barrick Gold were chosen using a three element selection criteria; first, the companies had to be familiar with corporate social responsibility soft law initiatives and leaders within the mining industry, as if they are industry leaders in CSR they would have records of their achievements to allow the researcher to analyze in which countries most of their progress in compliance with the Global Compact has been recorded. To determine this the researcher used the Dow Jones Sustainability Index,<sup>254255</sup> and found both Rio Tinto and

---

<sup>254</sup>The Dow Jones Sustainability Index, available at: <<http://www.sustainability-indices.com/>> accessed 25<sup>th</sup> August 2015

<sup>255</sup> The Dow Jones Sustainability Indexes (DJSI) track the financial performance of the leading sustainability-driven companies. Of the largest 2,500 firms worldwide, only the top ten per cent, in terms of economic, environmental and social criteria, qualify for the DJSI World Index. The DJSI Europe and the DJSI Asia Pacific Indexes track performance of the best 20 per cent of the largest 600 companies in the European or Asia Pacific markets as listed on the Dow Jones Global Total Stock Market Index. <http://www.riotinto.com/aboutus/ethical-indices-and-awards-4337.aspx> accessed 24th August 2015

Barrick Gold to be current members due to their social and environmental records. Secondly, the companies had to be participants of the United Nations Global Compact. Thirdly, companies had to be multinational companies with operations in both developed and developing countries. Taking the criterion into account Rio Tinto and Barrick Gold were well suited.

With regards to the EITI, unlike the Global Compact where companies are required to sign up, with EITI they are simply required to support it, as it is an initiative that requires countries as signatories. Therefore in contrast to the global compact, to effectively analyze the ability of an enabling environment in affecting compliance of EITI, this research examines two EITI signatory countries, Nigeria and Ghana. The former is chosen because it has been considered as the flagship of EITI for some time because of its relative success in publishing detailed data and the institutional structure and legal backing that has enabled the EITI initiative.<sup>256</sup> On the other hand, Ghana is chosen because although it is an EITI compliant country and has EITI structures in place it does not have an enabling act in terms of hard law to support EITI, unlike the Nigerian NEITI Act 2007.<sup>257</sup> Therefore, analyzing these two countries will allow us to see the impact of an enabling environment especially in terms of mandating hard law for soft law initiatives like EITI.

Just like the EITI the method for analyzing the effects of an enabling environment on the Equator Principles will be different to the above mentioned initiatives as although it is also a soft law initiative it is different. In order to test the effect of an enabling environment on the Equator Principles this research argues that the impact of the equator principles in terms of compliance can be significantly enhanced through the provision of an enabled civil society as part of an enabling environment for the EPs. Using the devastation caused by Mountaintop removal in Appalachia and the Rampal coal powered plant in Bangladesh this chapter was able to demonstrate how civil society organizations enhanced compliance with the Equator Principles. This therefore demonstrated an enabling environment in the form of an enabled civil society enhanced compliance with the Equator Principles thereby making them more effective, this will be discussed further below.

---

<sup>256</sup> Nicholas Shaxson, 'Nigeria's Extractive Industries Transparency Initiative: Just a Glorious Audit?' (2009) Chatham House, available at: [https://eiti.org/sites/default/files/documents/NEITI%20Chatham%20house\\_0.pdf](https://eiti.org/sites/default/files/documents/NEITI%20Chatham%20house_0.pdf) accessed 18<sup>th</sup> September 2018

<sup>257</sup> NEITI Act 2007

### 3.3 The United Nations Global Compact

#### 3.3.1 Overview

The United Nations Global Compact initiative was launched by Secretary-General Kofi Annan at the World Economic Forum held in 1999.<sup>258</sup> The main aim of the initiative was to promote among the business participants in the initiative, ten agreed principles<sup>259</sup> of responsible corporate citizenship that embrace the UN's universal values in four areas of action. These areas are; human rights, labour, environment and anti-corruption, which are, derived from four major UN instruments.<sup>260</sup> The initiative was seen as a way of getting TNCs who are some of the most powerful actors on the international plane yet to be regulated to adhere to agreements usually between nation states, for example, the Universal Declaration of Human Rights. The Global Compact Office (GCO) goes further to define the Global Compact as a policy platform and a practical framework for businesses that are committed to sustainability and responsible business practices. It is also a leadership initiative that seeks to align business operations and strategies worldwide with ten universally accepted principles; and a voluntary soft law initiative that relies on public accountability, transparency and disclosure to complement regulation and provide a space for further innovation.<sup>261</sup> Therefore from the outset it is clear that the initiative is not envisaged to fill the governance gap on its own, as it is meant to complement regulations already available and provide space for further

---

<sup>258</sup> Papa Louis Fall, Mohamed Mounir Zahran, "United Nations corporate partnerships: The role and functioning of the Global Compact" JIU/REP/2010/9 Joint Inspection Unit, Geneva 2010, available at: <[https://www.unjiu.org/sites/www.unjiu.org/files/jiu\\_document\\_files/products/en/reports-notes/JIU%20Products/JIU\\_REP\\_2010\\_9\\_English.pdf](https://www.unjiu.org/sites/www.unjiu.org/files/jiu_document_files/products/en/reports-notes/JIU%20Products/JIU_REP_2010_9_English.pdf)> accessed 19<sup>th</sup> September 2018

<sup>259</sup> *Principle 1* – Business should support and respect the protection of internationally proclaimed human rights; *Principle 2* – Businesses should make sure that they are not complicit in human rights abuses; *Principle 3* – Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining; *Principle 4*; Business should support the elimination of all forms of forced and compulsory labour; *Principle 5*- Business should support the effective abolition of child labour; *Principle 6* – Business should support the elimination of discrimination in respect of employment and occupation; *Principle 7* - Businesses are asked to support a precautionary approach to environmental challenges ; *Principle 8* - Businesses should undertake initiatives to promote greater environmental responsibility; *Principle 9* - Business should encourage the development and diffusion of environmentally friendly technologies; *Principle 10* - Businesses should work against corruption in all its forms, including extortion and bribery.

Available at <<http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/principle1.html>> accessed 21<sup>st</sup> August 2014

<sup>260</sup> The Universal Declaration of Human Rights, the ILO Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development and the United Nations Convention Against Corruption (UNCAC), Papa Louis Fall, Mohamed Mounir Zahran, "United Nations corporate partnerships: The role and functioning of the Global Compact" JIU/REP/2010/9 Joint Inspection Unit, Geneva 2010, available at: <[https://www.unjiu.org/sites/www.unjiu.org/files/jiu\\_document\\_files/products/en/reports-notes/JIU%20Products/JIU\\_REP\\_2010\\_9\\_English.pdf](https://www.unjiu.org/sites/www.unjiu.org/files/jiu_document_files/products/en/reports-notes/JIU%20Products/JIU_REP_2010_9_English.pdf)> accessed 19<sup>th</sup> September 2018

<sup>261</sup> Global Compact brochure, available at [www.unglobalcompact.org](http://www.unglobalcompact.org)



innovation. Therefore from the onset it could be argued that the Global Compact actually requires an enabling environment in the form of regulations to function effectively as a voluntary initiative as mentioned in its brochure.

Put simply, the principal aim of the Global Compact is to promote corporate responsibility through company participation in the initiative. However, the question remains how effective it is in ensuring its principal aim is achieved by participants in the initiative adhering to their pledges, as although companies pledge to include the ten principles in their corporate social responsibility policy it does not guarantee they will do so.

The lack of guarantee that companies will adhere to the ten Global Compact principles stem from the fact that the Global Compact is a voluntary initiative without an effective system of policing the activities of its participants apart from the annual communication on progress (COP) report required by the initiative. However, even this COP policing method has suffered some setbacks and cannot be relied upon to ensure compliance with the Global Compact. In 2010 the United Nations Joint Inspectorate Unit's report on the Global Compact found that, with regards to the monitoring aspect of the Global Compact, out of the 58 COPs examined, two thirds met all the requirements, in particular there were lapses when reporting on the GC principles.<sup>262</sup> The inspectors found that some COPs shown on the Global Compact website as meeting all requirements were in fact unsatisfactory, which point to the problem of scrutiny by the Global Compact Office (GCO).<sup>263</sup> Indeed it has been noted that deadlines for COP submission are lax and the COP reports tend to be poor.<sup>264</sup> In Addition, in its 2008 Annual Review the Compact noted the results of 40 large companies showed that "not all Global Compact principles are covered with the same level of detail," and that "there is a wide disparity with regard to information available per principle," and that "reported information is not comprehensive, with COPs focusing more on commitments and management systems than on materiality, performance and achievements"<sup>265</sup> Therefore it can be argued that just because a company is compliant in submitting its COP it does not follow that the goals of the initiative are being complied with as the COP information from the

---

<sup>262</sup> Papa Louis Fall, Mohamed Mounir Zahran, "United Nations corporate partnerships: The role and functioning of the Global Compact" JIU/REP/2010/9 Joint Inspection Unit, Geneva 2010, available at: [https://www.unjiu.org/sites/www.unjiu.org/files/jiu\\_document\\_files/products/en/reports-notes/JIU%20Products/JIU\\_REP\\_2010\\_9\\_English.pdf](https://www.unjiu.org/sites/www.unjiu.org/files/jiu_document_files/products/en/reports-notes/JIU%20Products/JIU_REP_2010_9_English.pdf) accessed 19<sup>th</sup> September 2018

<sup>263</sup> ibid

<sup>264</sup> Daniel Berliner and Aseem Prakash, 'From norms to programs: The United Nations Global Compact and Global Governance [2012], Regulation and Governance, 1-18, 4

<sup>265</sup> United Nations Global Compact 2009 cited in Daniel Berliner and Aseem Prakash, 'From norms to programs: The United Nations Global Compact and Global Governance [2012], Regulation and Governance, 1-18, 4

annual review above shows there is great disparity in information given by companies thereby questioning the credibility of the program.

Furthermore, the fact that the Global Compact Initiative adopts a self-assessment monitoring scheme allows for biases as companies are trusted to assess themselves and surely no company will admit to failing to adhere to the principles publicly. This has led to some criticism from NGOs such as Amnesty International, Greenpeace and Action Aid as they argue the initiative is ‘lacking in teeth’<sup>266</sup> as will be discussed further below.

### **3.3.2 The Effectiveness of the Global Compact Initiative in terms of Compliance as a Soft Law Initiative**

The Global Compact initiative has had numerous criticisms leveled at it within the literature.<sup>267</sup> However, the criticism that as a voluntary soft law initiative the Global Compact is toothless and thus irrelevant is the most common.<sup>268</sup> While acknowledging soft law initiatives can be successful, literature covering them suggests that soft law initiatives, which do not impose real obligations on companies or support them with sufficient monitoring, have a greater chance of failure.<sup>269</sup> Therefore, the Global Compact is likely to fail unless serious efforts are made to ensure sufficient monitoring, as currently the COP, which is the

---

<sup>266</sup>Papa Louis Fall, Mohamed Mounir Zahran, “United Nations corporate partnerships: The role and functioning of the Global Compact” JIU/REP/2010/9 Joint Inspection Unit, Geneva 2010, available at: <[https://www.unjiu.org/sites/www.unjiu.org/files/jiu\\_document\\_files/products/en/reports-notes/JIU%20Products/JIU\\_REP\\_2010\\_9\\_English.pdf](https://www.unjiu.org/sites/www.unjiu.org/files/jiu_document_files/products/en/reports-notes/JIU%20Products/JIU_REP_2010_9_English.pdf)> accessed 19<sup>th</sup> September 2018

<sup>267</sup> See for example; Jorge A. Arevalo and Francis T. Fallon, ‘Assessing corporate responsibility as a contribution to global governance: the case of the UN Global Compact’ , (2008) Vol. 8(4) Corporate Governance: The international journal of business in society, 456 -470, Hen Runhaar and Helene Lafferty, ‘Governing Corporate Social Responsibility: An Assessment of the Contribution of the UN Global Compact to CSR strategies in the Telecommunication Industry’ (2009) 84 Journal of Business Ethics 479-495, David Vogel, ‘Private Global Business Regulation’, (2008) 11 Annu. Rev. Polit. Sci. 261-82, 274, Surya Deva, ‘Global Compact: A Critique of the UN’s “Public-Private” Partnership for Promoting Corporate Citizenship’ (2006-2007) 34 Syracuse J. Int’L. & Com. 107

<sup>268</sup>Daniel Berliner and Aseem Prakash, 'From norms to programs: The United Nations Global Compact and Global Governance [2012], Regulation and Governance, 1-18, see also; Robert W. Nason, ‘Structuring the Global Marketplace: The Impact of the United Nations Global Compact’ (2008) Vol 28, No.4 Journal of Macromarketing, 418-425, 421, Andreas Rasche, Sandra Waddock, and Malcolm McIntosh, ‘The United Nations Global Compact: Retrospect and Prospect’ (2012) 52(1) Business & Society, 6-30, Surya Deva, Global Compact: A Critique of the UN’s “Public-Private” Partnership for Promoting Corporate Citizenship’ (2006-2007) 34 Syracuse J. Int’L. & Com. 107

<sup>269</sup> Cutler CA, Haufler V, Porter T (eds), *Private Authority and International Affairs* (State University of New York Press, Albany, NY 1999), Haufler V, *A Public Role for the Private Sector: Industry Self-Regulation in a Global Economy* (Carnegie Endowment for International Peace, Washington, DC 2001), Mattli W, Büthe T 'Setting International Standards: Technological Rationality Or Primacy of Power?'(2003) 56 World Politics, 1–42, Vogel D, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Brookings Institution Press, Washington, DC 2005)

Compact's main monitoring mechanism has been quite lax.<sup>270</sup> Under the Compact's COP policy companies are required to publicly communicate their progress through major mediums of communication, such as annual reports or websites, thereby allowing stakeholders the opportunity to evaluate the companies' commitment to the Global Compact.<sup>271</sup> The Global Compact requires a participants' first COP two years after joining.<sup>272</sup> Where a company fails to comply with the COP policy it results in a changed participant status and the eventual expulsion of the participant from the initiative.<sup>273</sup> Where a company does not submit a COP by the end of a third year from the last COP, it will be delisted and must make a fresh application to rejoin the Compact.<sup>274</sup> Indeed, during a period from January 2008 until 25 June 2008, the Global Compact, for the first time delisted 630 companies (close to 15% of the Global Compact corporate members) for failing to communicate on progress.<sup>275</sup>

However, this is as far as it goes for the Global Compact in terms of monitoring compliance. Companies can therefore present COP reports that may not actually be a reflection of Global Compact principles and continue being members, without facing delisting or even a status change. For example, in a recent study by the International Center for Corporate Accountability, Inc, of the CSR-S reports published by 513 corporations during the period of 2009-2010, 221 companies mention involvement in the Global Compact.<sup>276</sup> However, none of the companies who indicated participation in the global compact provided information as to how the Global Compact principles were implemented or embedded in their operations; for instance how their participation in the Global Compact has changed or improved their performance; or what challenges they foresee with regards their participation.<sup>277</sup> The above is

---

<sup>270</sup> See D.U Gilbert, 'The United Nations Global Compact as a network of networks, In A, Rasche & G. Kell (Eds.), *The United Nations Global Compact: Achievements, trends, and challenges*' (pp340-352) (Cambridge: Cambridge University Press 2010), G. Kell, 'The Global Compact: Selected experiences and reflections'(2005) 59(1) *Journal of Business Ethics*, 69-79, G. Kell and D. Levin, 'The Global Compact network: An historic experiment in learning and action. (2003) 108(2), *Business and Society Review*, 151-181

<sup>271</sup> United Nations Global Compact, Communication on Progress,

< <https://www.unglobalcompact.org/participation/report/cop>> accessed 29<sup>th</sup> September 2015

<sup>272</sup> Jorge A. Arevalo and Francis T. Fallon, 'Assessing corporate responsibility as a contribution to global governance: the case of the UN Global Compact' , (2008) Vol. 8(4), *Corporate Governance: The international Journal of Business in Society*, 456 -470, 465

<sup>273</sup> George Kell, '12 Years Later: Reflections on the Growth of the UN Global Compact' (2012) 52(1) *Business & Society* 31-52, 44

<sup>274</sup> Robert W. Nason, 'Structuring the Global Marketplace: The Impact of the United Nations Global Compact' (2008) Vol 28, No.4 *Journal of Macromarketing*, 418-425, 419

<sup>275</sup> Jette Steen Knudsen, 'Company Delisting from the UN Global Compact: Limited Business Demand or Domestic Governance Failure?' (2011) 103 *Journal of Business Ethics*, 331-349, 332

<sup>276</sup> S. Prakash Sethi and Donald H. Schepers, "United Nations Global Compact: The Promise-Performance Gap" (2014) 122 *Journal of Business Ethics*, 193 – 208, 206

<sup>277</sup> Referenced in S. Prakash Sethi and Donald H. Schepers, "United Nations Global Compact: The Promise-Performance Gap" (2014) 122 *Journal of Business Ethics*, 193 – 208, 204

not surprising as the Global Compact has minimal oversight functions, particularly the ability to review literally thousands of COP with a staff of less than 30 people, including support staff which is why Sethi and Schepers argue that as currently implemented (accepting COPs at face value) the COP process is flawed.<sup>278</sup> Therefore, based on the above one might even argue that in order to be more effective in monitoring its signatories' compliance, thereby making the initiative stronger the Global Compact may simply just need greater human capacity not an enabling environment.

However, human capacity is not the only issue hampering the effective use of the Global Compact, it has also been weak in specifying a uniform criteria that identifies non-compliance. Therien and Pouliot have argued that despite organizations such as Amnesty International agreeing to participate in the initiative, they denounced the absence of a specific criteria for identifying possible violations of Compact principles apart from the COP process.<sup>279</sup> They note that the absence of effective monitoring within the initiative validates the opinion of many observers within the literature such as Utting that; 'so-called "voluntary initiatives"...are often very weak and do little to significantly improve corporate social and environmental performance.'<sup>280</sup> Although there are further criticisms of the Global Compact's weakness as a soft law initiative due to its voluntary aspect this chapter will not dwell on it as it has been heavily covered by literature.<sup>281</sup>

On the other hand, there have not been too much analysis on the positives of voluntary initiatives such as the Global Compact within the literature and how they are encouraging compliance, so we shall analyze this here. Although they are in the minority some have argued that voluntariness is actually a strength of the Global Compact.<sup>282</sup> Authors such as

---

<sup>278</sup> S. Prakash Sethi and Donald H. Schepers, "United Nations Global Compact: The Promise-Performance Gap" (2014) 122 *Journal of Business Ethics*, 193 – 208, 204

<sup>279</sup> Jean-Philippe Therien and Vincent Pouliot, 'the Global Compact: Shifting the Politics of International Development?' (2006) 12 *Global Governance*, 55-75, 67

<sup>280</sup> Peter Utting, UN-Business Partnerships: Whose Agenda Counts? Oslo, Norway, 8<sup>th</sup> December, 2000, available at

[http://www.unrisd.org/80256B3C005BCCF9/\(httpAuxPages\)/A687857BD5E36114C1256C3600434B5F/\\$file/utting.pdf](http://www.unrisd.org/80256B3C005BCCF9/(httpAuxPages)/A687857BD5E36114C1256C3600434B5F/$file/utting.pdf) accessed 25<sup>th</sup> August 2014

<sup>281</sup> See Tracey James, 'Teaching Private Governance: A Critical analysis of the UN Global Compact' (2006), University of British Columbia, available at: [https://circle.ubc.ca/bitstream/handle/2429/17655/ubc\\_2006-0206.pdf?sequence=1](https://circle.ubc.ca/bitstream/handle/2429/17655/ubc_2006-0206.pdf?sequence=1) accessed 25<sup>th</sup> August 2014, Daniel Berliner and Aseem Prakash, 'From norms to programs: The United Nations Global Compact and Global Governance [2012], Regulation and Governance, 1-18, 6, Jette Steen Knudsen, 'Company Delisting from the UN Global Compact: Limited Business Demand or Domestic Governance Failure?' (2011) 103 *Journal of Business Ethics* 331-349, 334,

<sup>282</sup> Dilek Cetindamar and Kristoffer Husoy, 'Corporate Social Responsibility Practices and Environmentally Responsible Behavior: The Case of the United Nations Global Compact' (2007) 76 *Journal of Business Ethics*, 163-176, Hens Runhaar and Helene Lafferty, 'Governing Corporate Social Responsibility: An Assessment of the Contribution of the UN Global Compact to CSR Strategies in the Telecommunication Industry' (2009) 84

Bryane argue that voluntariness has to do with the idea of encouragement instead of punishment. Companies can therefore address their social and environmental issues in a more efficient and productive manner if given the freedom to do so by themselves, i.e. voluntarily as oppose to in response to government regulation.<sup>283</sup> For example, it was argued that Total which had been involved in human rights violations in Burma<sup>284</sup> has begun a dialogue about human rights, but only because they do not feel persecuted in the Compact setting.<sup>285</sup> Furthermore, Runhaar and Lafferty state that the voluntary approach of the Global Compact is argued to enhance CSR above levels that could be negotiated upon in the case of a regulatory framework, especially with regards its ability to stimulate dialogue and learning.<sup>286</sup> This assertion is supported by a survey carried out by McKinsey and Company in 2004 which found that the Global Compact has had a facilitating and accelerating role with regards to already existing CSR strategies around the world.<sup>287</sup> This view is also shared by Rasche, Waddock and McIntosh who argue that a key contribution of the compact is its impact on legitimizing the corporate responsibility agenda in different States and regions.<sup>288</sup> Therefore contrary to arguments mentioned above regarding its weakness the Global compact is having a positive impact with respect to compliance with soft law initiatives.

However, one may argue that while the Global Compact accelerates the use of existing CSR schemes it does not necessarily mean the Global Compact as an initiative has addressed its weakness as a voluntary soft law initiative discussed above. On the other hand, the argument that the voluntary aspect of the Global Compact is a strength of the initiative is a strong point as it is this voluntariness that allows companies to freely engage in dialogue with other groups for the sake of improving their social responsibilities as clearly demonstrated in the above Total example. Therefore, the voluntary aspect of the Compact may be its selling point

---

Journal of Business Ethics, 479-495, Andreas Rasche, Sandra Waddock, and Malcolm McIntosh, 'The United Nations Global Compact: Retrospect and Prospect' (2012) 52(1) Business and Society, 6-30

<sup>283</sup> M. Bryane, 'Corporate Social Responsibility in International Development: An Overview and Critique', (2003), 10 Corporate Social Responsibility and Environmental Management, 115-128

<sup>284</sup> Earth Rights International, 'Total Impact: The Human Rights, Environmental and Financial Impacts of Total and Chevron's Yadana Gas Project in Military- Ruled Burma (Myanmar)' (2009) Report available at <<https://www.earthrights.org/sites/default/files/publications/total-impact.pdf>> accessed 25<sup>th</sup> September 2015

<sup>285</sup> Global Policy Forum, 'Global Counter Summit, Panel 1: Greenwash, Blue-Wash and the Corporate Takeover of the UN' (23 June 2004) available at <<https://www.globalpolicy.org/empire/32250.html>> accessed 20th July 2015

<sup>286</sup> Hens Runhaar and Helene Lafferty, 'Governing Corporate Social Responsibility: An Assessment of the Contribution of the UN Global Compact to CSR Strategies in the Telecommunication Industry' (2009) 84 Journal of Business Ethics, 479-495, 480

<sup>287</sup> McKinsey and Company, 'Assessing the Global Compact's Impact', (2004), available at <[http://europeandcis.undp.org/guides/poverty/spd/ras/mckinsey\\_report\\_gc.pdf](http://europeandcis.undp.org/guides/poverty/spd/ras/mckinsey_report_gc.pdf)> accessed 16<sup>th</sup> July 2015

<sup>288</sup> Andreas Rasche, Sandra Waddock, and Malcolm McIntosh, 'The United Nations Global Compact: Retrospect and Prospect' (2012) 52(1) Business and Society, 6-30, 10

because as soon as the Compact is made a compulsory regulatory initiative companies may decline to sign up to it, as they may feel coerced as opposed to acting out of their own free will to greater effect. This would suggest that mandating legislation that enables soft law initiatives and makes them mandatory with the aim of creating an enabling environment may actually be counterproductive in making soft law initiatives effective, as it might actually lead to companies avoiding them altogether. For instance, Nwete noted that American mining companies were avoiding the Global Compact because they fear it will morph into hard law.<sup>289</sup> This therefore shows that an enabling environment in the form discussed in chapter two, especially mandating may not actually be necessary, as it may discourage companies from signing up to initiatives altogether, however, this will be discussed in more detail in the following sections.

While all the above arguments countering the weaknesses of voluntary codes are valid, one may still argue that as a voluntary initiative the Global Compact can do more than it has done so far especially with regards to monitoring the activities of its members through the COP. While it is understandable that the Compact is still a work in progress as touted by its proponents<sup>290</sup> it is fair to say that the tag ‘work in progress’ can no longer be applied after almost fifteen years of operation. However, as noted by Kuper “since corporations will not sign on to ‘hard law’ initiatives, attempting to produce ‘soft law’ is surely better than being stuck with no law at all.”<sup>291</sup> It is therefore essential to find a way of ensuring the Global Compact’s compliance monitoring is more effective. One such way is by having an enabled civil society within a state that will report non-compliance to the Global Compact organization and ensure the expulsion of such members. This is because as noted in chapter two together with soft law initiatives civil society in itself is a regulator and would solve the capacity issues faced by the Global Compact.<sup>292</sup> An enabling environment in the form of civil

---

<sup>289</sup> Bede Nwete, ‘Corporate Social Responsibility and Transparency in the Development of Energy and Mining Projects in Emerging Markets; is Soft Law the Answer? (2007)8 German L.J 311

<sup>290</sup> Robert W. Nason, ‘Structuring the Global Marketplace: The Impact of the United Nations Global Compact’, (2008) Vol. 28 No. 4 Journal of Macromarketing, 418-425, 423, see also George Kell, ‘12 Years Later: Reflections on the Growth of the UN Global Compact’, (2012), 52(1) Business & Society, 31-52, John Ruggie, ‘global\_governance.net: The Global Compact as Learning Network’, (2001), , 7:4 Global Governance, 373

<sup>291</sup> Andrew Kuper, ‘ Redistributing responsibilities – The UN Global Compact with corporations’ in Andreas Follesdale and Thomas Pogge (eds), *Real World Justice: Grounds, principles, human rights, and social institutions*, 358-80 (Springer 2005), 366

<sup>292</sup> Peter Utting, ‘Corporate Responsibility and the Movement of Business’ (2005) Vol. 15, No. 3/4 Development in Practice, 375-388

society would therefore seem essential to ensure monitoring and compliance of the Compact principles.

Moreover, compliance with the Global Compact may be hampered due to the argument that the Global Compact initiative seems to be promoting Northern views without much input from the South in terms of membership in the key areas of the organization, as most of the key officers are from the North. Bendell rightly argues that the initiative may actually be promoting not only the power of Western corporations but also a Western view of corporate responsibility, promoted by Northern NGOs which may not be in accordance with the practice and values of Southern nations.<sup>293</sup> This is a valid assertion as the cultural differences in the South differ from the North and what is seen as corporate responsibility in the North may not necessarily be the case in the South. Therefore, where Southern countries do not perceive the ideals of corporate responsibility within the Global Compact initiative to be within their understanding it loses its value and effect in changing their situation and improving their environmental and social situation. This is because if they do not see the ideals contained in an initiative as corporate responsibility it means more is required within the initiative to make it effective to their situation. Indeed, in his studies Bendell shows that models of monitoring, verifying and certifying codes of conduct on workplace issues reflect the interest of Western-based auditing companies and undermine Southern local initiatives with more transformative approaches.<sup>294</sup> Therefore, for the Global Compact initiative to be more effective in developing countries they must seek more participation from the Southern world, taking into account the complexities and traditions involved in different regions when framing principles and conditions.

This section has shown the main weakness of the Global Compact is that as a voluntary initiative it has struggled to ensure compliance especially due to its weak monitoring mechanism. Nevertheless, it must be noted that criticisms of the Global Compact for its inability to enforce compliance must be controlled taking into account that the main aim of the Global Compact is to promote corporate citizenship within the business community and

---

<sup>293</sup> Jem Bendell, 'Flags of Inconvenience? The Global Compact and the Future of the United Nations', (2004) ICCSR Research Paper Series, No.22, ISSN 1479-5124 available at: <https://www.peacepalacelibrary.nl/ebooks/files/338104755.pdf> accessed 18<sup>th</sup> September 2018

<sup>294</sup> *ibid*

act as a learning forum to strengthen corporate codes.<sup>295</sup> This research believes it has achieved this aim, as membership in the Compact constantly increases and becomes more and more diverse in terms of geography. Indeed, a survey conducted by Mckinsey and Company on behalf of the Global Compact Office indicates that, for nearly half of the participating companies (40.2 percent), the Compact has accelerated policy reforms related to its objectives.<sup>296</sup> Additionally, the survey further demonstrated that in developing and transitional countries, Compact membership has significantly helped familiarize companies with the very notion of corporate responsibility.<sup>297</sup> In a nutshell, as put by Ruggie;

“...the GC's strengths and weaknesses both stem from its having adopted a model that promotes learning by recognizing and reinforcing leadership. It helps create and build momentum toward its universal principles, but it is unlikely to get there by itself.”<sup>298</sup>

The Global Compact Initiative requires the assistance of Nation States who may help realize its potential to act as a governance tool by providing it with an enabling environment in the form of mandatory regulation, an enabled civil society and other facets of an enabling environment mentioned in chapter two as will be discussed below.

### **3.3.3 Does the availability of an enabling environment affect the likelihood of compliance with the Global Compact initiative?**

As discussed in the preceding section, it is widely accepted that the Global Compact initiative on its own will not be able to fill the governance gap caused by globalization and other factors discussed in its current form. However, this research argues that the provision of an enabling environment by Nation States in the form described in chapter two will enable adherence to the Compact by its participants, thus addressing the governance issue. Indeed, according to Georg Kell the executive director of the Global Compact Office, global labour unions were of the view that the compact could add value by encouraging governments to mandate effective laws to enable its use.<sup>299</sup> Kell further argues that governments hold the key when it comes to the Global Compact as they enable the initiative and it is therefore their

---

<sup>295</sup>John Ruggie, ‘global\_governance.net: The Global Compact as Learning Network’, (2001), 7:4, Global Governance, 371, 374

<sup>296</sup> Mckinsey & Company, ‘ Assessing the Global Compact’s Impact: Report prepared for the Global Compact Office’, 11<sup>th</sup> May 2004, 3-5

<sup>297</sup>Jean-Philippe Therien and Vincent Pouliot, ‘The Global Compact: Shifting the Politics of International Development?’ (2006) 12, Global Governance, 55-75, 68

<sup>298</sup> John Ruggie, ‘global\_governance.net: The Global Compact as Learning Network’, (2001), Global Governance, 7:4, 371 pp 374

<sup>299</sup> Georg Kell, ‘The Global Compact Selected Experiences and Reflections’ (2005) Journal of Business Ethics 59: 69-79



responsibility to play a greater part in finding a solution to the government-governance gap.<sup>300</sup> Authors such as Utting also argue for the importance of government led regulations.<sup>301</sup> They argue that voluntary initiatives are weak and do little to significantly improve corporate social and environmental behavior. On the other hand, they rightly argue that government legislation and intergovernmental agreements remain important components of promoting corporate responsibility. Although it is not entirely fair to suggest that voluntary initiatives such as the Global Compact do little to improve corporate behavior, one could say they are likely to be more effective alongside government mandated regulation as a form of providing an enabling environment for soft law as will be shown below. In order to assess whether the availability of an enabling environment as discussed earlier may affect compliance with Compact principles this section will analyze the activities of Rio Tinto and Barrick Gold around world.

### **3.3.4 The UN Global Compact and an Enabling Environment: Rio Tinto**

Rio Tinto is a founding member of the Global Compact having been a signatory at the inception of the initiative.<sup>302</sup> Rio Tinto is one of the biggest international mining groups; headquartered in the United Kingdom (UK), employing over 66,000 people, and with operations in more than forty countries across six continents.<sup>303</sup> Therefore, one may argue it is an ideal transnational company in which to establish whether compliance with the Global Compact depends on whether an enabling environment with respect to strong government mandated laws, strong civil society and a robust local governance system exist in the country they are operating. This can be established by examining case studies of their sustainable development practices around the world.

---

<sup>300</sup> Georg Kell, 'The Global Compact Selected Experiences and Reflections' (2005) *Journal of Business Ethics* 59: 69-79

<sup>301</sup> Peter Utting, *UN-Business Partnerships: Whose Agenda Counts?* Oslo, Norway, 8<sup>th</sup> December, 2000, available at [http://www.unrisd.org/80256B3C005BCCF9/\(httpAuxPages\)/A687857BD5E36114C1256C3600434B5F/\\$file/utting.pdf](http://www.unrisd.org/80256B3C005BCCF9/(httpAuxPages)/A687857BD5E36114C1256C3600434B5F/$file/utting.pdf) > accessed 25<sup>th</sup> August 2014 pp5

<sup>302</sup> Rio Tinto, *United Nations Global Compact: Communication on Progress, 2010*, available at: [http://www.riotinto.com/sustainabledevelopment2013/pdf/ungc\\_2010.pdf](http://www.riotinto.com/sustainabledevelopment2013/pdf/ungc_2010.pdf) > accessed 25<sup>th</sup> September 2015

<sup>303</sup> Rio Tinto, *2013 Sustainable Development: Supporting our Licence to Operate, 2013*, available at: [http://www.riotinto.com/documents/RT\\_SD\\_report\\_2013.pdf](http://www.riotinto.com/documents/RT_SD_report_2013.pdf) > accessed 12<sup>th</sup> November 2017

According to Rio Tinto, in accordance with principle 7 and 8 of the Compact which require businesses to take a precautionary approach to environmental challenges and to promote greater environmental responsibility it has taken positive steps in its operations. In Quebec, Rio Tinto Fer et Titane (RTFT) will initiate two major environmental improvement projects at its metallurgical complex in Sorel-Tracy. The projects are said to cost Rio Tinto an investment of C\$107m.<sup>304</sup> Indeed, Dominique Bouchard, president of Rio Tinto, Fer et Titane, noted:

These two major projects will allow us to improve our environmental performance by lowering Sulphur dioxide (SO<sub>2</sub>) emissions and improving dust collection. This investment demonstrates our relentless focus to improve our operations and maintain our leading position in our industry, but more importantly to reducing our environmental footprint.<sup>305</sup>

The above is an encouraging example of Rio Tinto's activities in compliance with its commitments to the Global compact which is highlighted in Rio Tinto's 2012 COP.<sup>306</sup> However, this is not the most impressive example demonstrating Rio Tinto's commitment to Compact principles. One such example is its activities in Scotland with the Burntisland alumina refinery. The refinery closed in 2002 and ten years on a popular housing development close to Edinburgh, brought new life into the town.<sup>307</sup> Additionally, the associated bauxite residue landfill site at Whinnyhall has also been converted into a field that supports wildlife.<sup>308</sup> Rio Tinto argue that this is a great example of how contractors, developers, regulators and local community can work together effectively to develop a new use for an industrial site.<sup>309</sup> Indeed, this is a useful example of environmental rehabilitation which principles 7 and 8<sup>310</sup> of the Compact encourage, showing how soft law initiatives may foster environmental responsibility when mining natural resources.

Furthermore, in accordance with principle 6 of the Compact which promotes the elimination of discrimination with respect to employment and occupation, Rio Tinto claim to actively

---

<sup>304</sup> Rio Tinto, RTFT Launches two major improvement projects at its Sorel-Tracy Operation in Qubec, <[http://www.riotinto.com/ourcommitment/features-2932\\_5387.aspx](http://www.riotinto.com/ourcommitment/features-2932_5387.aspx)> accessed on 10<sup>th</sup> October 2015

<sup>305</sup> *ibid*

<sup>306</sup> Rio Tinto, UN Global Compact: Communication on Progress, 2012, 20

<sup>307</sup> Rio Tinto, 2013 Sustainable Development: Supporting our Licence to Operate, 2013

<sup>308</sup> *ibid*

<sup>309</sup> *ibid*

<sup>310</sup>; *Principle 7* - Businesses are asked to support a precautionary approach to environmental challenges ; *Principle 8* - Businesses should undertake initiatives to promote greater environmental responsibility

favor local employment where requirements are met.<sup>311</sup> For instance, they highlight that in 2010 that they employed 1,605 indigenous Australians, thus representing 8 per cent of their Australian work force and were the largest private sector employers of indigenous Australians.<sup>312</sup> Additionally, they are also supporting the Australian National Water Initiative which is reforming how water is managed in the country. Together with other mining companies and the Australian Government, Rio Tinto are providing information and research on mining industry water issues, in accordance with principle 8 of the Compact.<sup>313</sup>

From the above examples in Canada, the United Kingdom, and Australia contained in Rio Tinto's self-assessment report, one might argue that Rio Tinto is rather compliant with Compact principles, however, this is to be expected in a self-assessed company report. With respect to other parts of the world the same cannot be said of Rio Tinto's operations as will be discussed here. In Namibia, Rio Tinto's conduct has been indecent.<sup>314</sup> Indeed, the United Nations Council for Namibia describing the conditions under which uranium was being mined in the 1970's by Rio Tinto and others said it was '...virtual slave labour under brutal conditions. Some of these conditions, continued as recently as 2000 where black workers were still paid lower wages than their white counterparts'.<sup>315</sup> Workers at Rio Tinto's Rossing uranium mine walked out in a series of wildcat strikes in 2008, civilians have also been killed by the military, assisted by the mine's security forces, and in terms of environmental concerns, these are also abundant.<sup>316</sup> Indeed, at least 20 million tons of crushed rock are produced annually by the mine; these rocks are sulphuric-acid-soaked and slightly radioactive.

In Mongolia, the Oyu Tolgoi copper-gold-silver project by Ivanhoe Mines which is controlled by Rio Tinto has raised environmental concerns, contrary to principles 7 and 8 of the Compact. The Investment Agreement for the project was signed on the 6<sup>th</sup> of October 2009 despite the non-acceptance of a technical and economic feasibility study by the Mongolian government, as prescribed by the law.<sup>317</sup> However, on the 26<sup>th</sup> of March 2010, the Minerals Expert Council did grant conditional acceptance of the technical and economic

---

<sup>311</sup> Rio Tinto, United Nations Global Compact: Communication on Progress, 2010, 18

<sup>312</sup> *ibid*

<sup>313</sup> *ibid*

<sup>314</sup> IndustriALL Global Union, 'Rio Tinto in Africa: Global Citizen or Corporate Shame?'(2012), 8

<sup>315</sup> *ibid*

<sup>316</sup> *ibid*, 11

<sup>317</sup> London Mining Network, 'Rio Tinto: A Record Fit for the Olympics?', (2012), 4 available at: <https://londonminingnetwork.org/2012/08/rio-tinto-a-record-fit-for-the-olympics-2/> accessed 12<sup>th</sup> November 2017

feasibility study despite the fact that Ivanhoe Mines had failed to significantly demonstrate the availability of, and access to, the water resources necessary for production, infrastructure and social needs of the project.<sup>318</sup> In 2012 Rio Tinto persuaded affected nomadic households in the mine area to sign compensation contracts. However, about a dozen households refused to sign as they argued the contract does not contain provisions on, how, when, and how often the compensation will be provided.<sup>319</sup> Additionally, rather than complying with Global Compact best practice principles, US government cables in 2009, revealed by WikiLeaks in 2012 reported that under the 2009 Investment agreement mentioned above, Rio Tinto got flexibility on issues such as labour, technology, and taxes.<sup>320</sup> Through parliament they also got essential law changes on roads, taxation and water, including amending laws to allow Rio Tinto to abstract ground water.<sup>321</sup> Despite Rio Tinto taking over management of the mining operation in 2010 and promising to introduce ‘Rio Standards’ it is reported that very little has changed, as accidents, violations of health and safety and physical harassment at the workplace continue.<sup>322</sup> The above case demonstrates Rio Tinto’s disregard for Compact principles in Mongolia as despite the fact that there was a lack of water available for the project, which would cause environmental and health damage Rio Tinto’s subsidiary still went ahead with the project. Furthermore, instead of proposing a transparent methodology for compensation purposes, Rio Tinto was vague in its contract dealings with the community.

In Indonesia, Rio Tinto also showed disregard for Compact principles due to its involvement in Grasberg, a joint venture with Freeport McMoran (FCX). The environmental damage caused by Grasberg’s riverine waste dumping and their waste rock dumping filling in two adjacent valleys have been quantified by the Indonesian environmental group WALHI.<sup>323</sup> They demonstrated that 1.3 billion tons of mining waste had been dumped into the Ajkwa river system, and by the contractual end of the mining in 2041 this would equate to 4 billion

---

<sup>318</sup> London Mining Network, ‘Rio Tinto: A Record Fit for the Olympics?’, (2012), 4 available at: <https://londonminingnetwork.org/2012/08/rio-tinto-a-record-fit-for-the-olympics-2/> accessed 12<sup>th</sup> November 2017

<sup>319</sup> *ibid*

<sup>320</sup> IndustriALL, ‘Unsustainable: The Ugly Truth About Rio Tinto’, (2014), 7 available at: [http://www.industriall-union.org/sites/default/files/uploads/documents/Rio\\_Tinto\\_Campaign/a4\\_rio\\_tinto\\_report\\_final2.pdf](http://www.industriall-union.org/sites/default/files/uploads/documents/Rio_Tinto_Campaign/a4_rio_tinto_report_final2.pdf) accessed 12<sup>th</sup> November 2017

<sup>321</sup> *ibid*

<sup>322</sup> London Mining Network, ‘Rio Tinto: A Record Fit for the Olympics?’, (2012), 5 available at: <https://londonminingnetwork.org/2012/08/rio-tinto-a-record-fit-for-the-olympics-2/> accessed 12<sup>th</sup> November 2017

<sup>323</sup> The Environmental Impacts of Freeport-Rio Tinto’s Copper and Gold Mining Operation in Indonesia, 2006, available at <http://freewestpapua.org/documents/the-environmental-impacts-of-freeport-rio-tintos-copper-and-gold-mining-operation-in-indonesia-june-2006/> accessed on 30<sup>th</sup> September 2015

tons.<sup>324</sup> This is all despite the fact that riverine disposal of mine tailings is expressly prohibited under the Indonesian Water Quality Management and Water Pollution Control Regulation 2001.<sup>325</sup> WALHI argue that the law is not enforced by the Ministry of Environment due to the joint venture's pervasive financial and political influence, which has reached a level where Freeport-Rio Tinto's proposal for circumventing water quality standards is being considered.<sup>326</sup> The Grasberg case clearly shows Rio Tinto's disregard for not only soft law Compact principles it signed up for, but the local environmental legislation. The level of environmental damage in Grasberg was considered so severe that the Norwegian State Pension Fund disinvested \$786 million from Rio Tinto in 2008 on the grounds of their investment risk being unethical because of Grasberg's continuing serious environmental damage.<sup>327</sup>

The last three country cases in contrast to the earlier ones in this section demonstrates that contrary to what Rio Tinto claims in its annual COP and Sustainable Development Report, 2013, Rio Tinto does not always comply with Compact principles, in fact from the above examples it would seem Rio Tinto picks and chooses when they deem it fit to follow such principles. Additionally, from the examples mentioned here it would appear that Rio Tinto seems to be more in compliance with compact principles in developed countries. One might argue that this is because they have stronger enabling environments in terms of mandated laws, civil society, and local governance that make it easier to comply with Global Compact principles. For instance, in Australia the climate change legislation and regulation reforms in 2010 saw Rio Tinto acknowledge in their COP that they would have cost exposure as a result of a requirement to purchase certificates as part of the Government's renewable energy target. They also noted that all legislated reporting requirements were met in 2010.<sup>328</sup> This demonstrates they are very aware of local legislation which through their existence enable soft law initiatives. Hard law legislations enable soft law initiatives where they are enforced by providing minimum standards within a sector that must be followed by institutions. These minimum standards are therefore the start point in the formation of soft law initiatives which

---

<sup>324</sup> IndustriALL, 'Unsustainable: The Ugly Truth About Rio Tinto', (2014), 10 available at: <[http://www.industriall-union.org/sites/default/files/uploads/documents/Rio\\_Tinto\\_Campaign/a4\\_rio\\_tinto\\_report\\_final2.pdf](http://www.industriall-union.org/sites/default/files/uploads/documents/Rio_Tinto_Campaign/a4_rio_tinto_report_final2.pdf)> accessed 12<sup>th</sup> November 2017

<sup>325</sup> Indonesian Water Quality Management and Water Pollution Control Regulation (2001)

<sup>326</sup> The Environmental Impacts of Freeport-Rio Tinto's Copper and Gold Mining Operation in Indonesia, 2006, available at <<http://freewestpapua.org/documents/the-environmental-impacts-of-freeport-rio-tintos-copper-and-gold-mining-operation-in-indonesia-june-2006/>> accessed on 30<sup>th</sup> September 2015

<sup>327</sup> IndustriALL, 'Unsustainable: The Ugly Truth About Rio Tinto', (2014), 10

<sup>328</sup> Rio Tinto, UN Global Compact: Communication on Progress, 2010, 25

may be principles that are of a higher standard requiring institutions to adhere to them voluntarily. Where there are no minimum standards in the form of hard law within a sector it is difficult for soft law to be formed and complied with as it will be difficult to convince an institution to comply with a principle which has no basis in law. Strong legislation providing minimum standards in developed countries therefore enable soft law initiatives. Again using Australia as an example the National Water Initiative which is a blueprint for water reform in Australia is another enabling policy which again has been acknowledged and supported by Rio Tinto.<sup>329</sup> Although an analysis of the Australian environmental legal framework and environment is beyond the scope of this section it is worth noting that there are further examples showing how the Australian environmental legal system acts as an enabling environment to Compact principles. For instance, the Environmental Offences and Penalties Act 1989 of New South Wales (As Amended by the 1990 Act No.84)<sup>330</sup> was passed after community calls for tougher penalties against polluters.<sup>331</sup> The new laws allowed for penalties of up to \$1 million against corporations and \$125,000 for offences under the Clean Air and Clean Water Acts and immediately after the law was passed prosecution increased by almost 30% between 1990/91 and 1993/94.<sup>332</sup> The availability of for example such sweeping environmental laws, penalties, and enforcement shows that through public sector mandating Australia provides an enabling environment for companies to comply with soft law mechanisms, as where they fail to do so they face hard laws with severe penalties. One may argue that such systems are usually common in other developed nations such as the UK, making it easier for companies such as Rio Tinto to have better Compact compliance records in such countries. Hence why most of the above examples of Rio Tinto complying with Compacts principles are in developed countries with strong enabling laws, enforcement procedures, and monitoring by government and even civil society, thereby regulating environmental and social conducts of mining companies.

---

<sup>329</sup> Rio Tinto, United Nations Global Compact: Communication on Progress, 2010, 18

<sup>330</sup> Environmental Offences and Penalties Act in 1989, New South Wales and Environmental Offences and Penalties (Amendment) Act 1990 No. 84, New South Wales

<sup>331</sup> Maria Comino, and Paul Leadbeter, 'Enforcement of Pollution Laws in Australia- Past Experience and Current Trends', Published in proceedings of Fifth International Conference on Environmental Compliance and Enforcement 16-20 November 1998, Monterey, California, USA, available at <  
<http://www.inece.org/5thvol1/comino.pdf>> accessed 12<sup>th</sup> October 2015

<sup>332</sup> Maria Comino, and Paul Leadbeter, 'Enforcement of Pollution Laws in Australia- Past Experience and Current Trends', Published in proceedings of Fifth International Conference on Environmental Compliance and Enforcement 16-20 November 1998, Monterey, California, USA, available at <  
<http://www.inece.org/5thvol1/comino.pdf>> accessed 12<sup>th</sup> October 2015

However, Rio Tinto compliance with Compact principles are not only found in developed countries. For example; in Peru the Rio Tinto La Granja Copper Project has a target to give a notable preference to labour hiring by recruiting 100% of non-qualified labour, as well as permanent positions requiring basic training.<sup>333</sup> Indeed, as of January 2010, local employment has reached 73% at the La Granja site, in accordance with Principle 6<sup>334</sup> of the Compact which is in itself impressive.<sup>335</sup> Furthermore, Rio Tinto approved US\$1.03 billion, in July 2013 for the construction of a new 2,500 litre per second seawater desalination facility to guarantee a continued supply of water and sustain operations. This will also minimize Escondida's reliance on the region's aquifers.<sup>336</sup> In Zimbabwe, Rio Tinto's Murowa Diamonds won the Zimbabwe National Chamber of Commerce (ZNCC) Best Corporate Social Responsibility Program awards for 2009.<sup>337</sup> The award was given especially on the basis of its community programs with a special focus on employee welfare and HIV/AIDS programs.<sup>338</sup> Therefore, the above examples suggest that Rio Tinto does comply with Compact principles in developing countries as well. On the other hand, one might argue Rio Tinto's compliance with Compact principles in developing countries is rather minimal when compared to the damage its mining operations have caused many other developing countries. For instance, Rio Tinto's operations in Bougainville, Papua New Guinea resulted in a petition being brought before the United States Court of Appeal in the context of the Alien Tort Claims Act for numerous violations of international law.<sup>339</sup> In Mozambique Rio Tinto's coal project in the Tete province is shrouded in secrecy, and withheld permission from district administrators have prevented UNICEF from conducting research on resettlement activities, which undermine the right to freedom of expression.<sup>340</sup> In its Kelian gold mine in Indonesia there is a legacy of human rights violations and ominous environmental threats such as the forced expulsion of villagers, burning of people's houses and arrests.<sup>341</sup> This leaves one to conclude that Rio Tinto is less likely to comply with soft law initiatives such as the Global Compact in developing countries where the enabling environment especially in terms of mandated legislation are less stringent and hardly enforced, as opposed to the

---

<sup>333</sup> Rio Tinto, United Nations Global Compact: Communication on Progress, 2010, 18

<sup>334</sup> Eliminate discrimination in respect of employment and occupation

<sup>335</sup> Rio Tinto, United Nations Global Compact: Communication on Progress, 2010, 18

<sup>336</sup> Rio Tinto, 2013 Sustainable Development: Supporting our Licence to Operate, 2013

<sup>337</sup> Rio Tinto Media Release, <[http://www.riotinto.com/media/media-releases-237\\_7036.aspx](http://www.riotinto.com/media/media-releases-237_7036.aspx)> accessed 12<sup>th</sup> October 2015

<sup>338</sup> *ibid*

<sup>339</sup> See *Sarei v Rio Tinto PLC*, (2009) United States Court of Appeal, 9<sup>th</sup> Circuit

<sup>340</sup> IndustriALL, 'Unsustainable: The Ugly Truth About Rio Tinto', (2014), 10

<sup>341</sup> London Mining Network, 'Rio Tinto: A Record Fit for the Olympics?', (2012), 6

environment provided in developed countries. For Instance, in a desperate bid to secure a partnership with Rio Tinto for the development of a Titanium Dioxide (TiO<sub>2</sub>) mining project the government of Madagascar hurriedly granted a mining permit to Rio Tinto barely three months after receiving its Environmental and Social Impact Assessment.<sup>342</sup> Such disregard for due diligence on investors by developing countries such as Madagascar weakens the enabling environment for soft law initiatives thereby providing the opportunity of abuse to companies such as Rio Tinto. Which one might argue is the reason why companies such as Rio Tinto may pick and choose when they feel like being global corporate responsibility citizens in developing countries as the examples above demonstrate. It is now imperative to consider whether this also applies to the second company analyzed in this section.

### **3.3.5 The UN Global Compact and an Enabling Environment: Barrick Gold**

Barrick Gold has been a member of the Global Compact since June 2005.<sup>343</sup> The company is one of the largest international gold mining group, headquartered in Canada, employing over 7,000 people, with operations in more than 15 countries across five continents.<sup>344</sup> Although not as large as Rio Tinto in terms of mining operations and staff size, it is still large enough and global enough for one to analyze its sustainability practices around the world in order to establish whether such practices are more common in countries with expected stronger enabling environments.

The Dow Jones Sustainability World Index in September 2014 listed Barrick for the seventh consecutive year.<sup>345</sup> This illustrates Barrick's strong commitment to sustainable and responsible mining in accordance with its Global Compact commitments. In Canada, Barrick's Hemlo mine located in northern Ontario is close to two communities; Pic Mobert and Pic River First Nations. According to Barrick in accordance with principles 7 and 8 of

---

<sup>342</sup> Vola Parker, 'Rio Tinto and Madagascar – is it equitable?', (2004) available at: <<http://www.andrewleestrust.org/Reports/QitFer%20Minerals%20Madagascar.pdf>> accessed 12<sup>th</sup> November 2017

<sup>343</sup> The United Nations Global Compact, Participants, available at <<https://www.unglobalcompact.org/what-is-gc/participants/1184>> accessed 12<sup>th</sup> October 2015

<sup>344</sup> See Barrick Gold, 'Responsible Mining: Responsibility Report', (2014), available at: <<http://barrick.q4cdn.com/808035602/files/responsibility/2014-Responsibility-Report.pdf>> accessed 12<sup>th</sup> November 2017  
Barrick Gold Corporation, Annual Report, (2014), available at: <<http://s1.q4cdn.com/808035602/files/annual-report/Barrick-Annual-Report-2014.pdf>> accessed 12<sup>th</sup> November 2017

<sup>345</sup> Barrick, 'Responsible Mining' 2014 Responsibility Report,4 available at: <<http://barrick.q4cdn.com/808035602/files/responsibility/2014-Responsibility-Report.pdf>> accessed 12<sup>th</sup> November 2017



the Compact dealing with environmental challenges they engage the communities on environmental stewardship and skills development.<sup>346</sup> For instance, under Barrick's Environmental Monitoring/Mining Essential Program (EMMEP) Barrick provides both communities with support to employ environmental monitors, as well as engaging with Hemlo's environmental department in their sampling program and environmental monitoring system.<sup>347</sup> Furthermore, the Hemlo mine received a Canadian Industry Program of Energy Conservation (CIPEC) Leadership Award in 2014, the award recognizes companies which have made major innovative contributions to energy efficiency.<sup>348</sup>

The above is a positive example of Barrick's activities in compliance with its commitments to the Global compact which is highlighted in Barrick's 2015 COP.<sup>349</sup> However, a review of Barrick's 'Responsibility Reports' of 2012, 2013, and 2014, as well as its first COP reports of 2010/2011 and that of 2011/2012 revealed that there are many more positive examples.<sup>350</sup>

For instance, demonstrating its commitment to Compact principles on environmental responsibility Barrick's Timbarra Mine in New South Wales, Australia successfully closed its mining activities with the full co-operation of the local community. Barrick separated Timbarra into six geographical domains and each domain according to Barrick had a specific reclamation strategy with agreed upon rehabilitation objectives, including;

'Developing stable landforms consistent with the surrounding landscape; providing habitat for flora and fauna; establishing vegetation expected to become self-sustaining forest, woodland and sedgeland communities; and preventing detrimental effects on water quality'.<sup>351</sup>

Indeed, this strategy was maintained according to Barrick as the mine closure project began in 2001 and Barrick maintained a full-time presence until relinquishment in 2013, once the re-profiled land reforms, revegetation and water quality rehabilitation was complete.<sup>352</sup>

---

<sup>346</sup> Barrick, 'Responsible Mining' 2014 Responsibility Report, 25

<sup>347</sup> Barrick, 'Responsible Mining' 2012 Corporate Responsibility Report, 31

<sup>348</sup> Barrick, 'Responsible Mining' 2014 Responsibility Report, 45

<sup>349</sup> Barrick Gold Corporation, UN Global Compact: Communication on Progress, 2015, 4, available at: <[https://www.unglobalcompact.org/system/attachments/cop\\_2015/167121/original/GRI\\_Content\\_Index\\_2014.pdf?1434027041](https://www.unglobalcompact.org/system/attachments/cop_2015/167121/original/GRI_Content_Index_2014.pdf?1434027041)> accessed on 2<sup>nd</sup> October 2015

<sup>350</sup> See, Barrick Gold Corporation, 'UN Global Compact: Communication on Progress', 2010/2011, Barrick Gold Corporation, 'UN Global Compact: Communication on Progress', 2011/2012 Barrick, 'Responsible Mining' 2012 Corporate Responsibility Report, Barrick, 'Responsible Mining' 2013 Responsibility Report, Barrick, 'Responsible Mining' 2014 Responsibility Report

<sup>351</sup> Barrick, 'Responsible Mining' 2013 Responsibility Report, 79

<sup>352</sup> *ibid*

Similar to the activities of Rio Tinto at its Burnt Island alumina refinery mentioned above this is another demonstration of soft law initiative principles being followed to ensure environmental responsibility.

Furthermore, with regards to principle 6 of the Compact which encourages the elimination of discrimination with respect to employment opportunities, Barrick has taken steps to comply with this principle.<sup>353</sup> In Nevada, USA Barrick has a long record of constructive engagement with the Western Shoshone<sup>354</sup> communities near their Nevada mines.<sup>355</sup> In 2012 efforts were made to increase Western Shoshone employment at Barrick operations, company staff frequently visited communities to educate residents on employment opportunities and identify qualified candidates.<sup>356</sup> According to Barrick as a result of such efforts Western Shoshone recruitment increased significantly in 2012.<sup>357</sup>

The above examples are just a sample of Barrick activities in Canada, Australia, and the USA demonstrating Barrick's compliance with Compact principles as contained in its company corporate responsibility reports. There are further examples of positive practices in its operations in Peru, Chile, Tanzania and Argentina.<sup>358</sup> However, one might expect to find such positive reports contained in a self-assessed company report. Further research of Barrick activities outside company reports found less positivity in terms of compliance with Compact principles that respect human rights, environmental responsibility, and labour rights as discussed below.

In Papua New Guinea, a report was submitted by a group of NGOs to the Canadian National Contact Point pursuant to OECD Guidelines for Multilateral Enterprises, requesting a review of the activities of Barrick Gold at the Porgera Joint Venture Mine.<sup>359</sup> According to the report the living condition of people within the Porgera Joint Venture mine's Special Mine lease

---

<sup>353</sup> United Nations Global Compact, Principle 6: The elimination of discrimination in respect of employment and occupation

<sup>354</sup> These are Native American Tribes

<sup>355</sup> Barrick, 'Responsible Mining' 2012 Corporate Responsibility Report, 29

<sup>356</sup> Barrick, 'Responsible Mining' 2012 Corporate Responsibility Report, 30

<sup>357</sup> Barrick, 'Responsible Mining' 2012 Corporate Responsibility Report, 30

<sup>358</sup> See, Barrick, 'Responsible Mining' 2012 Corporate Responsibility Report, Barrick, 'Responsible Mining' 2013 Responsibility Report, Barrick, 'Responsible Mining' 2014 Responsibility Report

<sup>359</sup> Mark Ekepa, Jethro Tulin, Catherine Coumans, 'Request for Review Submitted to the Canadian National Contact Point Pursuant to the OECD Guidelines for Multinational Enterprises: Specific Instance Regarding The Operations of Barrick Gold Corp. at the Porgera Joint Venture Mine on the Land of the Indigenous Ipili of Porgera, Enga Province, Papua New Guinea' 2011, Porgera SML Landowners Association, Akali Tange Association, Mining Watch Canada, available at <[http://oecdwatch.org/cases/Case\\_210/929/at\\_download/file](http://oecdwatch.org/cases/Case_210/929/at_download/file)> accessed 12<sup>th</sup> October 2015

area, which surround the open pit and underground mines and their extreme waste streams, are not compatible with human health and safety standards and with social, economic, and cultural development standards<sup>360</sup> as reflected by Barrick in its responsibility reports mentioned earlier.<sup>361</sup> Furthermore, the Akali Tange Association (ATA) in 2004 raised the alarm about on-going human rights abuses perpetrated by the Porgera mine security.<sup>362</sup> According to Jeffery Simpson, an ATA organizer, 39 people have died and 2000 have been injured, some by unsafe working conditions and others in the chaos that usually follows Barrick security crackdowns. More worryingly, there have been allegations of rapes and gang rapes by Barrick security guards in Pogera. The research teams of the International Human Rights Clinic of the Harvard Law School and the Center for Human Rights and Global Justice of New York University School of Law during their investigations between August 2006 and March 2009 gathered data on such alleged rapes.<sup>363</sup> Indeed, Human Rights Watch (HRW) also conducted their own investigation and noted five alleged incidents of gang rape by mine security personnel in 2009 and 2010, and a further sixth in 2008.<sup>364</sup> The brutality of the sexual attacks were shocking:

Some of the women interviewed by Human Rights Watch described scenes of true brutality. One woman told how she was gang raped by six guards after one of them kicked her in the face and shattered her teeth. Another said she and three other women were raped by ten

---

<sup>360</sup> Standards refer to International best practice guidelines, such as the International Council on Minerals and Metals (ICMM) ten principles of Sustainable Development (particularly principles 1, 2 and 3) of which Barrick is a member, the Global Compact (Principles 1 and 2) where Barrick is also a member, and other relevant international soft law or norms such as the United Nations Covenant on Economic, Social and Cultural Rights as well as elements of the Rio Declaration on Environment and Development.

<sup>361</sup> Mark Ekepa, Jethro Tulin, Catherine Coumans, 'Request for Review Submitted to the Canadian National Contact Point Pursuant to the OECD Guidelines for Multinational Enterprises: Specific Instance Regarding The Operations of Barrick Gold Corp. at the Porgera Joint Venture Mine on the Land of the Indigenous Ipili of Porgera, Enga Province, Papua New Guinea' 2011, Porgera SML Landowners Association, Akali Tange Association, Mining Watch Canada, available at <[http://oecdwatch.org/cases/Case\\_210/929/at\\_download/file](http://oecdwatch.org/cases/Case_210/929/at_download/file)> accessed 12<sup>th</sup> October 2015

<sup>362</sup> A Corpwatch Report, 'Barrick's Dirty Secrets: Communities Worldwide Respond to Gold Mining's Impacts' (2007) 5 available at: <<http://www.corpwatch.org/sites/default/files/Barrick%27s%20Dirty%20Secrets.pdf>> accessed 19<sup>th</sup> September 2018

<sup>363</sup> Mark Ekepa, Jethro Tulin, Catherine Coumans, 'Request for Review Submitted to the Canadian National Contact Point Pursuant to the OECD Guidelines for Multinational Enterprises: Specific Instance Regarding The Operations of Barrick Gold Corp. at the Porgera Joint Venture Mine on the Land of the Indigenous Ipili of Porgera, Enga Province, Papua New Guinea' 2011, Porgera SML Landowners Association, Akali Tange Association, Mining Watch Canada, available at <[http://oecdwatch.org/cases/Case\\_210/929/at\\_download/file](http://oecdwatch.org/cases/Case_210/929/at_download/file)> accessed 12<sup>th</sup> October 2015, pp12

<sup>364</sup> Human Rights Watch, Gold's Costly Dividend: Human Rights Impacts of Papua New Guinea's Porgera Gold Mine, 2011 available at <<https://www.hrw.org/sites/default/files/reports/png0211webwcover.pdf>> accessed 20<sup>th</sup> October 2015

security personnel, one of whom forced her to swallow a used condom that he had used while raping two other victims.<sup>365</sup>

The above is just an example, as there were so many more victim testimony on the brutal raping of women by Barrick mine security which is obviously incompatible with Compact principles. Indeed, recently it was reported by Mining Watch Canada that on the 3<sup>rd</sup> of April 2015 eleven of at least 120 women who claim to have been raped and gang raped by security guards at Barrick Gold's Pogera Joint Venture mine, and three of many more men and their families who claim to have been victims of violence and killing by security guards, finally received equitable settlements.<sup>366</sup> This therefore proves the allegations were in fact true, thereby clearly showing Barrick to not only be in breach of its Compact commitments, but also the numerous other multilateral initiatives that promotes human rights which it is party to.

Moreover, the human rights violations of Barrick did not stop in Papua New Guinea, in Tanzania, 1996, Canada-based Sutton Resources Ltd which was acquired by Barrick evicted around 30,000 to 250,000 miners from its Tanzanian operations and allegedly killed more than 50 miners according to Tanzanian environmental lawyer Tundu Lissu, by burying them alive with a bulldozer.<sup>367</sup> Despite this Barrick went ahead and bought the mine three years later, failing to bring the perpetrators to justice or to compensate the victim's families.<sup>368</sup> These major allegations were corroborated by an International NGO ( Mining Watch Canada, Friends of the Earth, Rights & Democracy) fact-finding Mission to Tanzania in March 2002, who recommended an independent, impartial, transparent and comprehensive inquiry into the allegations of uncompensated mass evictions of miners and mine owners and killings of owners.<sup>369</sup> Indeed, up until 2001 when Barrick was in control of the mine there was continued

---

<sup>365</sup> Human Rights Watch, Gold's Costly Dividend: Human Rights Impacts of Papua New Guinea's Pogera Gold Mine, 2011 available at < <https://www.hrw.org/sites/default/files/reports/png0211webwcover.pdf> > accessed 20<sup>th</sup> October 2015

<sup>366</sup> See Mining Watch Canada, 'Barrick Settlement on Rapes and Killings in Papua New Guinea Proof that Victims Need Independent Legal Counsel', 2015 available at <<http://www.miningwatch.ca/news/barrick-settlement-rapes-and-killings-papua-new-guinea-proof-victims-need-independent-legal-cou>> accessed 25<sup>th</sup> October 2015

<sup>367</sup> A Corpwatch Report, 'Barrick's Dirty Secrets: Communities Worldwide Respond to Gold Mining's Impacts' (2007) 5 available at: <<http://www.corpwatch.org/sites/default/files/Barrick%27s%20Dirty%20Secrets.pdf>> accessed 19<sup>th</sup> September 2018

<sup>368</sup> *ibid*

<sup>369</sup> Mining Watch Canada, 'Report of the International NGO Fact-Finding Mission to Tanzania, April 16, 2002, available at: <<https://miningwatch.ca/blog/2002/4/16/report-international-ngo-fact-finding-mission-tanzania>> accessed 19<sup>th</sup> September 2018

forced evictions by Tanzanian security forces.<sup>370</sup> In 2013, a report of inquiry into the death of five people on the 16<sup>th</sup> of May 2011 shot by police at Barrick's North Mara mine, conducted by the District Commissioner of Tarime, revealed Barrick failed to uphold numerous promises made to communities.<sup>371</sup> These promises include; healthy water, jobs, payment of royalty, building new schools, and construction of roads. They argue this led to discontent between the villagers and Barrick in North Mara.<sup>372</sup>

Furthermore, Barrick's Pascua Lama Project, which is based in Chile and Argentina has also witnessed allegations of serious violations of local environmental laws in both countries.<sup>373</sup> Indeed, this has resulted in law suits against the project, for instance a resident of San Juan promoted a collective environmental damage lawsuit to the Supreme Court of Argentina against Barrick Gold.<sup>374</sup> In Chile, on September 28<sup>th</sup> 2012 a protection appeal to the Appeals Court of Copiapo was presented by eight of the ten diaguita communities.<sup>375</sup> They accused Barrick of affecting 'the right to life' due to the damage it has done to the glaciers Toro 1 and Toro 2 and Esperanza, and polluted water resources in the area.<sup>376</sup> In a unanimous decision in April 2013 the court ruled in favor of the diaguita communities and suspended work on the mine, thereby demonstrating Barrick was indeed violating environmental laws and principles contrary to its commitments.<sup>377</sup>

The aforementioned decision was followed by the imposition of a maximum fine by Chile's environmental regulator citing Barrick Gold's 'very serious' violations of its environmental

---

<sup>370</sup> A Corpwatch Report, 'Barrick's Dirty Secrets: Communities Worldwide Respond to Gold Mining's Impacts' (2007) 5 available at: <<http://www.corpwatch.org/sites/default/files/Barrick%27s%20Dirty%20Secrets.pdf>> accessed 19<sup>th</sup> September 2018

<sup>371</sup> The United Republic of Tanzania, Office of the Prime Minister, Regional Administration and Local Government, District Commissioner of Tarime, 'The Report of the Inquiry into the Death of Five People on 16/05/2011 shot by the police at the North Mara mine', 13 June 2013, available at: [https://miningwatch.ca/sites/default/files/commission\\_of\\_inquiry\\_report\\_english.pdf](https://miningwatch.ca/sites/default/files/commission_of_inquiry_report_english.pdf) accessed 12<sup>th</sup> November 2017

<sup>372</sup> *ibid*

<sup>373</sup> Greenpeace, Pascua Lama Investor Briefing: What Barrick Gold is hiding from its shareholders, August 2013, available at: <[http://www.greenpeace.org/argentina/Global/argentina/report/2013/cambio\\_climatico/Accionistas-inlges.pdf](http://www.greenpeace.org/argentina/Global/argentina/report/2013/cambio_climatico/Accionistas-inlges.pdf)> accessed 12<sup>th</sup> November 2017

<sup>374</sup> *ibid*

<sup>375</sup> South American Indigenous people native to the Chilean Norte Chico and the Argentine North West.

<sup>376</sup> Marianela Jarroud, 'Chilean Court Suspends Pascua Lama Mine', *Inter Press Service News Agency* (Santiago 10 April 2013) <<http://www.ipsnews.net/2013/04/chilean-court-suspends-pascua-lama-mine/>> accessed 29<sup>th</sup> May 2017

<sup>377</sup> *ibid*

permit as well as its failure to accurately describe what it had done wrong.<sup>378</sup> The fine was upheld in March 2014 by Chile's Environmental Court of Santiago which was established to protect companies that wanted a way to challenge fines imposed by the country's environment superintendent, and in doing so further highlighted Barrick's violations.<sup>379</sup> Instead of protecting Barrick the court held that the \$16 million fine was inadequate taking into account the company's environmental violations.<sup>380</sup>

Just as in the case of Rio Tinto, the above examples of Barrick operations in Papua New Guinea, Tanzania, Chile, and Argentina demonstrate that contrary to reports in its Responsibility reports and yearly Compact COPs Barrick is in constant breach of soft law commitments. Taking all the examples presented here together, a pattern develops where Barrick seems to be more Global Compact compliant in developed countries with expected strong enabling environments than in developing countries where such enabling environments are usually weak as will be demonstrated in the African case studies in Chapters four and five. However, one may argue against such an assertion as Barrick has made some positive impact in some developing countries. For example, in Zambia Barrick's Local Contractor Development (LCD) program at the Lumwana mine helps train local contractors in business management, safety, human rights, and environmental protection.<sup>381</sup> Also, in Barrick's North Mara mine in Tanzania where human rights violations have been reported as noted above, Barrick conducts monthly tours of the mine to allow community members to familiarize themselves with mining operations and encourage relationship building between the mine and the community.<sup>382</sup> In Papua New Guinea, Barrick claim they promote safer environments in compliance with principles 7 and 8 of the Compact, as they deposit tailings material into a nearby river under government permit and regulation.<sup>383</sup> Overall, African Barrick Gold continues to promote conflict management initiatives with local communities in its African mines through its partnership with Search for Common Ground, an internationally recognized NGO, to help strengthen trust and improve collaboration between the mine and local communities. Therefore, the above examples

---

<sup>378</sup> Luis Andres Henao, 'Chile Fines Canada's Barrick Gold Corp. \$16m For Environmental Violations' *The Associated Press*, (Toronto 2013) available at <<http://globalnews.ca/news/587893/chile-fines-canadas-barrick-gold-corp-16m-for-environmental-violations/>> accessed 27<sup>th</sup> October 2015

<sup>379</sup> Eilis O'Neill, 'Chile Finally Gets Tough on Mining Industry' (2014), *Earth Island Journal*, <[http://www.earthisland.org/journal/index.php/articles/entry/chile\\_finally\\_gets\\_tough\\_on\\_mining\\_industry](http://www.earthisland.org/journal/index.php/articles/entry/chile_finally_gets_tough_on_mining_industry)> accessed 18<sup>th</sup> September 2018

<sup>380</sup> *ibid*

<sup>381</sup> Barrick, 'Responsible Mining' 2013 Responsibility Report, 27

<sup>382</sup> *ibid* 55

<sup>383</sup> Barrick, 'Responsible Mining' 2012 Responsibility Report, 20

suggest that Barrick does have some positive practices in developing countries with arguably weak enabling environments.

However, this research argues that such positive moves by Barrick to appease local communities have nothing to do with the availability of an enabling environment, it is because it is in their interest for there to be peace within mining communities so that their mining operations can go on, uninterrupted. Indeed, in support of such an argument authors such as Canel argue that corporate responsibility schemes are done in an effort to secure a "social license to operate" from communities in extractive regions and to hold back possible re-regulation from the state.<sup>384</sup> On the other hand, in the case of the positive activities in the developed countries mentioned above one may strongly argue it is because of the availability of strong enabling environments in OECD developed countries. For instance, in the USA there are strong regulations protecting environments, such as the Environmental Protection Agency (EPA) Toxic Release Inventory (TRI) program. Under the TRI program annual reports regarding the use and management of certain listed chemicals are required.<sup>385</sup> In 2013 a settlement agreement where Barrick paid \$278,000 was entered into by Barrick and the United States EPA, resolving a dispute regarding the EPA's Toxic Release Inventory program.<sup>386</sup> Furthermore, in 2011, approximately 1,450 kilograms of anhydrous ammonia was released from emission control equipment on the Barrick Goldstrike Mine autoclaves. EPA issued a notice of enforcement action based on the ammonia release, citing the violation of the Comprehensive Environmental Response, Compensation and Liability Act for failing to notify the National Response Centre of the release immediately and of the Clean Air Act for operational and design issues which led to the release.<sup>387</sup> The above is a good demonstration of an enabling environment in the form of mandated local laws for soft law initiatives such as the Global Compact. This is because there exist a body of laws for the protection of the environment and an enforcement agency that strictly adheres to the laws, punishing violators. This therefore makes it more convenient for companies such as Barrick to comply with Compact principles as by doing so they are complying with locally mandated

---

<sup>384</sup>Eduardo Canel, Uwafiokun Idemudia, Liisa L. North, 'Rethinking Extractive Industry: Regulation, Dispossession, and Emerging Claims' (2010) 30:1-2, Canadian Journal of Development Studies, 5-25 see also Ralph Hamann, N Acutt, 'How should Civil Society (and the Government) Respond to "Corporate Social Responsibility?" A Critique of Business Motivations and the Potential for Partnerships' (2003) 20 Development Southern Africa, 255-270, Daniel Berliner and Aseem Prakash, 'From norms to programs: The United Nations Global Compact and Global Governance [2012], Regulation and Governance, 1-18

<sup>385</sup> Barrick, 'Responsible Mining' 2013 Responsibility Report, 69

<sup>386</sup> *ibid* 55

<sup>387</sup> *ibid* 70

laws, where failure to do so will result in significant penalties. This therefore explains why most of Barrick Gold's compliance with Compact principles are found in developed nations.

In contrast, within developing countries the enabling environment especially in the form of local civil society, mandated laws, and their enforcement mechanisms are too weak, allowing companies such as Barrick Gold to ignore their commitments under soft law initiatives such as the Global Compact, as demonstrated above. For instance, in Chile, territorial and ancestral rights of the indigenous Diaguita community are being violated despite the availability of a law focusing on indigenous rights.<sup>388</sup> In fact it is argued that, this law does not adequately ensure the protection of the Diaguita's land and its water, corporate interests have actually used this law to trespass on indigenous community rights.<sup>389</sup> Therefore one might argue that just as in the case of Rio Tinto in the previous section Barrick also appears to pick and choose when it is convenient for them to comply with global compact principles in developing countries because of weak enabling environments for soft law, whereas in the developed world their operations largely comply with Global Compact principles because of a strong enabling environment, comprising of strongly drafted local laws, enforcement mechanisms, local governance, and a strong civil society.

### **3.3.6 The UN Global Compact and an Enabling Environment: The Effects**

Put together the above reviews of the social and environmental activities of Rio Tinto and Barrick Gold with regards their commitment to the Global Compact has showed that overall their compliance with Compact principles depends on where they are operating in the world. When they are operating in OECD member countries, who are the most developed countries in the world with strong enabling environments for instance, in terms of civil society, mandated regulations and enforcement mechanisms they are more compliant with Compact principles. However, this does not mean there are no environmental or social breaches in such countries, just that they are rather minimal when compared to the mass environmental and human rights violations in developing countries, such as the gang rapes by Barrick staff in Papua New Guinea mentioned above. On the other hand, when Rio Tinto and Barrick are

---

<sup>388</sup> Law 19,253 of 1993 on Protection, Promotion and Development of Native Peoples of the Department of Planning and Cooperation

<sup>389</sup> A Corpwatch Report, Barrick's Dirty Secrets: Communities Worldwide Respond to Gold Mining's Impacts, May 2007,10



operating in developing countries with weak enabling environments in the terms discussed in chapter two their compliance to Compact principles become rather minimal. They violate environmental and human rights laws, and ignore local laws regulating their activities, for instance, as noted above Rio Tinto ignored the Indonesian Water Quality Management and Pollution Control regulations and continued dumping waste. Where laws in developing countries do not favor their activities, companies such as Rio Tinto and Barrick have the financial and political influence to foster change in such developing countries. To conclude, for the Global Compact, the availability of an enabling environment such as an effective civil society, mandated laws and their enforcement by government clearly makes a difference. This is because through the Rio Tinto and Barrick Gold case studies this section has demonstrated that the companies comply with their Compact commitments more readily in developed countries, where an enabling environment is readily available especially in the form of a strong civil society and government mandated legislation. This therefore supports this author's argument that soft law initiatives can be effective tools for the regulation of mining activities in Africa, where they are accompanied by an enabling environment.

### **3.4 The Extractive Industries Transparency Initiative (EITI)**

Although the Extractive Industries Transparency Initiative (EITI) is an initiative that does not focus on environmental protection as its name suggest, it is a voluntary initiative within the mining industry which can be used to demonstrate how an enabling environment can be created for specific soft law initiatives through the mandating of laws as discussed in chapter two. The initiative will also help this research establish whether creating an enabling environment through mandating alone can make a soft law initiative more likely to be effective in terms of compliance. But first, we shall look at the background, functions and debates surrounding EITI as a voluntary initiative just like the Global Compact.

What is currently known as the Extractive Industries Transparency Initiative (EITI) began as a UK foreign policy proposal launched by Tony Blair at the 2002 World Summit on Sustainable Development.<sup>390</sup> The initiative is based on the belief that 'the prudent use of natural resource wealth has the potential to provide the basis for sustainable economic growth

---

<sup>390</sup> Virginia Haufler, 'Disclosure as Governance: The Extractive Industries Transparency Initiative and Resource Management in the Developing World' (2010) 10(3) *Global Environmental Politics* 53, 54

and development.<sup>391</sup> The initiative suggests that such prudent use of natural resource wealth may be done through the governance of the extractive industry. As put by Bracking EITI ‘aims to strengthen governance by improving transparency and accountability in the extractive sector. The EITI sets a global standard for companies to publish what they pay and for governments to disclose what they receive.’<sup>392</sup> The EITI is based on twelve principles<sup>393</sup> that capture the international consensus on the importance of transparency by governments and non-state actors, and the need for collaboration between the public and private sectors as well as civil society in ensuring accountability and good governance.<sup>394</sup>

The EITI thus brings together in a common purpose governments, companies, civil society groups, investors and international organizations to improve governance in resource-rich countries, in order to break the oft touted ‘resource curse’ and bring development to the public with regards to economic growth and poverty reduction.<sup>395</sup>

In a nutshell the initiative functions by requiring extractive sector companies to report all taxes and fees paid to governments and likewise governments are to publish their income from resource development. Such reports would then be audited and made available to the public to assess the major source of income flowing into the country’s treasury.<sup>396</sup> It is argued by authors such as Aaronson that the EITI has evolved since 2003 with participants improving on their governance and anti-corruption mechanisms. By 2007, 23 countries had agreed to adopt EITI.<sup>397</sup> However, only 14 of these countries actually made it mandatory for firms to publish what they paid, published what they received, and arranged for a diversified

---

<sup>391</sup> The EITI Statement of Principles and Action [2003]

<<http://webarchive.nationalarchives.gov.uk/+http://www.dfid.gov.uk/pubs/files/eitidraftreportstatement.pdf>> accessed 31<sup>st</sup> August 2014

<sup>392</sup> Sarah Bracking, ‘Hiding Conflict over Industry Returns: A Stakeholder Analysis of the Extractive Industries Transparency Initiative’ (2009) BWPI Working Paper

91<<http://hummedia.manchester.ac.uk/institutes/gdi/publications/workingpapers/bwpi/bwpi-wp-9109.pdf>> accessed 18<sup>th</sup> September 2018

<sup>393</sup> See EITI Source Book (2005), 8 available at:

<[https://eiti.org/sites/default/files/documents/sourcebookmarch05\\_0.pdf](https://eiti.org/sites/default/files/documents/sourcebookmarch05_0.pdf)> Accessed 18<sup>th</sup> September 2018

<sup>394</sup> Paul D. Ocheje, ‘The Extractive Industries Transparency Initiative (EITI): Voluntary Codes of Conduct, Poverty and Accountability in Africa’ [2006], available at:

<[https://www.researchgate.net/publication/266333694\\_The\\_Extractive\\_Industries\\_Transparency\\_Initiative\\_EIT\\_I\\_Voluntary\\_Codes\\_of\\_Conduct\\_Poverty\\_and\\_Accountability\\_in\\_Africa](https://www.researchgate.net/publication/266333694_The_Extractive_Industries_Transparency_Initiative_EIT_I_Voluntary_Codes_of_Conduct_Poverty_and_Accountability_in_Africa)> accessed 18<sup>th</sup> September 2018

<sup>395</sup> Sarah Bracking, ‘Hiding Conflict over Industry Returns: A Stakeholder Analysis of the Extractive Industries Transparency Initiative’ (2009) BWPI Working Paper 91, 3 available at:

<<http://hummedia.manchester.ac.uk/institutes/gdi/publications/workingpapers/bwpi/bwpi-wp-9109.pdf>> accessed 18<sup>th</sup> September 2018

<sup>396</sup> Virginia Haufler, ‘Disclosure as Governance: The Extractive Industries Transparency Initiative and Resource Management in the Developing World’ (2010) 10(3) Global Environmental Politics 53, 54.

<sup>397</sup> Susan Ariel Aaronson, ‘Limited Partnership: Business, Government, Civil Society, and the Public in the Extractive Industries Transparency Initiative (EITI)’ (2011) 31 Public Admin Dev 50, 53.

multi-stakeholder group to evaluate such accounting. Therefore the EITI board began to tighten up things and give more teeth to EITI, eventually asking several countries to leave the initiative.<sup>398</sup> EITI today has a more elaborate and international governance structure than at its inception in 2003.<sup>399</sup> It has continuously expanded its membership, (currently at 46 participants) and gradually extended its scope.<sup>400</sup> In December 2007 the EITI divided countries into two groups; candidate and compliant countries, which currently stand at 17 and 29 respectively.<sup>401</sup> A country that satisfies the minimal four steps of; committing to EITI, committing to work with NGOs and the private sector, selected an official to lead EITI implementation, and published a work plan is considered a candidate country.<sup>402</sup> On the other hand, compliant countries not only disclose and engage with the multi-stakeholder group, they also have validated the required stakeholder consultation process.<sup>403</sup>

### **3.4.1 The Effectiveness of the EITI in terms of compliance as a Voluntary Soft Law Initiative**

Debate within the literature concerning the EITI initiative has tended to be surrounded around the effectiveness of the initiative to meet its aims of ensuring the management of natural resources through the governance of their proceeds. While just as in the case of the Global Compact the voluntary aspect of EITI which may hinder compliance has been criticized, a lot of positives have also been identified, which will be discussed below summarily having discussed most of the arguments for and against voluntary initiatives in the previous section on the Global Compact.<sup>404</sup>

Supporters of the EITI initiative have argued that if extractive companies publicly disclose payments to governments, citizens will be able to hold governments and firms accountable. This in turn would improve the management of natural resources, reduce corruption, and

---

<sup>398</sup> Susan Ariel Aaronson, 'Limited Partnership: Business, Government, Civil Society, and the Public in the Extractive Industries Transparency Initiative (EITI)' (2011) 31 Public Admin Dev 50, 53.

<sup>399</sup> Virginia Haufler, 'Disclosure as Governance: The Extractive Industries Transparency Initiative and Resource Management in the Developing World' (2010) 10(3) Global Environmental Politics 53, 54.

<sup>400</sup> EITI Countries 2014, < <http://eiti.org/countries>> accessed 31<sup>st</sup> August 2014

<sup>401</sup> *ibid*

<sup>402</sup> Susan Ariel Aaronson, 'Limited Partnership: Business, Government, Civil Society, and the Public in the Extractive Industries Transparency Initiative (EITI)' (2011) 31 Public Admin Dev 50, 53.

<sup>403</sup> *ibid*

<sup>404</sup> See section 3.2.2

mitigate conflict.<sup>405</sup> However, as a voluntary initiative just how effective is the EITI in ensuring companies comply with it by publicly disclosing payments to governments, as for example we saw that the monitoring mechanism for compliance with the Global Compact was weak. The EITI however, has a rather strict approach to compliance. Where a participant country is unable to implement its principles they are asked to leave the initiative or are suspended.<sup>406</sup> For example, the EITI board temporarily suspended the Central African Republic's status as EITI Compliant, effective 10<sup>th</sup> April 2013, due to political instability.<sup>407</sup> The Board decided that the Central African Republic did not currently have a recognized government for effective EITI implementation. Furthermore, the Board also temporarily suspended the Democratic Republic of Congo (DRC) with immediate effect on the 17<sup>th</sup> of April 2013. The Board based its decision on the finding that the quality of EITI reports from the DRC did not comply with all the requirements with regards to EITI standards, particularly requirements for full disclosure and assurance of reliability of figures.<sup>408</sup> Therefore clearly the EITI is rather effective in monitoring the compliance of governments, thus having more 'teeth' than the Global Compact initiative. However, it is essential to establish how compliant extractive firms have been as key partners in the initiative if we are to really assess the effectiveness of the EITI voluntary initiative.

According to Bracking, companies within the extractive industries are generally in support of EITI and have been participating in the EITI process. She argues that companies' interest in the protection of their investments and future profits find voice in 'rule of law' initiatives such as the EITI.<sup>409</sup> Therefore, companies see EITI as helping to safeguard their operating environment and thus usually comply with its principles. Currently over 80 of the world's largest oil, gas, and mining companies support and actively participate in the EITI process, either in implementing countries, through their industry associations or endorsements and commitments declared internationally.<sup>410</sup> However, despite their open declaration in support

---

<sup>405</sup> Virginia Haufler, 'Disclosure as Governance: The Extractive Industries Transparency Initiative and Resource Management in the Developing World' (2010) 10(3) Global Environmental Politics 53, 54

<sup>406</sup> The EITI Standard, EITI International Secretariat, 11 July 2013, available at: <[https://eiti.org/sites/default/files/documents/english\\_eiti\\_standard.pdf](https://eiti.org/sites/default/files/documents/english_eiti_standard.pdf)> Accessed 18<sup>th</sup> September 2018

<sup>407</sup> EITI Countries, Central Republic of Africa, <http://eiti.org/CentralAfricanRepublic> Accessed 1<sup>st</sup> September 2014

<sup>408</sup> EITI Countries,, Democratic Republic of Congo, <https://eiti.org/news/democratic-republic-congo-temporarily-suspended> Accessed 4<sup>th</sup> May 2015

<sup>409</sup> <sup>409</sup> Sarah Bracking, 'Hiding Conflict over Industry Returns: A Stakeholder Analysis of the Extractive Industries Transparency Initiative' (2009) BWPI Working Paper 91, 3 available at: <<http://hummedia.manchester.ac.uk/institutes/gdi/publications/workingpapers/bwpi/bwpi-wp-9109.pdf>> accessed 18<sup>th</sup> September 2018

<sup>410</sup> EITI, Stakeholders, < <http://eiti.org/supporters/companies?page=2>> accessed 1<sup>st</sup> September 2014

of such transparency initiatives companies have not been completely open in declaring their oil production rates for purposes of taxation and may in fact be short changing some governments. For instance, the Nigerian Extractive Industries Transparency Initiative (NEITI) undertook an audit program of the Nigerian extractive industry processes such as levels and justification of capital expenditure proposals, and checks and balances in the importation of refined products. The audit program was for the period of 1999-2004.<sup>411</sup> The audit found that the Federal Inland Revenue Service (FIRS) found it difficult to access and validate petroleum profits taxes (PPT) from various companies because the information required for validation of PPT accounts were made unavailable to the FIRS by companies.<sup>412</sup> Such information include; realizable price of oil products, crude oil lifting information, production volumes, approved annual budgets, license fees, well cost reports, etc. Therefore it would appear that companies may be applying double standards when it comes to the issue of transparency. As while they encourage governments to be transparent especially in order to protect their interests they are not necessarily transparent with regards to the amount of profits they make and tax that should be paid into government accounts. However, generally companies are seen as complying with EITI as it really does not require much from them especially in terms of costs i.e. increasing their operating costs. But the benefits in terms of public reputation boosts are enormous, therefore it is very cheap in comparison with other voluntary initiatives.<sup>413</sup> Rachel Kyte the former IFC Vice President further stressed that the ‘material’ case for these types of initiatives is found in increased profitability for companies in the long run, as they tend to reduce risks to investment.<sup>414</sup>

The EITI is touted as one of the more successful voluntary initiatives by its proponents and its numbers are compelling indeed. Within a short space of time it has attracted 46 countries with almost 1.5 billion people, with some of the world’s largest oil and mineral producing nations as implementing nations, and with more than 50 reports produced by these countries. Furthermore, NGO’s in the majority of these countries have participated by commenting on

---

<sup>411</sup>Paul D. Ocheje, ‘The Extractive Industries Transparency Initiative (EITI): Voluntary Codes of Conduct, Poverty and Accountability in Africa’ [2006], available at: [https://www.researchgate.net/publication/266333694\\_The\\_Extractive\\_Industries\\_Transparency\\_Initiative\\_EITI\\_Voluntary\\_Codes\\_of\\_Conduct\\_Poverty\\_and\\_Accountability\\_in\\_Africa](https://www.researchgate.net/publication/266333694_The_Extractive_Industries_Transparency_Initiative_EITI_Voluntary_Codes_of_Conduct_Poverty_and_Accountability_in_Africa)> accessed 18<sup>th</sup> September 2018

<sup>412</sup> ibid

<sup>413</sup> Sarah Bracking, ‘Hiding Conflict over Industry Returns: A Stakeholder Analysis of the Extractive Industries Transparency Initiative’ (2009) BWPI Working Paper 91, 3 available at: <http://hummedia.manchester.ac.uk/institutes/gdi/publications/workingpapers/bwpi/bwpi-wp-9109.pdf>> accessed 18<sup>th</sup> September 2018

<sup>414</sup> ibid

government-issued reports on extractive revenues and citizens living in these countries now see what their governments earn from their resources.<sup>415</sup> However, despite its success the EITI also has some limitations which has been noted and will be discussed below.

The main criticism with regards to EITI as with other soft law initiatives is its voluntary nature. Despite many NGO's such as the "publish what you pay" (PWYP) coalition, supporting the initiative, they hold reservations with regards its voluntary nature and favor a mandatory approach.<sup>416</sup> Indeed, the President of the African Network for Environmental and Economic Justice, and a PWYP member from Nigeria David Ugolor, says "global and mandatory measures are the only lasting and effective solution to this global problem. Voluntary processes do not guarantee that the EITI will be successful at the global level or at a country level, especially in places like Nigeria."<sup>417</sup> Others further argue that the voluntary nature of EITI limits its effectiveness as participating governments can ignore, abandon or implement EITI selectively.<sup>418</sup> They can decide what to include within the extractive industries scope, which companies to include or exclude from the EITI reports.<sup>419</sup> Therefore although the freedom given to implementing countries is a part of EITI's success it is also a constraint for this initiative because the data provided by businesses is not internationally comparable.<sup>420</sup> However, even if EITI was to become a mandatory initiative it would be difficult to implement as countries with significant natural resources are generally financially independent. Therefore it would be difficult to control and punish them through withholding aid or loans.<sup>421</sup> Furthermore, the fact that transparency is mandatory does not necessarily

---

<sup>415</sup> Susan Ariel Aaronson, 'Limited Partnership: Business, Government, Civil Society, and the Public in the Extractive Industries Transparency Initiative (EITI)' (2011) 31 Public Admin Dev 50, 54.

<sup>416</sup> Virginia Haufler, 'Disclosure as Governance: The Extractive Industries Transparency Initiative and Resource Management in the Developing World' (2010) 10(3) Global Environmental Politics 53, 66.

<sup>417</sup> Mary Ella Koblusek, 'Is EITI Really Helping Improve Global Good Governance? Examining the Resource Curse, Corruption, and Nigeria's EITI Implementation Experience' [2010] available at: <<http://nidprodev.org/EITI%20-%20Nigeria%20Analysis.pdf>> accessed 11<sup>th</sup> November 2017

<sup>418</sup> Susan Ariel Aaronson, 'Limited Partnership: Business, Government, Civil Society, and the Public in the Extractive Industries Transparency Initiative (EITI)' (2011) 31 Public Admin Dev 50, 57.

<sup>419</sup> Jean Saldanha, Anne Lindsay, Gregoire Niaudet, Florian Gomart, 'Learning From the EITI: Lessons for Effective Country-by-Country Data Disclosure Requirements' [2011], CIDSE development organization <[file://tower6/home32/a7906930/Downloads/Catholic\\_Agencies\\_Briefing\\_on\\_Country-by-country\\_reporting\\_and\\_EITI\\_June\\_2011\\_final.pdf](file://tower6/home32/a7906930/Downloads/Catholic_Agencies_Briefing_on_Country-by-country_reporting_and_EITI_June_2011_final.pdf)> accessed 1<sup>st</sup> September 2014

<sup>420</sup> Jean Saldanha, Anne Lindsay, Gregoire Niaudet, Florian Gomart, 'Learning From the EITI: Lessons for Effective Country-by-Country Data Disclosure Requirements' [2011], CIDSE development organization <[file://tower6/home32/a7906930/Downloads/Catholic\\_Agencies\\_Briefing\\_on\\_Country-by-country\\_reporting\\_and\\_EITI\\_June\\_2011\\_final.pdf](file://tower6/home32/a7906930/Downloads/Catholic_Agencies_Briefing_on_Country-by-country_reporting_and_EITI_June_2011_final.pdf)> accessed 1<sup>st</sup> September 2014

<sup>421</sup> Mary Ella Koblusek, 'Is EITI Really Helping Improve Global Good Governance? Examining the Resource Curse, Corruption, and Nigeria's EITI Implementation Experience' [2010] available at: <<http://nidprodev.org/EITI%20-%20Nigeria%20Analysis.pdf>> accessed 11<sup>th</sup> November 2017

mean that all activities under a company's scope will be published. For example numerous production sharing contracts (PSC) between governments and extractive firms were signed in some cases during military regimes with stringent confidentiality agreements that do not allow for the release of data regarding production of crude in some cases.

Moreover, other criticisms of the initiative stems from the fact that countries may actually simply use the initiative just to boost their reputation with international donors so they can be rewarded by increase in aid rather than being committed to the ideals of the initiative.<sup>422</sup> Furthermore, others argue that the participation of civil society in the initiative has been weak especially in developing countries, where the civil society is weak.<sup>423</sup> It is also argued that the fact that there is transparency by a government does not necessarily mean that there is accountability as EITI simply allows for the disclosure of extractive industries proceeds it does not necessarily require the government to explain or take action where discrepancies are identified by auditors. Therefore corruption can still continue even with the implementation of EITI. Nevertheless, other criticisms of EITI other than its voluntary nature will not be dwelled on here as the reason for the examination of EITI was its voluntary nature akin to other soft law initiatives. This sub-section seeks to test whether the provision of an enabling environment through mandating a regulation has enabled the EITI to be more effective as a voluntary initiative which shall be considered below.

### **3.4.2 EITI and an Enabling Environment: Nigeria**

This subsection analyses the Nigerian Extractive Industries Transparency Initiative (NEITI) as an example of where an enabling environment in the form of mandated law was created specifically for the voluntary initiative EITI. This section will determine whether such enabling legislation made the EITI more effective in terms of compliance thereby proving that soft law initiatives can be effective regulatory tools with the right enabling environment.

---

<sup>422</sup> Liz David-Barrett, Ken Okamura, 'The Transparency Paradox: Why do Corrupt Countries Join EITI? [2013] Working Paper No.38 European Research Centre for Anti-Corruption & State Building available at: <<http://eiti.org/files/The-Transparency-Paradox.-Why-do-Corrupt-Countries-Join-EITI1.pdf>> accessed 2<sup>nd</sup> September 2014

<sup>423</sup>Mary Ella Keblusek, 'Is EITI Really Helping Improve Global Good Governance? Examining the Resource Curse, Corruption, and Nigeria's EITI Implementation Experience' [2010] available at: <<http://nidprodev.org/EITI%20-%20Nigeria%20Analysis.pdf>> accessed 11<sup>th</sup> November 2017

As argued by Kyte voluntary initiatives such as EITI are caused by drivers such as ‘effective regulation, including privatisation and public private partnerships, competitiveness, profitability and shareholder/stakeholder value’.<sup>424</sup> It is in line with this argument that the EITI initiative was enabled or driven as a voluntary initiative through the creation of the NEITI in Nigeria. The NEITI was created on February 19, 2004 and immediately Nigeria began to require all oil companies to publish what they pay, and government officials to make public where the money goes.<sup>425</sup> For instance, in its joint development zone agreement with Sao Tome and Principe the Nigerian government applied EITI requirements to it. Indeed, Nigeria continued with its implementation process of EITI principles through NEITI and even conducted an audit program where the Hart Group an international UK-based consultancy firm was employed to audit the Nigerian industry covering the period of 1999-2004.<sup>426</sup>

The audit quality was considered very high, as it exceeded the EITI standards themselves.<sup>427</sup> Therefore without even creating an enabling act through mandated regulation the EITI voluntary initiative was having a positive effect on promoting transparency in Nigeria, meaning an enabling regulatory Act to codify the EITI principles may not have been necessary. However, initially when Nigeria signed up to the initiative there were doubts it would outlive the then government of President Olusegun Obasanjo due to its voluntary nature. This is because the political elite had been accustomed to dealing in the extractive industry without much scrutiny and were unlikely to willingly embrace transparency.<sup>428</sup> In order to strengthen Nigeria's participation in EITI beyond the Obasanjo administration, the Nigerian Extractive Industries Transparency Initiative (NEITI) Act was passed in 2007.<sup>429</sup>

---

<sup>424</sup> Sarah Bracking, ‘Hiding Conflict over Industry Returns: A Stakeholder Analysis of the Extractive Industries Transparency Initiative’ (2009) BWPI Working Paper 91, 3 available at:

<<http://hummedia.manchester.ac.uk/institutes/gdi/publications/workingpapers/bwpi/bwpi-wp-9109.pdf>> accessed 18<sup>th</sup> September 2018

<sup>425</sup> Mary Ella Keblusek, ‘Is EITI Really Helping Improve Global Good Governance? Examining the Resource Curse, Corruption, and Nigeria’s EITI Implementation Experience’ [2010] available at:

<<http://nidprodev.org/EITI%20-%20Nigeria%20Analysis.pdf>> accessed 11<sup>th</sup> November 2017

<sup>426</sup> Paul D. Ocheje, ‘The Extractive Industries Transparency Initiative (EITI): Voluntary Codes of Conduct, Poverty and Accountability in Africa’ [2006], available at:

<[https://www.researchgate.net/publication/266333694\\_The\\_Extractive\\_Industries\\_Transparency\\_Initiative\\_EIT\\_I\\_Voluntary\\_Codes\\_of\\_Conduct\\_Poverty\\_and\\_Accountability\\_in\\_Africa](https://www.researchgate.net/publication/266333694_The_Extractive_Industries_Transparency_Initiative_EIT_I_Voluntary_Codes_of_Conduct_Poverty_and_Accountability_in_Africa)> accessed 18<sup>th</sup> September 2018

<sup>427</sup> Mary Ella Keblusek, ‘Is EITI Really Helping Improve Global Good Governance? Examining the Resource Curse, Corruption, and Nigeria’s EITI Implementation Experience’ [2010] available at:

<<http://nidprodev.org/EITI%20-%20Nigeria%20Analysis.pdf>> accessed 11<sup>th</sup> November 2017

<sup>428</sup> Michael Uchenna Uzoigwe, ‘Exploring Multi-Stakeholder Initiatives for Natural Resource Governance The Example of the Nigerian Extractive Industries Transparency Initiative (NEITI) September [2011], University of Birmingham, available at: < <http://etheses.bham.ac.uk/3346/9/Uzoigwe12PhD.pdf>> accessed 2<sup>nd</sup> September 2014

<sup>429</sup> Nigerian Extractive Industries Transparency Initiative (NEITI) Act, 2007



The Act under Section 1 establishes a body known as the Nigerian Extractive Industries Transparency Initiative also referred to as NEITI, as an autonomous self-accounting body.<sup>430</sup> Under Section 2 of the Act some of the main objectives of NEITI are to ensure due process and transparency in payments made by all extractive industries companies to the federal government and to ensure conformity with the principles of the EITI transparency initiative.<sup>431</sup> The Nigerian Extractive Industries Act by requiring conformity with EITI is a striking example of where government through its mandating role has enabled a voluntary initiative so as to make it stronger in achieving its aims. Whether such an enabling act does make a voluntary initiative stronger especially in terms of compliance is another issue that shall be considered below. Nevertheless, Nigeria was applauded by the international community for being the first country to have statutory backing for EITI implementation.<sup>432</sup>

The NEITI Act gives more teeth to the EITI initiative, which as mentioned earlier had been criticized for being a voluntary initiative. The NEITI Act defines the rules governing implementation as well as laying out the punishments for non-compliance of targeted stakeholders.<sup>433</sup> However, it is necessary to consider whether the NEITI Act as an enabling act has ensured compliance with EITI standards within the industry, thereby assisting EITI in achieving its main aim, which is the prudent management of resources through openness and transparency in resource rich countries. With respect to transparency it is important to note that the NEITI has been criticized for protecting multinationals from divulging information especially with regards to oil prospecting and licensing.<sup>434</sup> For instance, Section 14(1) of the NEITI Act states that:

the independent auditor shall submit the report with comments of the audited entity to the NEITI which shall cause same to be published for the information of the public, provided that the contents of such report shall not be published in a manner prejudicial to the contractual obligations or proprietary interests of the audited entity.<sup>435</sup>

---

<sup>430</sup> Nigerian Extractive Industries Transparency Initiative (NEITI) Act 2007, s 1

<sup>431</sup> Nigerian Extractive Industries Transparency Initiative (NEITI) Act 2007 s 2(a) and (e)

<sup>432</sup> Mary Ella Keblusek, 'Is EITI Really Helping Improve Global Good Governance? Examining the Resource Curse, Corruption, and Nigeria's EITI Implementation Experience' [2010] available at: <<http://nidprodev.org/EITI%20-%20Nigeria%20Analysis.pdf>> accessed 11<sup>th</sup> November 2017

<sup>433</sup> Nigerian Extractive Industries Transparency Initiative (NEITI) Act 2007

<sup>434</sup> Michael Uchenna Uzoigwe, 'Exploring Multi-Stakeholder Initiatives for Natural Resource Governance The Example of the Nigerian Extractive Industries Transparency Initiative (NEITI) September [2011], University of Birmingham, available at: < <http://etheses.bham.ac.uk/3346/9/Uzoigwe12PhD.pdf>> accessed 2<sup>nd</sup> September 2014 pg 201

<sup>435</sup> Nigerian Extractive Industries Transparency Initiative (NEITI) Act 2007 s 14(1)

This provision clearly has a limitation as it may deter the publication of reports due to the proprietary interests or contractual obligations of audited entities. It therefore provides a safety net for extractive industries firms and allows for the abuse of the Act by avoiding complete transparency. It has been reported that in some occasions NEITI has invoked provisions such as Section 14(1) to justify its refusal to disclose information on companies found to be engaged in malpractices in its review of the crude oil metering infrastructure.<sup>436</sup>

Such provisions are clearly contrary to the objective of EITI for full transparency.

Furthermore, it has been argued that as it is often the case in Nigeria and other African countries the issue is not usually the absence of laws but their appropriate implementation. In his research Uzoigwe found his interviewees to be of the view that while the NEITI Act came with good intentions they fear there is an inability of government to implement its content because of vested interest especially within the political elite, thereby hindering compliance with the initiative.<sup>437</sup>

Therefore while the enactment of the NEITI Act is positive it will only be totally effective in enabling the EITI initiative where it is implemented. Further discussions into the implementation of enabling acts and their effects in enhancing the effects of soft law will be discussed in the African case studies of chapters four and five. However, what is clear from this section is an enabling Act can particularly influence the longevity if not compliance, of voluntary soft law initiatives as compliance depends on government enforcement of mandated laws. Additionally, this section shows that where such enabling Acts are implemented they have the potential to achieve more results than the voluntary initiatives may have envisaged initially as they contain requirements and penalties for non-compliance i.e. they have more ‘teeth’ which was clearly missing with initiatives such as the Global Compact as discussed above.

---

<sup>436</sup> Michael Uchenna Uzoigwe, ‘Exploring Multi-Stakeholder Initiatives for Natural Resource Governance The Example of the Nigerian Extractive Industries Transparency Initiative (NEITI) September [2011], University of Birmingham, < <http://etheses.bham.ac.uk/3346/9/Uzoigwe12PhD.pdf>> accessed 2<sup>nd</sup> September 2014 pg 202

<sup>437</sup> *ibid*

### 3.4.3 EITI and an Enabling Environment: Ghana

This section analyses the Ghana Extractive Industries Transparency Initiative (GHEITI) as an example where an enabling environment in the form of hard law regulation specifically for the initiative is unavailable. In contrast to NEITI, which has an enabling act in the form of the NEITI Act 2007<sup>438</sup> GHEITI has no enabling act or law, this allows us to analyze whether the lack of hard law as a form of an enabling environment is detrimental to effective compliance with soft law initiatives.

Ghana is an important example to consider when analyzing the EITI, this is because Ghana was one of the first countries to adopt the voluntary initiative in 2003 and, constitutes the first Candidate Country to deal with the mining sector only.<sup>439</sup> Despite the absence on an enabling act or Law the GHEITI has been quite successful. Under the GHEITI in addition to the revenue audit requirement of the initiative, Ghana decided to also undertake a process audit. This process audit was seen as an international best practice in the implementation of EITI, it revealed systematic weaknesses which gave way to the non-payment of certain statutory taxes in the sector, such as ground rent and capital gains tax.<sup>440</sup> Additionally, Ghana extended its EITI reporting requirements to the sub-national level at the early stage of implementation of the initiative thus offering best practice transparency to apply to sub-national revenue flows.<sup>441</sup> This was a new phenomenon as most countries including Nigeria did not extend EITI to the sub-national levels where revenues accrued and their impact on the local communities can be closely monitored. This demonstrates Ghana's zeal in implementing the initiative despite not having a specific enabling act for the initiative. Furthermore, in its EITI validation report, which was produced in order to attain the status of an EITI compliant country stakeholders revealed that despite the absence of an enabling act the government of Ghana is committed to EITI.<sup>442</sup> To strengthen their point they highlighted the fact that the Government of Ghana initially funded the EITI aggregator which was a first out of all the 30 countries implementing

---

<sup>438</sup> NIGERIA EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE ACT 2007

<sup>439</sup> Extractive Industries Transparency Initiative, 'Advancing The EITI In The Mining Sector', (2009) available at: <<https://eiti.org/files/MINING%20Compressed.pdf>> accessed 20<sup>th</sup> October 2015

<sup>440</sup> Steve Manteaw, 'Ghana's EITI: Lessons From Mining and Policy Implications for Oil' (2010), The Ghana Policy Journal, 96 - 109

<sup>441</sup> Extractive Industries Transparency Initiative, 'Advancing The EITI In The Mining Sector', (2009) available at <https://eiti.org/files/MINING%20Compressed.pdf> accessed 20<sup>th</sup> October 2015

<sup>442</sup> GEITI, 'Validation of the Extractive Industries Transparency Initiative in Ghana', Final Report, 9<sup>th</sup> February 2010, available at < [https://eiti.org/files/Ghana\\_Validation\\_Reports\\_ENG\\_0.pdf](https://eiti.org/files/Ghana_Validation_Reports_ENG_0.pdf)> accessed 18<sup>th</sup> October 2015

EITI. They also facilitated the initiative with a vibrant EITI secretariat to further demonstrate their commitment.<sup>443</sup>

However, while the above positive moves by the government of Ghana to establish and strengthen transparency in the mining sector in Ghana must be commended, it must be noted that to truly be effective as a soft law initiative the GHEITI principles must be complied with by companies and the government. Indeed, the GHEITI validation report noted earlier, found there has been strong company engagement in EITI as of the time the report was made. The report noted, mining companies had initially been publishing payments prior to EITI and continued after EITI, along with participation in numerous EITI sensitization workshops.<sup>444</sup>

Furthermore, GHEITI's first three audit reports recorded further success in terms of providing information which is key to the initiative. The reports revealed that over the period of the reports mining companies generally failed to comply with statutory requirements to pay capital gains tax and ground rent because of lack of information on the part of the regulatory agencies.<sup>445</sup> This revelation was necessary in order to plug such leakages, which is the aim of EITI, thereby illustrating success in Ghana. Indeed, the Civil society meeting that reviewed Ghana's first EITI report concluded that the report met the minimum requirement of EITI; which is to improve development outcomes from payments made to governments by extractive industries, and to significantly hamper the potential for corruption.<sup>446</sup>

The above shows that despite not having an enabling act in the form of regulation to enable EITI in Ghana, GHEITI has been relatively successful and has even gone beyond EITI best practices in some instances, for example, extending the initiative to the sub-national level which is more than others with an enabling act such as Nigeria have done. However, it has been reported that Ghana's commitment to the initiative has not remained constant, stakeholders interviewed in the validation report noted that there was a reduction in the momentum of implementation of the EITI work plan due to the transition in government.<sup>447</sup> Indeed, this is a view supported by Manteaw who also noted that after the regime change of 2008, there

---

<sup>443</sup> GEITI, 'Validation of the Extractive Industries Transparency Initiative in Ghana', Final Report, 9<sup>th</sup> February 2010, available at < [https://eiti.org/files/Ghana\\_Validation\\_Reports\\_ENG\\_0.pdf](https://eiti.org/files/Ghana_Validation_Reports_ENG_0.pdf) > accessed 18<sup>th</sup> October 2015

<sup>444</sup> GEITI, 'Validation of the Extractive Industries Transparency Initiative in Ghana', Final Report, 9<sup>th</sup> February 2010, available at < [https://eiti.org/files/Ghana\\_Validation\\_Reports\\_ENG\\_0.pdf](https://eiti.org/files/Ghana_Validation_Reports_ENG_0.pdf) > accessed 18<sup>th</sup> October 2015

<sup>445</sup> Steve Manteaw, 'Ghana's EITI: Lessons From Mining and Policy Implications for Oil' (2010), The Ghana Policy Journal, 96 – 109, 100

<sup>446</sup> *ibid* 102

<sup>447</sup> GEITI, 'Validation of the Extractive Industries Transparency Initiative in Ghana', Final Report, 9<sup>th</sup> February 2010, available at < [https://eiti.org/files/Ghana\\_Validation\\_Reports\\_ENG\\_0.pdf](https://eiti.org/files/Ghana_Validation_Reports_ENG_0.pdf) > accessed 18<sup>th</sup> October 2015

appeared to have been some inactivity in EITI implementation.<sup>448</sup> One might argue that despite the headway made during the initial launch of the initiative and Ghana's acceptance as one of the first EITI compliant country due to the government's commitment to the initiative, it always risked losing its initial impetus due to its lack of legislative backing as illustrated by the lack of activity in implementing the EITI after the change of government in 2008.

This has led to arguments that the voluntary nature of the GHEITI initiative threatens its future and that Ghana must follow the example of countries such as Liberia and Nigeria that have passed EITI Acts.<sup>449</sup> Such Acts make it mandatory for governments and extractive companies to disclose receipts and payments respectively. Van Gyampo also adds that efforts must be made to tighten the initiative so it can curb opacity as transparency in the management of resources from gold mining are still lacking.<sup>450</sup> One might argue legislative backing for the initiative may go some way in tightening the initiative and plugging more leakages in Ghanaian resource accounting. Indeed, Adimazoya further adds that despite the efforts made by the Ghanaian government at improving governance in the minerals sector, Ghana's lack of transparency and accountability-enhancing laws deny ordinary citizens the opportunity to request information and call managers of mineral resources to account.<sup>451</sup> He argues that this creates a legal vacuum, which is a significant drawback in Ghana's commitment to good governance in the extractive sector. This has led to calls that Ghana should follow Nigeria's path of providing a legal backing to the EITI.<sup>452</sup> Indeed in the civil society meeting that reviewed the first EITI report in Ghana, concerns were raised that the aggregator did not have access to the contract documents which provide the basis of what companies pay, for instance tax exemptions, and other incentives.<sup>453</sup> They argued the difficulties faced by the aggregator in particular access to information highlight the need for the legislation of Ghana's EITI.<sup>454</sup> Indeed, access to contracts can be enhanced by such legislation, for instance, Liberia's 2009 EITI legislation requires not just the publication of revenue information but also the public

---

<sup>448</sup> Steve Manteaw, 'Ghana's EITI: Lessons From Mining and Policy Implications for Oil' (2010), The Ghana Policy Journal, 96 – 109, 103

<sup>449</sup> Ransford Edward Van Gyampo, 'Making Ghana's Oil Money Count: Lessons From Gold Mining' (2014), Vol 2, No.1 International Journal of Development and Economic Sustainability, 25-38, 34

<sup>450</sup> *ibid*

<sup>451</sup> Theodore Nsoe Adimazoya, 'Staying Ahead of the Curve: Meeting Ghana's Commitment to Good Governance in the Mining Sector' (2013) 31 J. Energy & Nat. Resources L.

<sup>452</sup> Extractive Industries Transparency Initiative, 'Advancing The EITI In The Mining Sector', (2009) available at <https://eiti.org/files/MINING%20Compressed.pdf> accessed 20<sup>th</sup> October 2015

<sup>453</sup> Steve Manteaw, 'Ghana's EITI: Lessons From Mining and Policy Implications for Oil' (2010), The Ghana Policy Journal, 96 – 109, 103

<sup>454</sup> *ibid*

disclosure of all contracts.<sup>455</sup> These calls for legislative backing of GHETI has been noted by the Ghanaian government and there is currently a proposed EITI bill which has the strong support of the Ministry of finance and Economic Planning.<sup>456</sup> Therefore it would appear the availability of an enabling environment in the form of legislation is important for the effective implementation of this soft law initiative as will be discussed further below.

#### **3.4.4 The EITI and an Enabling Environment: The Effects**

The analysis in sections 3.4.2 and 3.4.3 gives us the opportunity to conclude on whether the availability of an enabling environment in the form of legislation makes compliance with soft law initiatives more likely. This opportunity is provided based on the fact that whereas Nigeria has an enabling act for NEITI Ghana does not have one for GHEITI, allowing us to see which initiative is more successful, and whether this is due to the availability or unavailability of an enabling environment in the form of legislation. From the analysis of the aforementioned sections three conclusions are made by this research.

Firstly, the availability of an enabling environment in the form of legislation is not always necessary for the success of a soft law initiative. Government commitment and good will plays a more significant role. This would explain why despite the fact Ghana did not have legislative backing it recorded some significant success within the initiative. Another point to note is that Ghana generally has an enabling environment for the initiative as even prior to EITI implementation, mining companies voluntarily disclosed information on ground rent, tax and royalty payments to the media. This is due to Ghana's embrace of liberal norms of governance disclosure, which has made Ghana the darling of donors and provided the space for transparency in resource governance to flourish.<sup>457</sup>

Secondly, the availability of an enabling environment in the form of legislation cannot on its own make compliance with soft law initiatives more likely. The section on Nigeria highlighted the point that availability of legislation has never been the main issue in SSA,

---

<sup>455</sup> Theodore Nsoe Adimazoya, 'Staying Ahead of the Curve: Meeting Ghana's Commitment to Good Governance in the Mining Sector' (2013) 31 J. Energy & Nat. Resources L.

<sup>456</sup> James Van Alstine, 'Transparency in resource governance: the pitfalls and potentials of "new oil" in Sub-Saharan Africa' (2014) 14 (1) Global Environmental Politics, 20-39, 31

<sup>457</sup> James Van Alstine, 'Transparency in resource governance: the pitfalls and potentials of "new oil" in Sub-Saharan Africa' (2014) 14 (1) Global Environmental Politics, 20-39, 27

rather the implementation of laws has been the issue. Therefore, despite having an enabling act the NEITI has faced numerous bottlenecks as noted above, especially with vested interest particularly within the Nigerian political elite. This may lead one to conclude that despite legislative backing a soft law initiative may only go as far as a country may push it. Indeed, this is a point supported by Shaxson who argued that the EITI saw significant success in Nigeria between 2003 and 2006 during President Obasanjo's reformist drive, where share political will and drive saw the initiative reach heights that have never been seen in the world, however, in reality since then the initiative has had a significantly lower profile.<sup>458</sup>

Thirdly, despite legislative backing not being an absolute necessity for a soft law initiative to record success, having an enabling environment in the form of legislation gives such an initiative more teeth, thus making it more likely to be successful. For instance, as noted above in Ghana because of a lack of legal backing the aggregator did not have access to contracts which provide the basis to what companies pay, for instance tax exemptions and other incentives. In such a case all the aggregator would be shown is what the companies paid the government, as opposed to the all-important how the sum paid was computed by the companies. On the other hand, in Nigeria where there is legal backing the president of Goldwyn International Strategies LLC (GIS) of Washington, DC was reported as saying:

The NEITI audits have set the gold standard for audits under EITI principles... The audits looked deeper into the conduct of government and industry practices in Nigeria than any country has ever attempted.<sup>459</sup>

Clearly Nigeria would not have been able to reach this gold standard without legal backing, therefore legislative backing for soft law initiatives are clearly necessary to make soft law initiatives more effective. Furthermore, an enabling act is critical to the longevity of soft law initiatives such as EITI, because soft law initiatives may lose momentum depending on the government in power. Therefore to secure the future of an initiative it is essential it has an enabling Act. On the other hand, this research argues that Government or political will plays a more important role in enabling and thus ensuring compliance with soft law initiatives. This is because both Ghana and Nigeria have shown that Government will and drive affected the

---

<sup>458</sup> Nicholas Shaxson, 'Nigeria's Extractive Industries Transparency Initiative: Just a Glorious Audit?' (2009) Chatham House, available at: [https://eiti.org/sites/default/files/documents/NEITI%20Chatham%20house\\_0.pdf](https://eiti.org/sites/default/files/documents/NEITI%20Chatham%20house_0.pdf) accessed 18<sup>th</sup> September 2018

<sup>459</sup> *ibid*

continued success and earlier successes of the EITI initiative. Therefore while mandating laws may strengthen and even ensure the longevity of an initiative, on its own, and especially without Government will and enforcement it will be difficult for it to ensure effective compliance with soft law initiatives such as EITI.

### 3.5 The Equator Principles

#### 3.5.1 Overview

The equator principles (EPs) were developed as a voluntary code in 2003 by private banks, with the support of the International Finance Corporation and the World Bank.<sup>460</sup> They are a set of guidelines (Ten Principles<sup>461</sup>) which financial institutions can sign up to voluntarily, but however prescribe certain minimum standards which must be followed with regards to consideration of environmental and social issues in their project financing, project finance advisory services, project related corporate loans, and bridge loans.<sup>462</sup> The EPs recognize the indirect impact of financial institutions on the society and environment through their lending services and therefore seek to regulate the activities of their clients with regards to environmental and social issues. Before the EPs some banks did include environmental covenants in their loan documents which require that for example, a project would adhere to World Bank environmental guidelines.<sup>463</sup> However, the banks failed to indicate which World Bank guidelines the client would adhere to, they did not monitor compliance with such guidelines, and most importantly took no action if a project was non-compliant.<sup>464</sup> Such covenants were therefore largely unenforceable and rather toothless. This weak stance on regulating the negative environmental activities of their clients was based on the fact that

---

<sup>460</sup> Richard Macve and Xiaoli Chen, 'The "equator principles": a success for voluntary codes?' (2010), Vol. 23 (7) Accounting, Auditing & Accountability Journal, 890-919, 890

<sup>461</sup> Principle 1: Review and Categorisation, Principle 2: Environmental and Social Assessment, Principle 3: Applicable Environmental and Social Standards, Principle 4: Environmental and Social Management System and Equator Principles Action Plan, Principle 5: Stakeholder Engagement, Principle 6: Grievance Mechanism, Principle 7: Independent Review, Principle 8: Covenants, Principle 9: Independent Monitoring and Reporting, Principle 10: Reporting and Transparency

<sup>462</sup> The Equator Principles, 'A Financial industry benchmark for determining, assessing and managing environmental and social risk in projects' (2013), available at <http://www.equator-principles.com/index.php/ep3> accessed 12th February 2016

<sup>463</sup> Suellen Lazarus, 'The Equator Principles at Ten Years' (2014) Vol 5 (3) Transnational Legal Theory, 417-441, 418

<sup>464</sup> *ibid*



before the EPs banks took the view that the client had the sole responsibility for environmental issues.<sup>465</sup> This clearly could not stand as the banks were the main sources for the capital required for major projects which have a negative impact on the environment, and were therefore having a negative impact on the environment albeit indirectly. They therefore had to change their earlier attitude on environmental responsibility, which the EPs aim to achieve and have achieved to some extent by bringing forward a more stringent approach as will be discussed below.

As noted earlier there have been numerous initiatives with respect to corporate environmental and social performance governance, however the EPs have been among the most successful in becoming ever more widely adopted and as will be discussed in the next two chapters, they are now beginning to extend beyond the US and Western Europe.<sup>466</sup> The EPs started as a set of environmental guidelines adopted by ten private financial organizations on June, 2003, however, today 82 financial institutions in 36 countries have adopted the EPs.<sup>467</sup> Put together the Equator Principles Financial Institutions (EPFIs) control over 80% of all project lending worldwide.<sup>468</sup> Therefore, by putting the EPs into practice banks will have a direct impact on the practices of transnational companies with regards to social and environmental issues, as if companies fail to follow a bank's EPs guidelines on lending they risk losing funding for their projects. Funding for projects is especially important for capital intensive projects such as mining, therefore where banks strictly implement the EPs mining companies are sure to comply as they risk losing capital, which is bad for business. Therefore the EPs are a welcome development in the mining industry. Additionally, one may argue that one of the most distinguishing feature of the EPs as a voluntary code is that it threatens the loss of what is most important to transnational companies; capital. Therefore transnational companies are more likely to be regulated by it than any other voluntary code, as long as it is implemented by the banks.

---

<sup>465</sup> Suellen Lazarus, 'The Equator Principles at Ten Years' (2014) Vol 5 (3) Transnational Legal Theory, 417-441, 418

<sup>466</sup> Richard Macve and Xiaoli Chen, 'The "equator principles": a success for voluntary codes?' (2010), Vol. 23 (7) Accounting, Auditing & Accountability Journal, 890-919, 890

<sup>467</sup>The Equator Principles, < <http://www.equator-principles.com/index.php/members-and-reporting> > accessed 12th February 2016

<sup>468</sup> Andrew Hardenbrook, 'The Equator Principles: The Private Financial Sector's Attempt at Environmental Responsibility' (2007) 40 Vanderbilt Journal of Transnational Law, 197-232, 199

Implementation of the EPs by banks is critical to its success as a voluntary code, this is because the EPs puts a lot of responsibility in the hands of its member banks. In sum, the EPs require banks to pledge to undertake a systematic environmental and social assessment framework to project loans with a total cost of \$10 million and above. Such an assessment framework would subsequently identify investments as posing either high (Category A), medium (Category B), or low (Category C) environmental and social risk, on the basis of an Environmental and Social Impact Assessment usually produced by external consultants.<sup>469</sup> Based on the Environmental and Social Impact Assessment, the borrower or a third party expert for all high (Category A) and medium (Category B) environmental and social risk projects must develop an Environmental and Social Management Plan (ESMP).<sup>470</sup> The ESMP is to address issues raised in the assessment process, i.e. measures to minimize, mitigate, and offset adverse impacts.<sup>471</sup> Additionally where a borrower's ESMP do not adequately meet EPs standards to the bank's satisfaction, the borrower and the bank will agree to an Equator Principles Action Plan (AP). This is meant to outline gaps and commitments to meet the bank's requirements in line with EPs standards.<sup>472</sup> Under Principle 5, the EPs also requires a client or expert consultant for all Category A and Category B projects to demonstrate effective consultation with affected communities and more importantly the latest version of the EPs (EPIII) now requires projects with adverse impacts on indigenous people to obtain their 'Free, Prior and Informed Consent (FPIC)'<sup>473</sup> The above requirements are similar to the environmental and social provisions under the Nigerian Minerals and Mining Act 2007 which will be discussed in the next chapter. Therefore with laws not being strongly enforced in developing countries such as Nigeria one might argue the EPs requirements present a better chance of compliance especially taking Principle 8 into account.

Principle 8 which is titled Covenants is a major strength of the EPs as it requires the incorporation of covenants linked to compliance. It states that 'for all projects, the client will covenant in the financing documentation to comply with all relevant host country

---

<sup>469</sup> John M. Conley, and Cynthia A. Williams, 'Global Banks as Global Sustainability Regulators?: The Equator Principles' (2011) Vol. 33, No. 4 Law & Policy, 543-574, 544

<sup>470</sup> Principle 4: Environmental and Social Management System and Equator Principles Action Plan, The Equator Principles, 'A Financial industry benchmark for determining, assessing and managing environmental and social risk in projects' (2013), available at <http://www.equator-principles.com/index.php/ep3> accessed 12th February 2016

<sup>471</sup> *ibid*

<sup>472</sup> *ibid*

<sup>473</sup> Principle 5: Stakeholder Engagement, The Equator Principles, 'A Financial industry benchmark for determining, assessing and managing environmental and social risk in projects' (2013), available at <http://www.equator-principles.com/index.php/ep3> accessed 12th February 2016

environmental and social laws, regulations and permits in all material respects.<sup>474</sup> Therefore under this principle even where a country is weak on enforcement of its laws, such as in the Nigerian case, the client must adhere to the laws, as contained in their finance documentation. This is therefore a positive way of enforcing local laws. Furthermore, for all Category A and B projects the client will also covenant the financial documentation to comply with the ESMPs and EPs Action Plan mentioned above, during the construction and operation of the project in all material respects.<sup>475</sup> The client must also covenant to provide periodic reports documenting compliance with ESMPs, Action Plans, and local laws. Where there are failures in complying with covenants, the banks are required to work with the client on remedial actions to bring the project back into compliance. Where the client fails to re-establish compliance within an agreed period, the bank may exercise remedies as it deems appropriate.<sup>476</sup>

Other important requirements under the EPs include; the provision of a grievance mechanism by clients (Principle 6), the requirement for independent monitoring and reporting (Principle 9), and reporting and transparency (Principle 10). The above clearly demonstrate the EPs on paper to be a strong set of soft law code which if implemented effectively should have a positive impact on environmental and social issues within the mining industry especially in developing countries where social and environmental regulation has been weak as noted earlier. Indeed, the EP Association teamed up with the International Council on Mining and Minerals (ICMM) and IPIECA (the global oil and gas industry association for environmental and social issues) in order to launch the Cross-Sector Biodiversity Initiative to promote good practice in Implementing IFC Performance Standard 6 on biodiversity conservation.<sup>477</sup> This therefore supports this research's argument that the EPs can play an important role in regulating the negative impact of mining in Africa, thus making it necessary for this thesis to analyze them. It is now essential for this thesis to analyze whether the Equator Principles are currently effective in terms of banks implementing them thereby ensuring they are complied with by their clients.

---

<sup>474</sup> Principle 8: Covenants, The Equator Principles, 'A Financial industry benchmark for determining, assessing and managing environmental and social risk in projects' (2013), available at <http://www.equator-principles.com/index.php/ep3> accessed 12th February 2016

<sup>475</sup> *ibid*

<sup>476</sup> *ibid*

<sup>477</sup> Suellen Lazarus, 'The Equator Principles at Ten Years' (2014) Vol 5 (3) *Transnational Legal Theory*, 417-441, 431

### 3.5.2 How effective are the Equator Principles on their own as a Soft Law Initiative?

As noted above the EPs is considered as one of the most successful soft law initiative, and taking into account it affect's project finance it has the potential if implemented stringently to be a soft law that can truly regulate the negative impacts of mining. This is because companies are unlikely to risk losing funds due to non-compliance with financing covenants in accordance with the EPs, therefore an enabling environment in the form of hard law or other facets discussed earlier may not actually be required for the EPs. Indeed, authors such as Hardenbrook argue that the EPs often go beyond hard law environmental regulations found in the developing world, and going by the discussion on the EPs above in comparison to the Nigerian regulation that will be discussed in chapter four it is hard to disagree with him.<sup>478</sup> Indeed, Hardenbrook is supported by Conley and Williams who's interview subjects were in general agreement with an international banker who described the EPs as appropriate substitutes for 'hard' regulation in countries where 'regulations are not robust,' either on paper or in practice.<sup>479</sup> Interestingly, Nigeria was cited by the international banker as an example of a country which has 'EPA-style regulations but does not enforce them.'<sup>480</sup> The EP are argued to be positive substitutes for hard law regulations in the developing world because since their creation they have had some positive impact on environmental and social regulation. For example, in their research Macve and Chen found a KPMG environmental consultant to be of the view that the EPs as a voluntary initiative is remarkably successful: it assists banks in understanding and managing non-financial risks, which may affect financial results.<sup>481</sup> More importantly, the term impact or effect in this section applies to whether the EPs actually affect's the behaviour of financial institutions in managing their risk and whether the EPs changes their attitudes towards the environment, thereby signalling their compliance with the initiative. It also applies to whether the EPs are having a positive impact directly on the environment in this section.

With respect to the positive impact involving changes in financial behaviour, it is reported that the EPs have improved the process of evaluating or financing projects and have placed

---

<sup>478</sup> Andrew Hardenbrook, 'The Equator Principles: The Private Financial Sector's Attempt at Environmental Responsibility' (2007) 40 *Vanderbilt Journal of Transnational Law*, 197-232, 204

<sup>479</sup> John M. Conley, and Cynthia A. Williams, 'Global Banks as Global Sustainability Regulators?: The Equator Principles' (2011) Vol. 33, No. 4 *Law & Policy*, 543-574, 565

<sup>480</sup> *ibid*

<sup>481</sup> Richard Macve and Xiaoli Chen, 'The "equator principles": a success for voluntary codes?' (2010), Vol. 23 (7) *Accounting, Auditing & Accountability Journal*, 890-919, 897

peer pressure on other banks to compete on the EPs level.<sup>482</sup> Macve and Chen found that in Barclays, EPs are fully integrated into frontline project screening, this thus prevents the most obvious environmentally and socially unacceptable projects from even getting through the banks door.<sup>483</sup> Similarly, the results of the interview-based study of Conley and Williams demonstrate that the EPs have had a significant impact on financial behaviour. For instance, a European lawyer called the work of the EPs ‘quite remarkable’ and ‘amazing,’ with social and environmental issues moving ‘from the back room into board rooms.’<sup>484</sup> Additionally, the stakeholder engagement and information provision requirements of the EPs have also helped changed attitudes towards environmental issues. For instance, an executive with a European Bank noted that she was ‘very, very pleasantly surprised’ by local reactions, that ‘we haven’t seen local opposition,’ she noted such problems, ‘usually arose from lack of information.’<sup>485</sup> With information now readily available to all stakeholders in projects their bank is involved in as required by the EPs, naturally there will be less resistance from locals as they know what is going on in their environment, the potential effects of projects, and the steps being taken by companies to mitigate damage, and improve their living standards. Therefore the EPs are clearly having an impact in changing attitudes towards major projects and banks are seemingly complying with them.

Furthermore, an argument which this research supports is that the apparent compliance with the Equator Principles by banks as mentioned above may be due to the fact that financial institutions can maintain an environmentally conscious image, which may prevent them from losing investment from socially responsible investment groups. Indeed, with approximately \$2.3 trillion invested in investment products that utilized socially responsible investing in 2005, the EPs are having a major impact on how banks do business and encouraging compliance.<sup>486</sup> The Sakhalin II case presents this research with the opportunity to test how far the EPs have gone in impacting EPFIs with regards to projects that pose environmental and social risks. The Sakhalin II project is led by Royal Dutch Shell, and involves the

---

<sup>482</sup> Richard Macve and Xiaoli Chen, ‘The “equator principles”: a success for voluntary codes?’ (2010), Vol. 23 (7) Accounting, Auditing & Accountability Journal, 890-919, 898

<sup>483</sup> *ibid*

<sup>484</sup> John M. Conley, and Cynthia A. Williams, ‘Global Banks as Global Sustainability Regulators?: The Equator Principles’ (2011) Vol. 33, No. 4 Law & Policy, 543-574, 562

<sup>485</sup> *ibid*

<sup>486</sup> Andrew Hardenbrook, ‘The Equator Principles: The Private Financial Sector’s Attempt at Environmental Responsibility’ (2007) 40 Vanderbilt Journal of Transnational Law, 197-232, 214

development of two offshore fields: Piltun-Astokhskoye and Lunskoye oil and gas fields off the north-eastern coast of Sakhalin.<sup>487</sup> The project was due to be funded by EPFIs, therefore Shell produced an Environmental Impact Assessment, however such assessment was roundly criticized by NGOs for failure to contain specific details regarding endangered species, mitigating measures and a lack of a published EMP amongst other concerns.<sup>488</sup> Demonstrating the impact of the EPs; controversy over the project's environmental impact and assessment led several EPFIs to decline financing the project thus demonstrating compliance with the EPs.<sup>489</sup> However, some EPFIs did participate in the funding of the project despite environmental concerns, which include; Credit Suisse, BNP Paribas, and Standard Chattered.<sup>490</sup> This would in contrast to the earlier banks suggest that the EPs have not had a significant enough impact on some EPFIs in terms of compliance. However, one might argue that as discussed above the EPs do not actually automatically disqualify banking clients from finance on the basis of a failed preliminary EA. On the contrary, what they require is that the banks bring the project to the requisite standard of the EPs. Therefore the EPFIs that financed the Sakhalin II project may argue they brought the project into conformity with its environmental and social standards. Indeed, the World Wide Fund (WWF) reported that the above mentioned EPFIs ruled out the development of a third oil rig in their lender's assessment process, because it would increase the project's environmental impact.<sup>491</sup> This therefore further supports the argument that the EPs have in fact impacted the behavioural attitudes of financial institutions with regards environmental and social management in major projects thus highlighting a high level of compliance. However, with respect to direct impact on the environment, as with other soft law initiatives this remains a tricky area within the literature. It is generally accepted that without more detailed project level information it would be difficult to measure the direct effect of the EPs on the environment. Indeed, Conley and Williams note:

---

<sup>487</sup>Sakhalin Energy,< [http://www.sakhalinenergy.com/en/company/company\\_assets/index.wbp](http://www.sakhalinenergy.com/en/company/company_assets/index.wbp)> accessed on 20th March 2016

<sup>488</sup> Andrew Hardenbrook, 'The Equator Principles: The Private Financial Sector's Attempt at Environmental Responsibility' (2007) 40 Vanderbilt Journal of Transnational Law, 197-232, 217

<sup>489</sup> *ibid*

<sup>490</sup> See WWF, 'Whale talks allow banks to voice concerns over Sakhalin Energy Expansion' 12 February 2012, available at <[http://www.wwf.org.uk/about\\_wwf/press\\_centre/?unewsid=5682](http://www.wwf.org.uk/about_wwf/press_centre/?unewsid=5682)> accessed 20<sup>th</sup> March 2016

<sup>491</sup> *ibid*

We are at the start of a broader investigation ... In particular we emphasize that we have not evaluated any EP-funded projects on the ground, nor have we found other in-depth, academic studies that do so, a gap recognized by others as well.<sup>492</sup>

Therefore, while it is clear that the EPs have had some impact in terms of compliance which has resulted in a change in attitude by EP financial institutions with respect to environmental and social management of the projects they participate in, it is still difficult to establish whether they are having a direct impact on the environment. This research believes this may be where the provision of an enabling environment by States may be very useful. For instance, by providing better local governance of EPs financed projects, which will be discussed further, in chapters four and five. The lack of evidence demonstrating the direct environmental impact of the EPs is not the only issue questioning the effect of the EPs as a voluntary initiative, a few other issues have been highlighted as will be discussed below.

A major issue that threatens the acceptance of the EPs as a soft law initiative capable of regulating the negative impact of mining activities on its own by this research is the non-compliance of signatories to the principles. For instance, a study by the NGO group, BankTrack, criticized signatory financial institutions for failure to comply with the EPs and the use of EPs for purposes contrary to the spirit of the principles, i.e. free riding.<sup>493</sup> Specifically, BankTrack's survey of the compliance of EP banks to the reporting requirement also further established partial compliance of this requirement by EP banks.<sup>494</sup> Indeed, the head of a sustainable investment organization was noted as characterizing the EPs as 'total B.S.' for him the EPs fail because of their 'compliance approach.'<sup>495</sup> He was referring to the fact that the EPs focus more on following a process not meeting a substantive standard, and thus monitoring compliance.<sup>496</sup> This is in line with the general view of CSR held by Shever in her research on the efforts of Royal Dutch Shell to practice CSR in Argentina. Here she holds

---

<sup>492</sup> John M. Conley, and Cynthia A. Williams, 'Global Banks as Global Sustainability Regulators?: The Equator Principles' (2011) Vol. 33, No. 4 Law & Policy, 543-574, 547 See also Richard Macve and Xiaoli Chen, 'The "equator principles": a success for voluntary codes?' (2010), Vol. 23 (7) Accounting, Auditing & Accountability Journal, 890-919

<sup>493</sup> BankTrack, 'Principles, Profits, or Just PR?: Triple P Investment Under the Equator Principles An Anniversary Assessment' (June 2004) available at: <<https://www.scribd.com/document/34117090/Priinciples-Profits-or-Just-Big-Oil-PR>> accessed 19<sup>th</sup> September 2018

<sup>494</sup> BankTrack, 'The Silence of the Banks: An Assessment of equator principles reporting', (2007) available at: <[https://www.banktrack.org/download/the\\_silence\\_of\\_the\\_banks\\_1/0\\_0\\_071203\\_silence\\_of\\_the\\_banks.pdf](https://www.banktrack.org/download/the_silence_of_the_banks_1/0_0_071203_silence_of_the_banks.pdf)> accessed 19<sup>th</sup> September 2018

<sup>495</sup> John M. Conley, and Cynthia A. Williams, 'Global Banks as Global Sustainability Regulators?: The Equator Principles' (2011) Vol. 33, No. 4 Law & Policy, 543-574, 563

<sup>496</sup> *ibid*

that corporate CSR efforts are nothing more than a pretense that ‘shifts the terrain of struggle away from the formal judicial domain, where challenges... have met limited successes, and toward the more pliable field of public opinion, where questions of good will, intentions, and moral character are debated.’<sup>497</sup> Therefore to critics such as Shever voluntary codes such as the EPs may never be a step in the right direction, especially where the option of judicial remedy continues to become diminished by such codes, where companies choose when and where to comply with.

Moreover, a further criticism of the EPs is that although the latest principles have tried to increase transparency, particularly through principles 9 and 10 which as noted above focus on reporting and transparency, it is argued there is still little transparency. Such an argument is supported by the fact that because the EPs govern private project finance, financial institution hide behind confidentiality clauses in the non-disclosure of information regarding projects.<sup>498</sup> Indeed, according to an interviewee at Barclays bank although the publication of a client’s EIA is allowed, other information such as the direct economic benefit to the client in comparison to how much they would incur mitigating environmental damage are often subject to customer confidentiality.<sup>499</sup> Such non-disclosure limits the transparency effects of the EPs which is necessary for monitoring and ensuring compliance with the principles and maintaining the spirit of the initiative.

Furthermore, it has been argued that the EPs reflects primarily the interpretation of banks as to what are the needs of stakeholders as opposed to a multi-stakeholder initiative such as the EITI which involves all stakeholders as discussed above.<sup>500</sup> Therefore, one might argue that a code created by banks is at a great risk of being self-serving.<sup>501</sup> Indeed, within the banking industry there has been claims of banks joining the EPs and using their membership for

---

<sup>497</sup> Elana Shever, ‘Engendering the Company: Corporate Personhood and the ‘Face’ of an Oil Company in Metropolitan Buenos Aires’ (2010) 33 (1) *Political and Legal Anthropology Review*, 26-46, 41

<sup>498</sup> Andrew Hardenbrook, ‘The Equator Principles: The Private Financial Sector’s Attempt at Environmental Responsibility’ (2007) 40 *Vanderbilt Journal of Transnational Law*, 197-232, 209, see also Ryan Christopher Hansen, ‘The impact of the equator principles on lender liability: risks of responsible lending’, (2006) available at < [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=948228](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=948228)> accessed 10<sup>th</sup> March 2016, John M. Conley, and Cynthia A. Williams, ‘Global Banks as Global Sustainability Regulators?: The Equator Principles’ (2011) Vol. 33, No. 4 *Law & Policy*, 543-574, 564

<sup>499</sup> Richard Macve and Xiaoli Chen, ‘The “equator principles”: a success for voluntary codes?’ (2010), Vol. 23 (7) *Accounting, Auditing & Accountability Journal*, 890-919, 907

<sup>500</sup> Jane Andrew, ‘The equator principles, project finance and the challenge of social and environmental responsibility’, (2007) vol 1(1) *Social and Environmental Accounting*, available at <http://ro.uow.edu.au/commpapers/365/> accessed 12<sup>th</sup> March 2016

<sup>501</sup> Richard Macve and Xiaoli Chen, ‘The “equator principles”: a success for voluntary codes?’ (2010), Vol. 23 (7) *Accounting, Auditing & Accountability Journal*, 890-919, 910



reputational gain, without complying with the principles (free-riding). For example, executives within the banking industry noted that some banks were claiming credit for joining the EPs and then either doing no project finance or making lukewarm compliance efforts.<sup>502</sup> According to an executive in a signatory bank this is due to there being ‘no sanctions against non-performers’.<sup>503</sup> Indeed, this research finds the lack of sanction for non-performance a major setback to the strength of the EPs as unlike for instance, the EITI where non-performance may result in suspension or the IFC Performance Standards which may be enforced through the Compliance Advisor Ombudsman, no such mechanism is available for EPs. This therefore presents the opportunity for free riding as noted, however, it has been argued that banks who fail to comply with their commitment to the EPs can be held liable via the judicial system.<sup>504</sup> For instance, in the United States, the Securities and Exchange Commission (SEC) regulates the disclosure of public traded U.S. corporations in order to prevent them from making false statements to investors.<sup>505</sup> Therefore, under US rules a plaintiff may claim against a corporation which made a materially false or misleading statement, in our case that they would comply with the EPs. Under US rules the courts consistently require that the statement be about information that is ‘important to a reasonable investor in making his or her investment decision.’<sup>506</sup> More importantly, some courts have found this requirement fulfilled by misstatements of environmental objectives.<sup>507</sup> Now although this would prove difficult in emerging countries, the above demonstrates companies can be held accountable for commitments. However, where this proves unsuccessful as Shever noted earlier, non-compliance of EPs will be dealt with in the ‘pliable field of public opinion’<sup>508</sup> which can also be just as damaging to the revenues of corporations where investors withdraw capital due to reputational damage.

In order to promote the improved EP implementation and compliance Lazarus argues that the EP Association should require that an independent audit be conducted at the time of adoption of the EPs by the banks to verify EP readiness and capacity.<sup>509</sup> This is an argument this thesis

---

<sup>502</sup> John M. Conley, and Cynthia A. Williams, ‘Global Banks as Global Sustainability Regulators?: The Equator Principles’ (2011) Vol. 33, No. 4 Law & Policy, 543-574, 563

<sup>503</sup> *ibid*

<sup>504</sup> Andrew Hardenbrook, ‘The Equator Principles: The Private Financial Sector’s Attempt at Environmental Responsibility’ (2007) 40 Vanderbilt Journal of Transnational Law, 197-232, 220

<sup>505</sup> *ibid*

<sup>506</sup> *ibid*

<sup>507</sup> *ibid*

<sup>508</sup> Elana Shever, ‘Engendering the Company: Corporate Personhood and the ‘Face’ of an Oil Company in Metropolitan Buenos Aires’ (2010) 33 (1) Political and Legal Anthropology Review, 26-46, 41

<sup>509</sup> Suellen Lazarus, ‘The Equator Principles at Ten Years’ (2014) Vol 5 (3) Transnational Legal Theory, 417-441, 440

supports as currently the EP Association's approach of allowing banks to adopt the EPs according to their preferences has created a broad disparity in the way members implement EP requirements.<sup>510</sup> While some banks are stringent in their implementation of the principles such as Access bank of Nigeria others such as Fidelity bank again of Nigeria have been lax in the implementation of the EPs as demonstrated in section 4.4.2 of the next chapter. Therefore an audit to assess capacity would indeed boost compliance of members and ensure a more uniform implementation of the EPs by EPFIs. However, the EP Association currently does not have the capacity to adopt such an approach given that it does not even possess a body of full time professional staff to run the association, and is currently run by a 14 member steering committee with representatives of financial institutions, hence why it does not monitor compliance with EPs itself.<sup>511</sup>

This research argues that a more pragmatic way of making the EPs more effective for now i.e. by ensuring the compliance of signatory banks, thereby strengthening the initiative, is ensuring they are provided with an enabling environment, particularly in the form of civil society. This is because while it is clear the Equator Principles is indeed a strong soft law initiative that may potentially regulate the negative impact of mining companies by ensuring banks only provide finance to companies that meet EPs standards, its success depends on banks complying with the initiative, without their compliance the initiative is toothless. The above discussion has demonstrated that while some banks do comply with the EPs some signatories have been non-compliant thus threatening its effect as a regulatory tool. Indeed, despite claims that as a form of sanction, where strict compliance of the EPs is met by banks, companies with poor environmental records risk losing finance Coumans noted "I have not been able to identify an example in which a mining company has lost funding from the IFC or an Equator Principles bank as a result of community complain."<sup>512</sup> This therefore highlights a lack of compliance with EPs standards by EPFIs. With very few mechanisms available to the EPs in terms of monitoring and ensuring compliance, apart from the reporting requirements by EPFIs which are a form of self-assessment an enabling environment in the form of civil society would significantly assist in monitoring and ensuring compliance, thereby making the initiative more successful. As will be demonstrated in the section below,

---

<sup>510</sup> Suellen Lazarus, 'The Equator Principles at Ten Years' (2014) Vol 5 (3) Transnational Legal Theory, 417-441, 440

<sup>511</sup> *ibid* 430

<sup>512</sup> Catherine Coumans, 'Alternative Accountability Mechanisms and Mining: The Problems of Effective Impunity, Human Rights, and Agency' Canadian Journal of Development Studies, (2011) 30:1-2, 27-48 36

civil society organizations have actually led to the withdrawal of finance in mining projects, thus demonstrating their enabling capacity.

### **3.5.3 Ensuring compliance with the Equator Principles through the provision of an Enabled Civil Society**

Chapter two revealed that an enabled civil society is considered necessary in the provision of an enabling environment for soft law initiatives. This is because together with soft law civil society are seen as regulators themselves and have been key in the establishment and enforcement of some initiatives such as the Kimberly Process mentioned in chapter two. This research is of the view that an enabled civil society will more likely to enhance the effect of the Equator Principles and will demonstrate this by showing how civil society activities have turned into effective regulation and resulted in the withdrawal of finance or support for two key mining projects by Equator Principle Financial Institutions recently.

The first mining project relates to the devastating mining practice of mountain top removal coal mining in the Central Appalachian Mountains in the Eastern United States of America. Mountaintop removal coal mining is a type of strip mining that utilizes explosives to blast as much as 800 to 1000 feet off the tops of mountains in order to access coal deposits.<sup>513</sup> This form of mining has caused great environmental degradation in Appalachia, it destroys hundreds of square miles of vibrant forest, the by-product of the blast known as ‘valley fill’ is dumped into valleys, burying and choking hundreds of miles of streams in rubble thereby negatively affecting thousands of miles of water downstream.<sup>514</sup> Surrounding communities suffer from rock slides, disastrous floods, constant blasting, destroyed property, lost culture and poisoned water supply.<sup>515</sup>

Despite the negative effects of Mountaintop removal in Appalachia some of which are noted above, there are currently no laws in the United States of America (U.S) that ban Mountaintop removal, and although, the ‘valley fill’ dumped into valleys by mining companies is regulated by the Clean Water Act<sup>516</sup> there is still the issue of forest destruction, rock slides, and flooding as a result of mountaintop removal which is allowed. With limited

---

<sup>513</sup> Mark Baller and Leor Joseph Pantilat, ‘Defenders of Appalachia, ‘The Campaign to Eliminate Mountaintop Removal Coal Mining and the Role of Public Justice’ (2007) vol 37 *Envtl. L.*, 629-646, 631

<sup>514</sup> *ibid* 632

<sup>515</sup> *ibid*

<sup>516</sup> Federal Water Pollution Control Act, 33 U.S.C. 1251-1387 (2000)

regulations available civil society in the U.S have been very active in regulating mountaintop removal.

Through some public interest litigation, media coverage, and advocacy, civil organizations such as the Appalachian Center for the Economy and the Environment, Public Justice, Earth Justice, and the Sierra Club provide policy and legislative support, funding to hire experts at trials, and contribute funds to advocacy campaigns.<sup>517</sup> An unrelenting campaign by the aforementioned organizations against mining companies in the Courts, the media and congress has led to landmark decisions such as *Bragg v Robertson* where an injunction was granted against the West Virginia Department of Environmental Protection for abdicating in their responsibilities to

‘withhold approval of permit applications that result in unlawful disturbances to 100-foot buffer zones around streams, destruction of riparian vegetation, violations of the requirement to restore mined and reclaimed areas to their approximate original contours, and improper post-mining land uses.’<sup>518</sup>

More importantly with respect to the Equator Principles, such sustained pressure from civil society led to financial institutions withdrawing finance for projects involving mountaintop removal coal mining. In April 2015 equator principles signatory Barclays Bank announced it has ended its financing of mountain top removal coal mining. This decision was significant taking into account the bank was the world’s biggest financier of mountain top removal mining in 2013, when it loaned mountaintop removal companies \$550 million.<sup>519</sup> Indeed, in 2013 it is reported that Barclays helped raise finance for Alpha Natural Resources, at a time Alpha was the world’s largest mountaintop removal miner.

The above clearly shows how civil society was able to regulate a devastating mining practice which is not currently effectively regulated, eventually leading to the withdrawal of finance by an EPFI bank. This shows that civil society can enable the equator principles, this is because by pressuring banks into withdrawing finance for devastating mining practices they are enabling the Equator Principles which also require their signatories to avoid financing

---

<sup>517</sup> Mark Baller and Leor Joseph Pantilat, ‘Defenders of Appalachia, ‘The Campaign to Eliminate Mountaintop Removal Coal Mining and the Role of Public Justice’ (2007) vol 37 *Envtl. L.*, 629-646, 632

<sup>518</sup> Second Amendment Complaint for Declaratory Judgment and Injunctive relief at 1, *Bragg v. Robertson*, 83 F. Supp. 2d 713 (S.D. W. Va. 1998) (No. 98-0636), 1999 WL 33933888

<sup>519</sup> Karl Mathiesen, ‘Barclays ends financing of controversial mountaintop removal mining’, *The Guardian* (London, 7 April 2015) available at < <https://www.theguardian.com/environment/2015/apr/07/barclays-ends-financing-of-controversial-mountaintop-removal-mining> > accessed 25<sup>th</sup> February 2017

such projects, or pull out finance where they have already began financing, they are in effect therefore ensuring compliance with the EPs. The enabling effects of civil society with respect to the Equator Principles is even more apparent where the second mining project mentioned above is concerned.

The second project is the Rampal Coal Fired Power Plant in Bangladesh, which is a proposed 1320-megawatt (MW) coal-fired power station. The project is a 50:50 joint venture between India's partly state- owned National Thermal Power Corporation (NTPC) and the Bangladesh Power Development Board (BPDP).<sup>520</sup> On January the 2<sup>nd</sup> 2012 a land acquisition order for 1,834 acres of land was issued for the Rampal coal plant and site preparations have commenced.<sup>521</sup> However, the project has generated severe controversy and opposition within Bangladesh.<sup>522</sup> Such controversy is as a result of the threat to the environment and community the project poses, for instance, civil society organizations such as Transparency International Bangladesh (2015) and South Asians for Human Rights (2015) amongst other issues have independently confirmed that people in the project area have been forcibly displaced from their homes and lands without compensation.<sup>523</sup>

As noted above civil society in the form of Transparency International Bangladesh and South Asians for Humans are very much involved in ensuring should this project go ahead it is well regulated. However, with respect to enabling soft law initiatives, in particular the equator principles civil society particularly the NGO Banktrack demonstrate how the equator principles can be further enabled by civil society. In order to ensure EPFIs only finance the Rampal Coal Fired Power Plant project if it met EPs standards, in June 2015 Banktrack independently composed a twenty page detailed report on the Compliance of the Rampal Coal Fired Power Plant with the Equator Principles and the IFC Performance Standards.<sup>524</sup>

---

<sup>520</sup> Banktrack, 'Equator Principles Analysis of The Rampal Coal Fired Power Plant Project, Bangladesh' (2015) available at:

<[https://www.banktrack.org/download/rampal\\_equator\\_principles\\_full\\_analysis\\_pdf/rampal\\_equator\\_principles\\_full\\_analysis.pdf](https://www.banktrack.org/download/rampal_equator_principles_full_analysis_pdf/rampal_equator_principles_full_analysis.pdf)> accessed 19<sup>th</sup> September 2018

<sup>521</sup> *ibid*

<sup>522</sup> *ibid*

<sup>523</sup> Transparency International Bangladesh, 'Rampal and Matarbari Power Projects: Governance Challenges in Environmental Impact Assessment and Land Acquisition' (2015) <[https://www.ti-bangladesh.org/beta3/images/2015/es\\_ffs\\_coal\\_15\\_en.pdf](https://www.ti-bangladesh.org/beta3/images/2015/es_ffs_coal_15_en.pdf)> accessed 1<sup>st</sup> June 2017, see also South Asia for Human Rights 'Report of the Fact Finding Mission to Rampal, Bangladesh' (2015) <<https://www.southasianrights.org/wp-content/uploads/2015/09/Report-of-the-FFM-Rampa-Bangladesh.pdf>> accessed 1<sup>st</sup> June 2017

<sup>524</sup> See Banktrack, 'Equator Principles Analysis of The Rampal Coal Fired Power Plant Project, Bangladesh' (2015) available at:

The report analyzed every equator principle relating to the project and assessed whether the project complied with it. The report concluded that the Rampal coal plant failed to comply with even the minimum environmental and social norms established by the Equator Principles relating to the project. Indeed, Banktrack's assessment is supported by other civil society organizations such as Transparency International Bangladesh which reported the project failed to comply with local Environmental Impact Assessment and Land acquisition laws and procedures, which is in clear breach of Principle 3<sup>525</sup> of the EPs.<sup>526</sup> The findings of Transparency International were in line with those found by the NGO South Asians for Human Rights who in supporting Banktrack also argued that the environmental impact assessment conducted for the project failed to meet minimum standards, and called for the suspension of the project pending the conduction of an independent EIA.<sup>527</sup> Banktrack has accordingly recommended that EPs signatory financial institutions should immediately cancel all considerations of financing the Rampal plant, they further called on signatory banks to publicly rule out financing or support of any kind to the project.<sup>528</sup>

Indeed, following Banktrack's recommendation three EPFIs made public statements declaring they will not be investing in the project. Stanislas Potter the Global Head Sustainable Development of Credit Agricole was quoted as saying 'Credit Agricole SA Group has no plans to finance the Rampal coal power plant in Bangladesh, given our intervention rules and the risks associated with this project.'<sup>529</sup> Additionally, Jean-Michel Mepuis of Societe Generale stated;

---

<[https://www.banktrack.org/download/rampal\\_equator\\_principles\\_full\\_analysis\\_pdf/rampal\\_equator\\_principles\\_full\\_analysis.pdf](https://www.banktrack.org/download/rampal_equator_principles_full_analysis_pdf/rampal_equator_principles_full_analysis.pdf)> accessed 19<sup>th</sup> September 2018

<sup>525</sup> Principle 3 of the EPs titled 'Applicable Environmental and Social Standards' requires EPFI's to ensure clients in the first instance 'address compliance with relevant host country laws, regulations and permits that pertain to environmental and social issues.'

<sup>526</sup> Transparency International Bangladesh, 'Rampal and Matarbari Power Projects: Governance Challenges in Environmental Impact Assessment and Land Acquisition' (2015) <[https://www.ti-bangladesh.org/beta3/images/2015/es\\_ffs\\_coal\\_15\\_en.pdf](https://www.ti-bangladesh.org/beta3/images/2015/es_ffs_coal_15_en.pdf)> accessed 1<sup>st</sup> June 2017

<sup>527</sup> South Asia for Human Rights 'Report of the Fact Finding Mission to Rampal, Bangladesh' (2015) <<https://www.southasianrights.org/wp-content/uploads/2015/09/Report-of-the-FFM-Rampa-Bangladesh.pdf>> accessed 1<sup>st</sup> June 2017, VII

<sup>528</sup> See Banktrack, 'Equator Principles Analysis of The Rampal Coal Fired Power Plant Project, Bangladesh' (2015) available at:

<[https://www.banktrack.org/download/rampal\\_equator\\_principles\\_full\\_analysis\\_pdf/rampal\\_equator\\_principles\\_full\\_analysis.pdf](https://www.banktrack.org/download/rampal_equator_principles_full_analysis_pdf/rampal_equator_principles_full_analysis.pdf)> accessed 19<sup>th</sup> September 2018

<sup>529</sup> Janaki Lenin, 'French Banks Say No to Bangladesh Coal Plant', *The Guardian* (London, 25 June 2015) available at <<https://www.theguardian.com/environment/blog/2015/jun/25/french-banks-say-no-to-bangladesh-coal-plant>> accessed 27 February 2017

Societe Generale does not provide any financial advisory services and is not currently contemplating any financing related to the Khulna coal-fired power project, located in Rampal, Bangladesh.<sup>530</sup>

The positions of the aforementioned EPFIs regarding the Rampal power plant was also followed by BNP Paribas which also declined to invest in the plant.<sup>531</sup>

The above clearly demonstrates how civil society organizations such as Banktrack, enable the Equator Principles by producing reports that ensure projects comply with the Equator Principles before receiving finance from EPFIs. Such reports therefore ensure EPFIs only finance projects that are in compliance with the EPs thereby enhancing compliance and thus enabling the Equator Principles.

It is also worth noting that Banktrack does not only produce reports on specific projects it also monitors the activities of EPFIs in order to ensure the Equator Principles are being complied with as mentioned in the above section. For instance, Credit Agricole which complied with Banktrack's report on the Rampal power plant has been criticized by Banktrack for its involvement in the Tanjung Jati B coal fired plant in Indonesia which has been said to be responsible for a heavy public health toll.<sup>532</sup> Such monitoring of projects and EPFIs by Banktrack and other civil organizations clearly enhance the effectiveness of the Equator Principles as by monitoring the compliance of banks and projects to the EPs they act as a watchdog that reminds banks of their commitments and ensure they are maintaining the EPs standards. It also enhances compliance as banks will be aware of the watchdog function of such civil organizations therefore they will not sign up to the EPs and ignore them, as civil organizations like Banktrack will ensure the world is aware of their negative practices thereby damaging the reputation of such banks. In other words civil society organizations such as Banktrack will address the 'free rider' issue associated with soft law initiatives such as the EPs, thus making such initiatives more effective due to higher compliance levels.

---

<sup>530</sup> Janaki Lenin, 'French Banks Say No to Bangladesh Coal Plant', *The Guardian* (London, 25 June 2015) available at <<https://www.theguardian.com/environment/blog/2015/jun/25/french-banks-say-no-to-bangladesh-coal-plant>> accessed 27 February 2017

<sup>531</sup> *ibid*

<sup>532</sup> BankTrack, 'Credit Agricole: Quit Coal', May 2016, available at <[http://www.banktrack.org/download/credit\\_agricole\\_coal\\_bank\\_briefing\\_2016\\_pdf/credit\\_agricole\\_coal\\_bank\\_briefing\\_2016.pdf](http://www.banktrack.org/download/credit_agricole_coal_bank_briefing_2016_pdf/credit_agricole_coal_bank_briefing_2016.pdf)> accessed 27 February 2017

### **3.5.4 The Equator Principles and an Enabling Environment: The Effects**

This research argued that an enabling environment in the form of an enabled civil society is likely to enhance the effectiveness of the Equator Principles and indeed the above section has demonstrated that civil society have played a key role in making the equator principles more effective. With respect to the mountaintop removal by mining companies in Appalachia it was clear that civil society activities led to financial institutions withdrawing finance and support to mining companies involved in mountaintop removal which has had devastating effects to the environment. Where the Rampal coal fired power plant is concern again civil society played a key role in ensuring EPFIs are not involved in any financing of this project due to incompatibility with the Equator Principles thereby demonstrating the enabling effect of civil society.

It is therefore clear to this author that despite the Equator Principles being a strong set of soft law initiatives on their own, as noted earlier they are more effective where an enabled civil society is present as the Appalachian example above demonstrates. As a strong set of soft law initiatives that can be applied to the mining sector in SSA the equator principles will be further discussed in chapters four and five in order to establish whether Nigeria and South Africa provide enabling environments for soft law initiatives which are argued to be the potential fourth generation of mining codes in Africa.

### **3.6 Conclusion**

This section concludes the chapter by discussing the findings from the three initiatives analyzed in this chapter. This is so that the chapter can conclude on whether having an enabling environment in the terms discussed in chapter two can affect the implementation of soft law mining initiatives that protect the environment and ensure social development, thereby addressing the research question in the introduction.

With regards the Global Compact initiative an analysis of the corporate responsibility practices of Rio Tinto and Barrick Gold found that their compliance with the Global Compact initiative depends on where they are operating in the world. When they are operating in OECD member countries (developed countries) who have strong enabling environments in



terms of strong environmental and social protection local legislations, an organized civil society and generally other strong civil institutions, they are more compliant with Compact principles. However, when they are operating in developing countries with weak enabling environments in the form described above their compliance with the Global Compact is rather minimal. The section on the Global Compact therefore supports the argument that the provision of an enabling environment for soft law is likely to enable adherence to such initiatives thus making them more effective, as demonstrated by Rio Tinto and Barrick's compliance with Compact Principles in the developed world.

On the other hand, the analysis of the EITI initiative revealed that while the provision of an enabling environment through legislation can be very effective in empowering soft law initiatives and ensuring longevity, legislation is not the only key to the successful implementation of soft law initiatives, factors such as government will also play a key role. This section therefore showed that having legislation alone cannot automatically make soft law initiatives effective, there is a need for further enabling features, such as a strong government as demonstrated by Nigeria's lack of EITI implementation since 2007 due to a change of government.

The section on the Equator Principles also supported this research's argument that an enabling environment can enhance the effect of soft law initiatives by proving how valuable civil society has been in enabling the EPs despite the EPs being viewed as a very strong initiative on its own. In fact from the findings of the Global Compact and EPs sections especially, it is this research's view that an enabled civil society is pivotal to the success of most soft law initiatives.

Therefore if soft law is indeed the fourth generation of mining codes in Africa they will need an enabling environment in the form of an enabled civil society and other features of an enabling environment discussed above and in chapter two in order for them to be effective. This chapter has clearly established that an enabling environment may be necessary for soft law initiatives to be effective in regulating the negative impacts of mining, it is therefore necessary to consider whether an enabling environment for soft law initiatives are provided in SSA countries, this will be addressed in the next two chapters.

## Chapter 4: Mining in SSA and the Provision of an Enabling Environment for Soft Law Initiatives: Nigeria

### 4.1 Introduction

With the fall in global oil prices seriously harming Nigeria's economy, focus on diversifying Nigeria's economy towards the solid minerals sector and mining has been a major objective of Nigeria's current government. Such renewed focus and activity in mining solid minerals in Nigeria, while positive for the economy, may bring major social and environmental problems. In general, mining has a very high impact on man and the environment, on the one hand, it results in an increase of employment and economic profit for the community and operators, while on the other hand represents a threat to natural reserves due to landscape changes and pollution.<sup>533</sup> The threat to society and the environment is particularly heightened in countries with weak regulatory systems, which may apply to Nigeria especially taking into account the devastation caused by oil exploration in the Niger Delta region of Nigeria.<sup>534</sup> Where mining is concerned chapters one, two, and three of this thesis have highlighted that a governance gap may exist within the mining sector in SSA as a result of globalization and weak regulatory systems in SSA States, which has led to the proliferation of soft law initiatives.<sup>535</sup> Authors within the mining literature such as Schwartz and Usman have indeed argued that the enforcement of legislation in SSA can prove difficult, which thus creates a governance gap.<sup>536</sup>

This chapter will further contribute to this literature and this thesis by critically analysing the Nigerian mining regulatory system in order to determine whether there is indeed a governance gap that may heighten environmental and social issues as a result of mining in

---

<sup>533</sup> I.G.E. Ibeanu, 'Tin Mining and processing in Nigeria: cause for concern?' (2003) 64, *Journal of Environmental Radioactivity*, 59-66, 64

<sup>534</sup> Fans Coomans, 'The Ogoni Case before the African Commission on Human and Peoples Rights' (2002) available at <<http://www.righttoenvironment.org/ip/uploads/downloads/OgoniCaseProf.Coomans.pdf>> accessed 28th July 2017

<sup>535</sup> Sections 2.3.1 and 2.3.1.1 of this thesis highlighted the fact that there is a rise and need for soft law regulation as a result of the governance gap that was borne in African mining because of globalization and African States following the World Bank's advice in liberalizing their mining sectors to attract more FDI as opposed to enforcing strict mining regulations.

<sup>536</sup> See Priscilla Schwartz, 'Corporate activities and environmental justice: perspectives on Sierra Leone's mining', in Jonas Ebbesson and Phoebe Okowa (eds), *Environmental Law and Justice in Context* (Cambridge University Press 2009), N.L Usman, 'Environmental Regulation in the Nigerian Mining Industry: Past, Present, and Future', (2001), 19:3, *Journal of Energy & Natural Resources Law*, 230-243, 241, John M. Conley, and Cynthia A. Williams, 'Global Banks as Global Sustainability Regulators?: The Equator Principles' (2011) Vol. 33, No. 4 *Law & Policy*, 543-574, 565

Nigeria. Where there is a governance gap within the Nigerian mining regulatory system, as noted in chapter two soft law can be useful in filling such a gap, however in order to fill the governance gap effectively chapter three demonstrated that soft law require an enabling environment to be more effective. Therefore this chapter will also focus on establishing whether Nigeria has an enabling environment for soft law so that it may effectively fill the governance gap in its mining sector and may be rightly considered as the fourth generation of mining codes in Africa.<sup>537</sup> In focusing on the above analysis, this chapter specifically addresses the research questions; ‘is there a governance gap within the mining sector in SSA as a result of weak mining regulations or the enforcement of such regulation?’ and ‘to what extent do current policy and legal regimes in Nigeria and South Africa provide an enabling environment for soft law initiatives and what implications does it have on the application of soft law initiatives within SSA mining?’

With regards to the analysis on the Nigerian mining regulatory system the chapter specifically focuses on legislation that regulate the impact of mining activities on society and the environment, which include; the Nigerian Environmental Impact Assessment Decree,<sup>538</sup> the Minerals and Mining Decree,<sup>539</sup> and the Nigerian Minerals and Mining Act.<sup>540</sup> Furthermore, the chapter will determine whether Nigeria has an enabling environment for soft law based on the features of an enabling environment discussed in chapter two.

The findings in this chapter will then be compared to the findings in chapter five, the case study on South Africa, with the aim of having a better understanding of how an enabling environment for soft law initiatives should work and which country if any appears to have an enabling environment for soft law initiatives. This chapter concludes that while the Nigerian Minerals and Mining Act, 2007 through some strong provisions has remedied previous weak attempts to regulate mining in Nigeria, as with most African nations enforcement remains a major issue, thereby leaving a governance gap. Therefore transnational soft law initiatives would indeed aid in managing the negative impacts of mining in Nigeria given the right enabling environment. With regards to whether Nigeria has an enabling environment for soft law initiatives the chapter concluded that Nigeria is lacking in a strong enabled civil society

---

<sup>537</sup> Hany Besada and Philip Martin, “Mining Codes in Africa: Emergence of a “Fourth” Generation? (2013), The North-South Institute, available at: <<http://www.nsi-ins.ca/wp-content/uploads/2013/03/Mining-Codes-in-Africa-Report-Hany.pdf>> accessed 18<sup>th</sup> September 2018

<sup>538</sup> Environmental Impact Assessment Decree, Supplement to Official Gazette Extraordinary, No 73, Vol 79, December 1992

<sup>539</sup> Nigerian Minerals and Mining Decree No. 34 of 1999

<sup>540</sup> Nigerian Minerals and Mining Act, 2007

and an effective local governance system thereby preventing it from having an enabled environment for soft law initiatives.

This chapter is divided into five sections including this introduction; section two provides an overview of mining activities in Nigeria; section three examines regulations available for social and environmental protection in the mining sector of Nigeria; section four, uses the Equator Principles as an example of a soft law initiative applicable to Nigeria, in order to assess whether Nigeria has an enabling environment for them and other soft law initiatives, and section five concludes the chapter, revealing the findings mentioned above in more detail.

## **4.2 Overview of Mining Activities in Nigeria and Their Impact**

Nigeria is amongst the most endowed countries in terms of mineral resources in the world. Indeed, such mineral resources have contributed immensely to its national wealth, as mineral resources are an important source of wealth especially for developing countries. However, before minerals are harnessed they have to pass through the stages of exploration, mining, and processing, such stages are inevitably accompanied by environmental damage and hazards.<sup>541</sup> Tin mining activities in Nigeria began in 1904 at Jos, Plateau State, by the mid-1920s more cassiterite and columbite discoveries were made resulting in a greater demand for more mechanized extraction techniques.<sup>542</sup> Such techniques resulted in the removal of considerable amounts of soils and generated radioactive waste which are referred to as tailings.<sup>543</sup> Interest in Nigeria's tin mines continued to grow, as they received glowing reviews, for instance, an eminent authority was once quoted as saying "It will be seen, therefore, that of all the tin fields in the world those of Nigeria have by far the most complex natural history."<sup>544</sup> However, with more interest came more environmental and social hazards, as there were no provisions for the reclamation of mining pits and mill/mine tailings, radioactive material were dispersed from the tin mining working areas, resulting in radioactive contamination of soils in its vicinity.<sup>545</sup> Despite this Nigeria continued to mine

---

<sup>541</sup> I. Aigbedion and S.E. Iyayi, 'Environmental effect of Mineral Exploitation in Nigeria', (2007) Vol. 2 (2) International Journal of Physical Sciences, 033-038,

<sup>542</sup> I.G.E. Ibeanu, 'Tin Mining and processing in Nigeria: cause for concern?' (2003) 64, Journal of Environmental Radioactivity, 59-66, 59

<sup>543</sup> *ibid*

<sup>544</sup> Godfrey Fell, 'The Tin Mining Industry in Nigeria', (1939) Vol. 38, No. 151, Journal of the Royal African Society, 246 - 258

<sup>545</sup> I.G.E. Ibeanu, 'Tin Mining and processing in Nigeria: cause for concern?' (2003) 64, Journal of Environmental Radioactivity, 59-66, 59

cassiterite (tin), columbite, tantalite, wolframite, lead, Zinc, gold and coal, on a commercial scale which made significant contributions to the revenue and socio-economic development of the country.<sup>546</sup>

At present large commercial and mechanized mining is rare in Nigeria, however, illegal mining and Artisanal and Small Scale Mining (ASM) are very much active in the sector.<sup>547</sup> Despite their activities being on a smaller scale artisanal miners cause major damage to the environment, especially due to the frequency of their activities in an uncontrolled manner.<sup>548</sup> Environmental damage is caused by haphazard pitting and trenching of the ground in many areas, which results in an artificial bad land topography, which consequently renders the land impossible to cultivate for agricultural purposes.<sup>549</sup>

#### **4.2.1 Impact of Solid Minerals Mining In Nigeria**

Large scale tin mining in Nigeria has caused severe environmental damage, and even where the mines have been closed they still remain an environmental hazard to the locals. This is because tailing dump sites of abandoned mines are generally not identified or seen as hazardous by locals.<sup>550</sup> Locals therefore continue using these sites as building materials for construction, and even for farming of soils. For example, in Jos, Nigeria, where residents are occupational farmers and mostly illegal cassiterite and columbite miners, this practice has been observed, leading writers such as Ibeanu to conclude that such abandoned sites expose locals to radiation, detrimental to their health.<sup>551</sup> The detrimental impact of tin mining activities on the environment is mainly as a result of the excavation of large amounts of sand and the eventual accumulation of a large volume of tailings, this significantly alters the natural constituents of radionuclides in the soil and thus affect the terrestrial ecosystem.<sup>552</sup> Lipsztein et al observed that mining, milling and processing of uranium and thorium bearing

---

<sup>546</sup> I. Aigbedion and S.E Iyayi, 'Environmental effect of Mineral Exploitation in Nigeria', (2007) Vol. 2 (2) International Journal of Physical Sciences, 033-038,

<sup>547</sup> A.M. Arogunjo, V. Hollriegl, A. Giussani, K. Leopold, U. Gerstmann, I. Veronese, U. Oeh, 'Uranium and thorium in soils, mineral sands, water and food samples in a tin mining area in Nigeria with elevated activity' (2009) 100 Journal of Environmental Radioactivity, 232-240, 233

<sup>548</sup> I. Aigbedion and S.E Iyayi, 'Environmental effect of Mineral Exploitation in Nigeria', (2007) Vol. 2 (2) International Journal of Physical Sciences, 033-038,

<sup>549</sup> *ibid*

<sup>550</sup> I.G.E. Ibeanu, 'Tin Mining and processing in Nigeria: cause for concern?' (2003) 64, Journal of Environmental Radioactivity, 59-66, 64

<sup>551</sup> *ibid* 65

<sup>552</sup> A.M. Arogunjo, V. Hollriegl, A. Giussani, K. Leopold, U. Gerstmann, I. Veronese, U. Oeh, 'Uranium and thorium in soils, mineral sands, water and food samples in a tin mining area in Nigeria with elevated activity' (2009) 100 Journal of Environmental Radioactivity, 232-240

minerals as is the case with tin, lead to enhanced radiation exposures not only to the workers but also the indigenes of mining and processing sites.<sup>553</sup> Other accessory minerals like tantalite, zirconium, monazite, xenotime, and thorite, which are known to have high concentration of uranium and thorium, were discovered in Nigeria in the mid-1920s. Such discovery led to increased mechanized mining and large mining pits were created due to soil excavation that resulted in ecological devastation of the Bisichi, Plateau region in Nigeria.<sup>554</sup> According to NGO OK International, unsafe mining and smelting practices in developing countries such as Nigeria have been responsible for a continuing series of environmental and human health disasters, which cause great human tragedy and undermine social stability, economic development and sustainability goals.<sup>555</sup> For instance, in 2010, more than 400 children died in Zamfara, Nigeria from acute lead poisoning as a result of unsafe mining and processing lead-containing gold ore, such processing contaminated at least 180 villages over a wide area.<sup>556</sup> Moving to the South Western part of Nigeria, Opalana observed that gold mining was fast becoming rather unsustainable as vegetation cover were being left unprotected, farmlands degraded and the entire area prone to land subsidence.<sup>557</sup> In their study on the impact of gold mining on vegetation and soil in South Western Nigeria A.T. Salami et al found mining to be exacerbating the problems of vegetation degradation, they found evidence of contamination of soil and plant species with trace metals, capable of impacting negatively on human health.<sup>558</sup> Furthermore, in Nasarawa State, Northern Nigeria, Ezeaku found the exploration of solid minerals was by surface exploitation through excavation of the earth using heavy equipment that resulted in farm land and forest/vegetation destruction.<sup>559</sup> Ezeaku's study further found that about 80% of the locals in the mining sites indicated that minimal compensation was made available for economic trees

---

<sup>553</sup> J.L Lipsztein, Dias da Cunha, K.M. Azeredo, A.M.G. Juliao, L. Santos, D.R. M. Melo, F.F.L Simoes Filho, 'Exposure of workers in mineral processing industries in Brazil' (2001) 54 *Journal of Environmental Radioactivity*, 189-199

<sup>554</sup> A.M. Arogunjo, V. Hollriegl, A. Giussani, K. Leopold, U. Gerstmann, I. Veronese, U. Oeh, 'Uranium and thorium in soils, mineral sands, water and food samples in a tin mining area in Nigeria with elevated activity' (2009) 100 *Journal of Environmental Radioactivity*, 232-240

<sup>555</sup> <http://www.okinternational.org/mining>

<sup>556</sup> *ibid*

<sup>557</sup> T. Opalana, 'Gold Town in Danger', (1999) cited in; Ayobami Salami, M.A. Jimoh, and J.I. Muoghalu, 'Impact of Gold Mining on Vegetation And Soil in Southwestern Nigeria' (2003) 60:4 *International Journal of Environmental Studies*, 343-352,344

<sup>558</sup> Ayobami Salami, M.A. Jimoh, and J.I. Muoghalu, 'Impact of Gold Mining on Vegetation And Soil in Southwestern Nigeria' (2003) 60:4 *International Journal of Environmental Studies*, 343-352,351

<sup>559</sup> Peter Ikemefuna Ezeaku, 'Evaluating the influence of open cast mining of solid minerals on soil, land use and livelihood systems in selected areas of Nasarawa State, North-Central Nigeria' (2012) vol.4(3) *Journal of Ecology and Natural Environment*, 62-70, 64

lost in the process, and contrary to the Nigerian Land Use Act 1978,<sup>560</sup> households affected were not relocated.<sup>561</sup> As with most mining sites they also complained of poor vegetation as a result of mining. In Ogun State, South-West Nigeria, granite mining, popularly known as quarrying has caused severe problems to residents near quarry sites, in their study, Olusegun et al found that health problems suffered by the residents are those associated with inhalation of dust in the air. They further found that residents also experienced shock due to the sudden noise from the use of explosives and ground vibrations that result from rock blasting.<sup>562</sup> It has been reported that the detonation of explosives in quarrying operation causes ground vibrations, which results in the causation of stress, anxiety, increased pulse rate, loss of sleep, fatigue, and excessive contraction of pupil among residents residing near quarry sites.<sup>563</sup>

Furthermore, Lead and Zinc mining have also had a detrimental effect on local environments where they have been mined. With the interest in solid minerals gaining ground in Nigeria, in his study in Ebonyi State, Nigeria, Chukwuma found if mining activities at the Enyigba lead/zinc mine recommences at any scale, the levels of heavy metal concentrations will increase in both soils and plants. This will cause degradation to the local, ecological, sociological, and economic and health environment of Abakaliki, Ebonyi State.<sup>564</sup>

Environmental and social damage within the Nigerian mining sector is further heightened due to the fact that currently most mining activities are carried out by artisanal miners who control 80% of the mining sector in Nigeria.<sup>565</sup> Methods used by artisanal miners include open cast, which involves using tools such as diggers, hoes, and shovels, and underground tunnelling. Such methods of mining are risky and often result in grave and fatal consequences, especially where the dugout pits have gone to great depths.<sup>566</sup> For example, in

---

<sup>560</sup> Nigerian Land Use Act (1978), Laws of the Federation of Nigeria(LFN), (2004)

<sup>561</sup> Peter Ikemefuna Ezeaku, 'Evaluating the influence of open cast mining of solid minerals on soil, land use and livelihood systems in selected areas of Nasarawa State, North-Central Nigeria' (2012) vol.4(3) *Journal of Ecology and Natural Environment*, 62-70, 64

<sup>562</sup> Oguntoke Olusegun, Aboaba Adeniyi, and Gbadebo T. Adeola, 'Impact of Granite Quarrying on the Health of Workers and Nearby Residents in Abeokuta Ogun State, Nigeria' (2009), Vol 2 No.1 *Ethiopian Journal of Environmental Studies and Management*

<sup>563</sup> *ibid*

<sup>564</sup> Chrysanthus Chukwuma Sr., 'Environmental impact assessment, land degradation and remediation in Nigeria: current problems and implications for future global change in agricultural and mining areas', (2011) *International Journal of Sustainable Development and World Ecology*

<sup>565</sup> Al Chukwuma Okoli, Clement Ahar Uhembe, 'Crisis of Natural Resource Governance in Nigeria's Extractive Industry: Examining the Phenomenon of Artisanal Mining/Quarrying' (2015) Vol 15(7) *Global Journal of Human Social Science & Political Science*, 39-48, 44

<sup>566</sup> M.S. Chaanda, N.G. Obaje, A. Moumouni, N.G. Goki, and U.A. Lar, 'Environmental Impact of Artisanal Mining of Barytes in Azara Area, Middle Benue trough, Nigeria' (2010) 4(1) *Journal of Earth Sciences*, 38-42, 38

the Bisichi region of Plateau, mentioned earlier, where large scale miners are no longer operational, the sites have been taken over by artisanal miners. The artisanal miners usually manually dig wells to a depth ranging from 10 to 20m before tunnelling to different directions.<sup>567</sup> Due to such artisanal mining, in some locations in Nigeria, radionuclides have been found in foodstuff and reported to be of a health risk to the public.<sup>568</sup> More recently, in the mining site of the Jos Plateau called Bisitchi, controlled by artisanal miners extremely high concentrations of natural radionuclides were reported in foodstuffs.<sup>569</sup> The mining of barytes in Azara, Nasarawa State by artisanal miners have left behind devastated landscape, exposed fertile lands, artificial dams, paddocks and abandoned ponds.<sup>570</sup> The environmental and social impacts of small scale mining in Nigeria cannot be taken lightly, especially taking into account that children are those most likely to be involved. Indeed, according to the United Nations Environment Program (UNEP), small-scale gold processing operations in developing countries employ one million children.<sup>571</sup> Children are more susceptible to the impacts of heavy metals and account for the majority of deaths and diseases associated with major poisoning incidents from small scale mining.<sup>572</sup>

The driving force sustaining such risky operations are reported to be economic pressure from poverty stricken villagers with no jobs, given them very little option in considering the environmental effects of their activities.<sup>573</sup> However, environmental effects are not the only issues that come from such activities. In Azara, Nasarawa, it is observed that the high level of

---

<sup>567</sup> A.M. Arogunjo, V. Hollriegl, A. Giussani, K. Leopold, U. Gerstmann, I. Veronese, U. Oeh, 'Uranium and thorium in soils, mineral sands, water and food samples in a tin mining area in Nigeria with elevated activity' (2009) 100 *Journal of Environmental Radioactivity*, 232-240, 233

<sup>568</sup> A.M Arogunjo, 'Radioactivity level of some soil and foodstuffs in Ibadan' (2003a) 15 *Nigerian Journal of Physics*, 121-124

<sup>569</sup> A.M. Arogunjo, V. Hollriegl, A. Giussani, K. Leopold, U. Gerstmann, I. Veronese, U. Oeh, 'Uranium and thorium in soils, mineral sands, water and food samples in a tin mining area in Nigeria with elevated activity' (2009) 100 *Journal of Environmental Radioactivity*, 232-240, 233

<sup>570</sup> M.S. Chaanda, N.G. Obaje, A. Moumouni, N.G. Goki, and U.A. Lar, ' Environmental Impact of Artisanal Mining of Barytes in Azara Area, Middle Benue trough, Nigeria' (2010) 4(1) *Journal of Earth Sciences*, 38-42, 41

<sup>571</sup> United Nations Environment Programme, 'Draft business plan of the artisanal and small scale gold mining (ASGM) Partnership Area' August 7, 2008

<sup>572</sup> <http://www.okinternational.org/mining>

<sup>573</sup> M.S. Chaanda, N.G. Obaje, A. Moumouni, N.G. Goki, and U.A. Lar, ' Environmental Impact of Artisanal Mining of Barytes in Azara Area, Middle Benue trough, Nigeria' (2010) 4(1) *Journal of Earth Sciences*, 38-42, 39



interaction of merchants within a small mining community could contribute to the rapid spread of diseases especially STDs and HIV/AIDS.<sup>574</sup>

While the above suggests the impact of mining may be rather negative to local communities in Nigeria, it is often hard to discourage such activities taking into account those involved in artisanal mining depend on it as a means of livelihood in a country where the unemployment rate continually rises, leaving the unemployed with nothing to survive on. Indeed, in Nigeria the unemployment rate has risen from 11.9% in 2005, to 14% in 2016.<sup>575</sup> Artisanal mining therefore allows those unemployed in Nigeria to become engaged and actually make a living, rather than remaining idle, which may lead to criminal activities. Therefore while artisanal mining does have its issues as discussed above, in a country like Nigeria with a high rate of poverty and unemployment this thesis argues artisanal mining can be a positive development. Indeed this is a view supported by Ezeaku as his study reported that locals in mining communities also found mining to have a positive impact.<sup>576</sup> The specific positive impact of mining reported by Ezeaku include; ‘employment generation (60% of the population), increased income (80% of population showed to have earned higher income than realized from farm produce sales), increased economic activities (more petty businesses especially for women) and increased infrastructure (graded roads) and transportation facilities.’<sup>577</sup> Furthermore, such positive effects of artisanal and small scale mining have also been reported elsewhere in Africa. In Sierra Leone, artisanal mining activity is rife and contributes to the livelihood of a large part of the population in northern and eastern Sierra Leone.<sup>578</sup> The lack of livelihood opportunities left communities with no choice but to turn to informal gold or diamond mining, with Carter and Burge noting that there are an estimated 120,000 recorded diamond and gold artisanal miners in Sierra Leone, a figure that may actually be much larger in reality.<sup>579</sup> With regards to the positive impact of artisanal mining their study found that

---

<sup>574</sup> M.S. Chaanda, N.G. Obaje, A. Moumouni, N.G. Goki, and U.A. Lar, ‘Environmental Impact of Artisanal Mining of Barytes in Azara Area, Middle Benue trough, Nigeria’ (2010) 4(1) *Journal of Earth Sciences*, 38-42, 39

<sup>575</sup> Kayode Asaju, Samuel Arome, and silas Felix Anyio, ‘The rising rate of unemployment in Nigeria: The socio-economic and political implications’ (2014) vol. 3(2) *Global Business and Economics Research Journal* 12-31, 13, see also Nigerian National Bureau of Statistics, ‘Unemployment/Underemployment Report’ Quarter 4, (2016) available at [www.nigerianstat.gov.ng/download/481](http://www.nigerianstat.gov.ng/download/481) accessed 25th October 2017

<sup>576</sup> Peter Ikemefuna Ezeaku, ‘Evaluating the influence of open cast mining of solid minerals on soil, land use and livelihood systems in selected areas of Nasarawa State, North-Central Nigeria’ (2012) vol.4(3) *Journal of Ecology and Natural Environment*, 62-70, 68

<sup>577</sup> *ibid*

<sup>578</sup> Laurent E. Carter and Michael Burge, ‘Agriculture and Artisanal Gold Mining in Sierra Leone: Alternatives or Complements?’ (2011) 23 *Journal of International Development*, 1080-1099, 1081

<sup>579</sup> *ibid*

gold artisanal mining in Sierra Leone has considerable potential in alleviating rural poverty and creating economic opportunities for individuals and communities.<sup>580</sup> Furthermore, in their study of Sierra Leone Maconachie and Binns also found that the ‘links between the rural and mining economies are crucial to maintaining sustainable livelihoods, and could well play a pivotal role in rebuilding the rural economy.’<sup>581</sup>

Therefore, although mining causes serious damage to the social and environmental wellbeing of communities it also contributes to their economic wellbeing especially in poverty stricken rural areas in SSA. Consequently, a balance must be reached whereby social and environmental damage are mitigated without stemming economic activities. This is because such economic activities are critical for livelihood sustainability with the high level of unemployment in many SSA countries. With regards to Nigeria government must therefore find a way to formalise artisanal mining to limit its environmental and social issues without stemming economic activity. Indeed, government has attempted to formalise such activities through the formation of small scale mining corporative schemes, the registration of 69 private mineral buying centres, and small scale mining licencing schemes, that aims to record the activities of artisanal miners.<sup>582</sup> However, such efforts have not brought much success as artisanal and small scale mining continues to thrive informally in Nigeria as noted in the Government’s ‘Roadmap for the growth and development of the Nigerian mining industry’.<sup>583</sup> One might argue that such failure in Nigeria’s attempt to formalise artisanal mining may be due to the government being more concerned with generating revenue from the solid minerals sector by formalising artisanal mining and taxing them, rather than creating a mechanisms to protect the miners and the environment. For instance, the creation of the mineral buying centres are clearly a way of keeping a record of minerals collected and sold, so they may be taxed rather than protecting the miners or environment. Indeed, the government noted the centres are seen as a ‘panacea to mineral commodity smuggling’<sup>584</sup> thus highlighting the government’s focus on recovering potential lost revenue. Furthermore,

---

<sup>580</sup> Laurent E. Carter and Michael Burge, ‘Agriculture and Artisanal Gold Mining in Sierra Leone: Alternatives or Complements?’ (2011) 23 *Journal of International Development*, 1080-1099, 1092

<sup>581</sup> Roy Maconachie and Tony Binns, ‘Farmer miners’ or ‘mining farmers’? Diamond mining and rural development in post-conflict Sierra Leone’ (2007) 23 *Journal of Rural Studies*, 367-380

<sup>582</sup> Ministry of Mines And Steel Development, ‘A Brief on the Minerals and Metals Sector and Its Potential to Diversify the Nigerian Economy: A Presentation to President Muhammadu Buhari’ July 2015

<sup>583</sup> Ministry of Mines and Steel Development, *Roadmap for the Growth and Development of the Nigerian Mining Industry*, (2016), available at <[http://www.minesandsteel.gov.ng/wp-content/uploads/2016/09/Nigeria\\_Mining\\_Growth\\_Roadmap\\_Final.pdf](http://www.minesandsteel.gov.ng/wp-content/uploads/2016/09/Nigeria_Mining_Growth_Roadmap_Final.pdf)> accessed 07/10/2016

<sup>584</sup> Ministry of Mines And Steel Development, ‘A Brief on the Minerals and Metals Sector and Its Potential to Diversify the Nigerian Economy: A Presentation to President Muhammadu Buhari’ July 2015

as will be demonstrated below there is no regulation in Nigeria which aims to train artisanal and small scale miners on mining methods which may reduce risks and limit damage on the environment, which is what the government should be promoting in order to protect the environment while also maintaining the livelihoods of many poverty stricken communities in Nigeria. Overall, this section has demonstrated that mining activities have had a significant impact on the environment and society. Therefore it is necessary to establish what form of regulation the State has introduced to mitigate the negative impacts of mining, this will be considered below.

### **4.3 Regulating Mining in Nigeria**

With Nigeria currently shifting its attention to the solid minerals mining sector with the aim of diversifying its economy due to plunging oil prices, an assessment of Nigeria's regulations in terms of solid minerals mining has become imperative, if the environmental and social issues associated with its oil and gas sector are to be avoided. This section will analyse Nigerian mining regulations with respect to environmental and social issues. This is an area where literature has been scarce due to most academics focusing on the environmental degradation caused by the oil and gas sector, most notably the Ogoni land situation. This section will seek to establish whether Nigerian regulations are strong enough to manage the negative impacts of mining discussed earlier, in accordance with the research questions mentioned in the introduction.

From the commencement of organised mining in 1902, up until 1946 when the first mining law in Nigeria was enacted, there was no regulatory effort aimed at environmental protection in the Nigerian solid minerals mining sector.<sup>585</sup> The Minerals Act of 1946<sup>586</sup> sought to remedy this situation, however the act was rather weak in its protection of the environment from the effects of mining, as illustrated by the environmental devastation caused by tin mining in the Jos, Plateau region.<sup>587</sup> Following the 1972 Stockholm UN Conference on Human Environment, the dumping of toxic waste in Koko, Delta State of Nigeria, and the 1992 UN Rio de Janeiro Earth Summit, Nigeria took the issue of environmental damage seriously and established some national policies on the environment, which affected the

---

<sup>585</sup> N.L Usman, 'Environmental Regulation in the Nigerian Mining Industry: Past, Present, and Future', (2001), 19:3, *Journal of Energy & Natural Resources Law*, 230-243, 230

<sup>586</sup> Minerals Act, 226 Laws of the Federation of Nigeria (LFN) 9746-9817 (1990)

<sup>587</sup> N.L Usman, 'Environmental Regulation in the Nigerian Mining Industry: Past, Present, and Future', (2001), 19:3, *Journal of Energy & Natural Resources Law*, 230-243, 230

mining sector.<sup>588</sup> 1988 saw the Federal Environmental Protection Law<sup>589</sup> enacted; this is now the main legislative instrument for national environmental protection. The following year (1989), Nigeria's national policy on the environment was formulated to promote public awareness on the link between development and the environment amongst other objectives.<sup>590</sup> The national policy was followed by the Environmental Impact Assessment Decree in 1992, as with other environmental impact assessment policies, this sought to ascertain the environmental impacts of all new projects in Nigeria, including solid minerals mining, before their commencement.<sup>591</sup> With regards to mining specifically, in 1999 a new mining policy and law were created and enacted. This addressed environmental and social concerns in the mining industry in greater detail than the 1946 Act.<sup>592</sup> However, the 1999 mining law was repealed in 2007 by the Nigerian Minerals and Mining Act, 2007, which one may argue is rather comprehensive when it comes to laying out provisions dealing with environmental and social issues as will be illustrated below. This section will discuss the Environmental Impact assessment Decree, 1992, the 1999 Mining Law and the Minerals and Mining Act, 2007 in more detail below as they specifically apply to the mining sector in Nigeria.

#### **4.3.1 The Nigerian Environmental Impact Assessment Decree,1992**

Nigeria took a major step when she enacted the Environmental Impact Assessment (EIA) Decree, Act No. 86 of 1992 (EIA Act). The Act makes an EIA mandatory for development projects likely to have adverse impacts on the environment prior to commencement.<sup>593</sup> Before this Act, project evaluations were centred on feasibility studies and economic-cost benefit analysis, they did not take environmental costs, public opinion, and social and environmental impacts of development projects into consideration.<sup>594</sup> With respect to mining this Act only applies where a mining lease covers an area exceeding 250 hectares. Additionally, ore processing, including concentrations of aluminium, copper, gold or tantalum, and sand

---

<sup>588</sup> Onyenekenwa Cyprian Eneh, 'Managing Nigeria's Environment: The Unresolved Issues' (2011) 4(3) Journal of Environmental Science and Technology, 250-263, 250

<sup>589</sup> Federal Environmental Protection Agency Act, 131 Laws of the Federation of Nigeria (LFN) 5601-5623 (1990)

<sup>590</sup> Anago Ifeanyi, 'Environmental Impact Assessment as a tool for sustainable development: The Nigerian experience' Proceedings of the FIG XXII International Congress, April 19-26, Washington, D.C. USA, pp1-13

<sup>591</sup> Environmental Impact Assessment Decree, Supplement to Official Gazette Extraordinary, No 73, Vol 79, December 1992

<sup>592</sup> N.L Usman, 'Environmental Regulation in the Nigerian Mining Industry: Past, Present, and Future', (2001), 19:3, Journal of Energy & Natural Resources Law, 230-243, 230

<sup>593</sup> Abdullahi Hussein, 'The current status of environmental impact assessment in Nigeria (EIA): challenges and prospects', (2015) 1(1) HSE, 28-37, 29

<sup>594</sup> *ibid* 30

dredging in an area of 50 hectares or more will also require an Environmental Impact Assessment.<sup>595</sup> Worryingly, considering the impacts of artisanal and small scale mining (ASM) on the environment in Nigeria mentioned above, it would appear this law may not apply to ASM where the land area is less than that required for mandatory assessment.<sup>596</sup>

However, generally the EIA Act 1992 is a welcome development in Nigeria, as the government had previously focused on maximum exploitation of natural resources with the aim of rapid economic development with very little consideration for social and environmental needs. By requiring an EIA for mining projects, Nigeria ensures that environmental aspects are addressed and potential problems are foreseen at the earliest stage of project design, thus allowing for a way to mitigate such problems. Under the Nigerian EIA Act 1992, the minimum an EIA report should contain are; (i) the description of the proposed activity, (ii) a description of the potentially affected environment, (iii) a description of practical alternatives as appropriate, (iv) assessment of the potential environmental impacts of the proposed activity and alternatives, (v) identification and description of measures available to mitigate adverse environmental impacts of the proposed activity, (vi) the gaps of knowledge and uncertainties encountered in compiling the required information, (vii) whether the environment of any other State or areas beyond national jurisdiction are likely to be affected by the proposed activity, (viii) a non-technical summary of the information provided under the above mentioned headings.<sup>597</sup> More importantly, a key requirement of the 1992 EIA Act is consultation; the act requires, the impact assessors to consult the local communities.<sup>598</sup> Although one might argue that it is impossible to have zero-tolerance of environmental degradation in the mining industry, what makes the difference is the ability to create the will and means of eliminating, mitigating or minimising the impact of mining on the environment.<sup>599</sup> Therefore whether the EIA act is actually followed and has had a significant impact in minimizing environmental degradation in Nigeria is another issue which will be considered below.

---

<sup>595</sup> N.L Usman, 'Environmental Regulation in the Nigerian Mining Industry: Past, Present, and Future', (2001), 19:3, *Journal of Energy & Natural Resources Law*, 230-243, 238

<sup>596</sup> *ibid*

<sup>597</sup> Onyenekenwa Cyprian Eneh, 'Managing Nigeria's Environment: The Unresolved Issues' (2011) 4(3) *Journal of Environmental Science and Technology*, 250-263, 250

<sup>598</sup> Federal Republic of Nigeria, *Environmental Impact Assessment (EIA) Act 86, 1992, Guidelines for Review of EIA Report in Nigeria*, Federal Ministry of Environment, (2009)

<sup>599</sup> N.L Usman, 'Environmental Regulation in the Nigerian Mining Industry: Past, Present, and Future', (2001), 19:3, *Journal of Energy & Natural Resources Law*, 230-243, 232

Authors such as Hussaini have reported that there is a lack of implementing mandatory requirements for EIA in Nigeria.<sup>600</sup> He further noted that project promoters take the responsible authorities in Nigeria for granted, for lack of coordination in the enforcement machinery. Indeed, it is most often the case that projects where an EIA is required are usually carried out after procurement of site or even after the start of the project, hence an EIA becomes just a formality.<sup>601</sup> The issue of non-implementation of good policies is a common trend in Nigeria, indeed Ebigbo noted that Nigeria is full of impeccable policies, but lacks in their implementation.<sup>602</sup> Furthermore, even where the impact studies were produced as required the detailed procedure laid down in the Act/Guidelines were usually ignored, especially with regards to consultations.<sup>603</sup> Indeed, in their study of the West African Gas Pipeline (WAGP) project, Lawal et al found very little evidence of effective consultation as required, for instance, an interviewee noted:

we have visited WAGP project at the high sea... there was EIA for this project, but the communities were not carried along and that is applicable to most multinational oil companies' project. (Interview with E.L. NGO, Social Environmental Rights Action Control Group Centre, 27 August 2010.)<sup>604</sup>

On further investigation to ascertain why there was a lack of compliance with such EIA requirements such as consultation, Lawal et al were informed by a Geography professor at the University of Nigeria; 'because the situation in Nigeria appears to be business as usual.'<sup>605</sup> In other words, non-compliance of excellent regulation by wealthy multi-nationals was seen as being the norm in Nigeria, especially due to weak institutional capacity and lack of funding to enforce policies, bad governance, and a culpable government.<sup>606</sup>

Furthermore, Usman notes that with respect to mining the EIA Act is rather confusing.<sup>607</sup> He argues that its drafting is inelegant and confusing, thus making it difficult or nearly

---

<sup>600</sup> Abdullahi Husseini, 'The current status of environmental impact assessment in Nigeria (EIA): challenges and prospects', (2015) 1(1) HSE, 28-37, 33

<sup>601</sup> *ibid*

<sup>602</sup> P.O. Ebigbo, 'Appraising the impact of economic reform programme on micro, small and medium scale enterprises.' (2008) 19<sup>th</sup> Enugu International Trade Fair Colloquium

<sup>603</sup> Abdullahi Husseini, 'The current status of environmental impact assessment in Nigeria (EIA): challenges and prospects', (2015) 1(1) HSE, 28-37, 34

<sup>604</sup> Akeem Morounkeji Lawal, Stefan Bouzarovski, and Julian Clark, 'Public participation in EIA: the case of West African Gas Pipeline and Tank Farm projects in Nigeria' (2013),31(3) *Impact Assessment and Project Appraisal*, 226-231

<sup>605</sup> *ibid*

<sup>606</sup> Abdullahi Husseini, 'The current status of environmental impact assessment in Nigeria (EIA): challenges and prospects', (2015) 1(1) HSE, 28-37, 34

<sup>607</sup> N.L Usman, 'Environmental Regulation in the Nigerian Mining Industry: Past, Present, and Future', (2001), 19:3, *Journal of Energy & Natural Resources Law*, 230-243, 238

impossible to understand the law. For instance, it is unclear whether an EIA is required at each stage of the mining process, i.e. prospecting, exploration, exploitation, and closure. Additionally, the act fails to clearly define the expectations of the participants in the EIA process, thus confusing matters.<sup>608</sup> However, to clarify matters this thesis found that the Nigerian Federal Ministry of Environment has issued sectoral guidelines for environmental impact assessments, the latest being in 2009, signed by Mr. John Odey the then Minister of Environment.<sup>609</sup> In the preface of the guidelines it is stated that the intent of the guideline is ‘to develop a Guideline for EIA’s reviews for the improvement of the EIA practice and process in Nigeria which this document has adequately addressed’.<sup>610</sup> A review of this document reveals the document to be rather clear and precise, in fact even a checklist for evaluation and reviewing EIA reports is provided. For instance, question 2 of the checklist asks; ‘Did the impact assessors consult the local community and have they, in their study, shown evidence of having taken note of the community attitude and feelings?’ The guidelines evidently make the EIA Act clearer, thus remedying earlier criticisms noted above, however, this research still found little to convince one that the Act is being stringently enforced with the provision of the guidelines. Indeed, Ifeanyi notes that in Nigeria Government routinely approves projects within the mandatory EIA list before any Impact Assessment is made.<sup>611</sup> For instance, the Niger Delta Development Commission in a press release had already decided to dredge Ayetoro canal prior to any EIA. Therefore in Nigeria most EIA Reports are actually “post mortem” documents contrived to “fulfil all righteousness” and avoid resistance from NGOs and host communities.<sup>612</sup> Furthermore, Olubenga et al also noted that at present the EIA practice in Nigeria is a showcase for corruption and infraction of the EIA Act of 1992.<sup>613</sup> This is due to the flagrant abuse of the EIA process by the stakeholders in Nigeria; i.e. the government and project proponents, mostly multi-national oil companies in Nigeria. For instance, while sections 34 and 37 of the EIA Act set out the duties of an independent ‘Review Panel’ to include; (i) ensuring that the information required for assessment is

---

<sup>608</sup> *ibid*

<sup>609</sup> Federal Republic of Nigeria, Environmental Impact Assessment (EIA) Act 86, 1992, Guidelines for Review of EIA Report in Nigeria, Federal Ministry of Environment, (2009)

<sup>610</sup> *ibid*

<sup>611</sup> Anago Ifeanyi, ‘Environmental Impact Assessment as a tool for sustainable development: The Nigerian experience’ (2002) Proceedings of the FIG XXII International Congress, April 19-26, Washington, D.C. USA, pp1-13

<sup>612</sup> *ibid*

<sup>613</sup> Fatona Pius Olubenga, Adetayo Olumide, Adesanwo Adeola, ‘Environmental Impact Assessment Law and Practice in Nigeria: How Far? How Well?’ (2015) Vol 1 No. 1, American Journal of Environmental Policy and Management, pp. 11-15, 13

obtainable and available to the public; and (ii) holding hearings that offer the public an opportunity to participate in a project's impact assessment.<sup>614</sup> Olubenga et al noted that in the oil rich Niger Delta, local communities are most often unable to make informed contributions and decisions on projects affecting their environment, contrary to sections 34 and 37 of the EIA Act.

While this thesis agrees with Olubenga et al and other authors mentioned above that environmental impact assessments are routinely ignored in Nigeria thereby rendering the EIA Act 1992 weak despite sectoral guidelines, this is to be expected. This is due to the fact that the Environmental Impact Assessment Decree is too ambitious for a developing country such as Nigeria to implement given its resources. Environmental Impact Assessments have been adopted as environmental management and planning tools by developed and developing countries, since its introduction by the United States in the late 1960s.<sup>615</sup> While developed countries are very capable of implementing environmental impact assessment laws as developed in the United States, a fellow developed country, developing countries although more than willing to adopt the same law fail to tailor it to their circumstances in terms of resources and the capacity to implement the law. For instance, the EIA Act of 1992 requires the establishment an environmental protection council, review committees, mediators, public hearings, and a federal environmental protection agency.<sup>616</sup> While a Federal Environmental protection agency, which is currently the Ministry of Environment is necessary to enforce the Act, it is too costly to be establishing separate environmental protection councils, review committees, and bringing in mediators just to determine whether an EIA is necessary for an activity or project. Nigeria simply does not have the resources to implement such requirements.

Furthermore, having too many bodies involved in assessing EIAs and determining whether there is a need for one is causing undue confusion and bureaucracy that hamper the effective protection of the environment and causes time wasting. There is therefore a need to have a single agency which may decide what activities require EIAs, whether their EIAs when submitted are in compliance with the Act, and will continue monitoring compliance of project proponents to their EIAs. Such an agency would be more focused on EIA reviews and

---

<sup>614</sup> Section 34 and 37, Federal Republic of Nigeria, Environmental Impact Assessment (EIA) Act 86, 1992,

<sup>615</sup> Fatona Pius Olubenga, Adetayo Olumide, Adesanwo Adeola, 'Environmental Impact Assessment Law and Practice in Nigeria: How Far? How Well?' (2015) Vol 1 No. 1, American Journal of Environmental Policy and Management, pp. 11-15, 12

<sup>616</sup> Federal Republic of Nigeria, Environmental Impact Assessment (EIA) Act 86, 1992



monitoring thereby ensuring compliance and implementation of the Act, thus making the act stronger than it is. This would also help Nigeria manage its scant resources more effectively as opposed to having numerous bodies undertaking numerous functions all with the aim of implementing the EIA Act of 1992. Developing countries such as Nigeria must therefore avoid simply imitating developed nations in the way they implement laws in their respective countries and must tailor it to their own circumstances and resources to avoid a situation where they have an excellent law on paper but may not be able to enforce it due to weak resources. Indeed, Olubenga et al in their study noted the Federal Ministry of Environment in Nigeria had a lack of technical resources to regulate operators it was empowered to regulate by the EIA Act 1992.<sup>617</sup> Nigeria must therefore seek to review its EIA Act which is rather weak and outdated, and bring it more in line with its current circumstances as suggested above.

Moreover, as noted above in section 4.2.1, the major culprits of environmental degradation currently, in the Nigerian mining sector are artisanal miners, however, the EIA Act may actually not regulate their activities where the lease covers an area not exceeding 250 hectares, which is the requirement for mandatory assessment under the Act. With over 80% of Nigeria's mining handled by artisanal miners<sup>618</sup> it would suggest that a large portion of the culprits of environmental degradation are not being regulated by one of Nigeria's major piece of regulation for the protection of the environment. It is therefore essential to establish if this is remedied under other regulations below.

#### **4.3.2 The Nigerian 1998 National Policy on Solid Minerals and the Minerals and Mining Decree 1999**

The Minerals and Mining Decree 1999 was promulgated as a result of the Nigerian National Policy on Solid Minerals which was approved by the then Federal Executive Council on 15 April 1998. The policy's main objective was to ensure the orderly development of the solid minerals sector through among other things; increasing awareness of Nigeria's mineral

---

<sup>617</sup> Fatona Pius Olubenga, Adetayo Olumide, Adesanwo Adeola, 'Environmental Impact Assessment Law and Practice in Nigeria: How Far? How Well?' (2015) Vol 1 No. 1, American Journal of Environmental Policy and Management, pp. 11-15, 13

<sup>618</sup> Al Chukwuma Okoli, Clement Ahar Uhembe, 'Crisis of Natural Resource Governance in Nigeria's Extractive Industry: Examining the Phenomenon of Artisanal Mining/Quarrying' (2015) Vol 15(7) Global Journal of Human Social Science & Political Science, 39-48, 44

endowment and the creation of a favourable investment climate.<sup>619</sup> The policy did however also highlight the fact that environmental, health and safety issues were an integral part of the development of the solid minerals sector. It noted the negative impact solid minerals exploration could have on the environment, which therefore makes it necessary for the incorporation of EIAs from the inception of mining projects.<sup>620</sup> The above therefore demonstrates that the main objective of the Minerals and Mining Decree was to develop the sector especially through foreign private investments. However, the negative impacts of mining was also highlighted, the decree was also aimed to address this, the question of whether this was achieved is considered below.

Unlike the Mineral Act and regulations of 1946 which was rather weak on environmental protection, the 1999 mining Decree was specific on environmental conservation. According to Odiase-Alegimenlen, the 1999 Mining Law adequately addressed issues such as environmental conservation, security and national interest arising from solid minerals development.<sup>621</sup> Additionally, the 1999 Mining Policy<sup>622</sup> made environmental, health and safety issues a major part in the development of the solid minerals sector, thereby actually realizing a country's mining sector may only be successful where there are effective laws protecting the environment. One may argue therefore that the government realised as mentioned in chapter two that it is no longer a race to the bottom in terms of environmental laws in order to attract investment. Rather strong social and environmental laws actually assist in attracting investment as multinational companies come under pressure from shareholders with regard to their social and environmental practices. Furthermore, the 1999 Mining Policy acknowledges the negative impact solid minerals exploitation may have on the environment, and demands the integration of an EIA to ensure health and safety in any mineral development project from its inception.<sup>623</sup>

However, Usman argues that the 1999 Mining Decree which was meant to give teeth to the new policy did not differ much from the 1946 Act in its weak approach to environmental regulation.<sup>624</sup> He argues that it actually follows the pattern of the 1946 Act by again

---

<sup>619</sup> O A Odiase-Alegimenlen, 'New Regime for Solid Mineral Development in Nigeria' (2001), 19:4, Journal of Energy and Natural Resources Law, 344-363, 346

<sup>620</sup> *ibid*

<sup>621</sup> *ibid*

<sup>622</sup> National Policy on Solid Minerals, 1998

<sup>623</sup> O A Odiase-Alegimenlen, 'New Regime for Solid Mineral Development in Nigeria' (2001), 19:4, Journal of Energy and Natural Resources Law, 344-363, 348

<sup>624</sup> N.L Usman, 'Environmental Regulation in the Nigerian Mining Industry: Past, Present, and Future', (2001), 19:3, Journal of Energy & Natural Resources Law, 230-243, 240

conferring discretionary powers on the minister and other government officials to regulate environmental issues by imposing rather vague obligations on the holders of the mining titles on environmental protection.<sup>625</sup> For example, under Section 2(b); the minister in charge of mineral development may develop a coherent exploration programme taking into account, inter alia, environmental and ecological factors.<sup>626</sup> Additionally, under sections 46 and 48 (2) the minister is empowered to require the grantee of a mining lease to restore any area in which mining operations have been conducted, including the removal of tailings and dumps.<sup>627</sup> The above examples clearly support Usman's views that the 1999 act was rather weak as the language of the sections denote that environmental regulations were discretionary and at the will of the minister in charge. Therefore it seems rather evident that contrary to the author's earlier view, Nigeria was still under the impression that weaker environmental laws were bound to increase foreign investment in the sector, which has not been the case since 1999.

Furthermore, just as in the case of the EIA Act of 1992 mentioned above the 1999 Mining Decree made no specific provision for environmental protection in small-scale mining again, despite being the majority in the Nigerian mining sector as noted above.

Although the Environmental Impact Assessment Act of 1992 and the Minerals and Mining Decree of 1999 have their shortfalls as noted above, they were steps in the right direction in trying to develop and improve Nigeria's mining sector in a sustainable way. With the enactment of the Nigerian Minerals and Mining Act, 2007 which the Nigerian government regularly describes as world class, it is essential to establish whether all the shortcomings of the earlier regulations have been addressed. This shall be considered below.

### **4.3.3 The Nigerian Minerals and Mining Act, 2007**

According to the Nigerian Ministry of Mines and Steel Development the failure of Nigeria's nationalisation approach of the 1970's and the 1980's led the Nigerian government to attempt to liberalise the mining sector by enacting the Nigerian Minerals and Mining Act, 2007.<sup>628</sup> As

---

<sup>625</sup> N.L Usman, 'Environmental Regulation in the Nigerian Mining Industry: Past, Present, and Future', (2001), 19:3, *Journal of Energy & Natural Resources Law*, 230-243, 240

<sup>626</sup> Section 2(b), Nigerian Minerals and Mining Decree No 34 of 1999

<sup>627</sup> Section 46 and 48(2), Nigerian Minerals and Mining Decree No 34 of 1999

<sup>628</sup> Ministry of Mines and Steel Development, 'Roadmap for the Growth & Development of the Nigerian Mining Industry: On the Road to Shared Mining Prosperity' (2016) available at [http://www.minesandsteel.gov.ng/wp-content/uploads/2016/09/Nigeria\\_Mining\\_Growth\\_Roadmap\\_Final.pdf](http://www.minesandsteel.gov.ng/wp-content/uploads/2016/09/Nigeria_Mining_Growth_Roadmap_Final.pdf) accessed 13th June 2017 page 80

a result of this approach and the enactment of the 2007 Act the Ministry claims that in recent time Nigeria has witnessed increased interest in foreign direct mineral investment.<sup>629</sup> The above clearly suggests that similar to the 1999 decree, the 2007 Act was passed primarily to promote investment in Nigeria's solid minerals sector rather than to specifically strengthen environmental and social regulations, which is reasonable as since 1999 the sector had failed to further develop. However, this does not mean that the Act is weak in regulating social and environmental injustices as a result of mining activities as will be discussed below.

Literature on the Minerals and Mining Act 2007 has been rather scarce which may be due to the fact that the Nigerian mining sector has been neglected with government mainly focusing on the oil and gas sector. Therefore this section relies mostly on primary data, mainly the Act itself. A review of the Minerals and Mining Act 2007 reveals that unlike the 1999 Mining Decree, provisions on social and environmental issues are very comprehensive and non-discretionary. Some of the key provisions highlighting this will be analysed below.

Under the Minerals and Mining Act, 2007, the great importance placed on social and environmental protection can be highlighted by section 16(1)(b); which states:

‘For the purposes of carrying out his functions under this Act, the Minister shall establish in the Ministry a Mines Environmental Compliance Department’<sup>630</sup>. The use of the word ‘shall’ as opposed to ‘may’ which was used in the 1999 decree clearly makes it mandatory. The establishment of such a department is important for ensuring all the environmental provisions as will be discussed below are complied with. This therefore suggests that Nigeria is serious about enforcing environmental provisions. Indeed, under Section 18 of the Act, the functions of the department include: reviewing all plans, studies and reports required to be prepared by holders of Mineral title with respect to their environmental obligations under this Act; enforcing compliance by holders of mineral title with all environmental requirements and obligations under the Act and other laws in force; and also liaising with relevant government agencies with regards to the social and environmental issues involving mining operations, mine closure and reclamation of land.<sup>631</sup> Despite the above welcome development in the Act, one might argue that surely one department with limited resources may not be able to monitor and enforce environmental regulation in a country as vast as Nigeria in land mass. To limit

---

<sup>629</sup> Ministry of Mines and Steel Development, ‘Roadmap for the Growth & Development of the Nigerian Mining Industry: On the Road to Shared Mining Prosperity’ (2016) available at [http://www.minesandsteel.gov.ng/wp-content/uploads/2016/09/Nigeria\\_Mining\\_Growth\\_Roadmap\\_Final.pdf](http://www.minesandsteel.gov.ng/wp-content/uploads/2016/09/Nigeria_Mining_Growth_Roadmap_Final.pdf) accessed 13th June 2017 page 80

<sup>630</sup> Section 16(1)(b), Nigerian Minerals and Mining Act, 2007

<sup>631</sup> Section 18, Nigerian Minerals and Mining Act, 2007

such criticisms the 2007 Act under Section 19 establishes a Mineral Resources and Environmental Management committee for each State of the Nigerian Federation.<sup>632</sup> This is a novel development as it aims to ensure better protection of the environment and communities through closer monitoring of mining activities across the Federation, which had never been the case. The committee will advise the Minister and relevant departments on issues involving for instance: compensating local communities, pollution and degradation, and implementation of social and environmental protection measures in their states.<sup>633</sup> The fact that the act focuses on establishing environmental regulators in the early sections before the environmental provisions are laid out suggest the importance placed on environmental protection, enforcement, and the desire to lay institutional foundations as opposed to the discretionary 1999 mining decree.

However, while the above provisions, particularly section 19 are positive developments in ensuring compliance with environmental and social regulations contained in the 2007 Act, this thesis disputes whether they are practical currently. This is because the establishment of an environmental management committee that can effectively monitor compliance with environmental regulations in thirty six States (36) and 774 local governments in Nigeria would require major financial resources, which Nigeria currently lacks. This is evidenced by the fact that in recent budgetary years (2012, 2013, and 2014) the mining sector which is supervised by the Ministry of Mines and Steel had scant budgetary allocations which were not fully released. In 2012, the ministry had a budget of \$24,405, 825.68, but only received \$14,454,745.4, for all its activities within the sector and in 2014, its budgetary allocation declined with only \$15, 413, 237.8 budgeted and even less released (\$9,648,340.9).<sup>634</sup> Therefore, while the provisions are positive and novel, they will be difficult to enforce in practice, due to the lack of financial resources currently. Indeed, this view is supported in the Nigerian roadmap for the growth and development of the Nigerian Mining Industry, produced under the chairmanships of Professors Ibrahim Garba and Siyan Malomo.<sup>635</sup> The roadmap found the Mineral Resources and Environmental Management Committees under section 19 of the 2007 Act although a strong institution is currently ineffective. They

---

<sup>632</sup> Section 19, Nigerian Minerals and Mining Act, 2007

<sup>633</sup> *ibid*

<sup>634</sup> Ministry of Mines And Steel Development, 'A Brief on the Minerals and Metals Sector and Its Potential to Diversify the Nigerian Economy: A Presentation to President Mohamadu Buhari' July 2015

<sup>635</sup> Ministry of Mines and Steel Development, 'Roadmap for the Growth & Development of the Nigerian Mining Industry: On the Road to Shared Mining Prosperity' (2016) available at [http://www.minesandsteel.gov.ng/wp-content/uploads/2016/09/Nigeria\\_Mining\\_Growth\\_Roadmap\\_Final.pdf](http://www.minesandsteel.gov.ng/wp-content/uploads/2016/09/Nigeria_Mining_Growth_Roadmap_Final.pdf) accessed 13th June 2017

therefore recommended better funding to ensure effective oversight and management of environmental responsibility at the state level.<sup>636</sup>

Moreover, the establishment of the Environmental Management Committee is not the only positive novel development for the protection of the environment, introduced by the 2007 Act, another such development is contained in Section 30 of the Act. Under Section 30 companies engaged in the exploitation of mineral resources are required to establish a tax deductible reserve for environmental protection, mine rehabilitation, reclamation and closure costs. A sum equivalent to the reserve amount will then be set aside every year and invested in a dedicated account or trust fund managed by independent trustees appointed pursuant to the 2007 Act. Where the tax is to be deducted it will be restricted to the actual amount incurred for the purpose of the reclamation.<sup>637</sup> By having such a provision it ensures that there are funds set aside for the rehabilitation of the environment after mining activities are concluded. Additionally, by having trustees to handle the fund it ensures neutrality. Therefore, if a company refuses to rehabilitate an environment, the trustees can apply the funds to rehabilitate the environment. If stringently followed this provision is a positive development for the rehabilitation of the environment, which the 2007 Act brings to Nigeria, taking into account the abandoned tin mines all over the country.

However, most of the provisions on protecting the environment and host communities are contained in Chapter 4 of the Act, and just as the earlier sections noted above, they are seemingly stringent and comprehensive. As always the case in most laws on the environment there are provisions protecting sacred areas, such as trees and wildlife, the 2007 Act is no different, and such provisions are found in sections 97 and 98 of the Act.<sup>638</sup> More interestingly, the 2007 Act offers much more protection to host communities of mining activities than in previous Nigerian laws. For instance, under section 100, where an application is made for a mineral title on a private land which is occupied, a notice of the application must be given to the owner, and consent obtained before the title is granted.<sup>639</sup> Furthermore, under section 104, where the government is required to revoke a right of occupancy over any land, the title holder must pay the government the amount of

---

<sup>636</sup> Ministry of Mines and Steel Development, 'Roadmap for the Growth & Development of the Nigerian Mining Industry: On the Road to Shared Mining Prosperity' (2016) available at [http://www.minesandsteel.gov.ng/wp-content/uploads/2016/09/Nigeria\\_Mining\\_Growth\\_Roadmap\\_Final.pdf](http://www.minesandsteel.gov.ng/wp-content/uploads/2016/09/Nigeria_Mining_Growth_Roadmap_Final.pdf) accessed 13th June 2017 pg 56

<sup>637</sup> Section 30, Nigerian Minerals and Mining Act, 2007

<sup>638</sup> Section 97 and 98, Nigerian Minerals and Mining Act, 2007

<sup>639</sup> Section 100, Nigerian Minerals and Mining Act, 2007

compensation paid by the government to the holder of the right of occupancy.<sup>640</sup> The above two provisions clearly protect land owners from being forcefully evicted from their land without their consent and adequate compensation in favour of the economic benefits of mining activities, which as discussed in chapter three has been the case in numerous countries.

Although, the 2007 Act attempts to protect local land owners by requiring consent before mining commences, one must question how much protection these provisions actually afford local communities. This is because firstly, rural land owners where mining activities take place in Nigeria are usually uneducated and lack the understanding of what they are giving consent to. This allows the usually advanced mining operators the opportunity to easily obtain their consent through a superior negotiating skill set and resources. Secondly, in Nigeria rural land ownership tends to be communal which creates a situation where consent might have been obtained by a part of the community but others within the community are not consulted and are forcefully evicted from their rightful land. The 2007 Act does not specify how to go about obtaining consent, thereby weakening its protection.<sup>641</sup> Indeed this is a view supported by Nigeria's current Minister of Mines and Steel Dr Kayode Fayemi who also observed the issues relating to consent when he noted 'we have also seen over the years that consent is often abused by elements within the same host communities, giving two or three letters to different companies, thereby causing conflict'<sup>642</sup> In accordance with the above concerns the 2016 Mining Road Map mentioned earlier noted there was a need for more clarity under section 100 and therefore recommended it be amended.<sup>643</sup> Additionally, in agreement with the author's claim that land owners in mining communities are usually uneducated and unaware of their rights, the report advocated the need to intensify the

---

<sup>640</sup> Section 104, Nigerian Minerals and Mining Act, 2007

<sup>641</sup> Section 100 of the 2007 Act States: When an application is made for a Mineral title in respect of an area which includes any private land or land occupied under a state lease or right of occupancy, the notice of the application, shall be given in the prescribed manner to the owner or occupier of the land and consent obtained before the license is granted, otherwise the license may be granted with exclusion of the private land in question.

<sup>642</sup> Bassey Udo, 'How Corrupt Government Officials Helped Ruin Nigeria's Mining Sector – Minister' *Premium Times* (Abuja, 15<sup>th</sup> October 2016) available online at

<<http://www.premiumtimesng.com/news/headlines/212822-interview-corrupt-govt-officials-helped-destroy-nigerias-mining-sector-minister.html>> accessed 15<sup>th</sup> October 2016

<sup>643</sup> Ministry of Mines and Steel Development, 'Roadmap for the Growth & Development of the Nigerian Mining Industry: On the Road to Shared Mining Prosperity' (2016) available at [http://www.minesandsteel.gov.ng/wp-content/uploads/2016/09/Nigeria\\_Mining\\_Growth\\_Roadmap\\_Final.pdf](http://www.minesandsteel.gov.ng/wp-content/uploads/2016/09/Nigeria_Mining_Growth_Roadmap_Final.pdf) accessed 13th June 2017 pg 53

education of mining communities about their rights and responsibilities in the consent process.<sup>644</sup>

Generally more clarity on obtaining consent is required to strengthen section 100 of the 2007 Act. In Zimbabwe for instance, section 31(1) (a) of the Mines and Minerals Act Chap 21 05 is clearer on who consent should be sought from, when it notes no prospecting operations should be carried out upon any holding or private land except:

with the consent in writing of the owner or of some person duly authorized thereto by the owner or, in the case of a portion of Communal Land, by the occupier of such portion, or upon any State land except with the consent in writing of the President or of some person duly authorized thereto by the President.<sup>645</sup>

The above is a clearer approach to consent which Nigeria may adopt to clarify section 100 of the 2007 Act. However, it must be noted that the Ministry of Mines and Steel is seeking to remedy the issue of ensuring that the correct and fair consent is obtained from host communities by having local state governments verify host community consents before a mining title is awarded.<sup>646</sup> This is a positive move because being the custodian of lands in rural areas where mining activities take place in Nigeria, State governments and local governments in Nigeria are in the best position to ensure and verify consent has been given, and it was given by the rightful owner or owners of the land.

Moreover, the 2007 Act does not stop at the need to obtain consent and providing compensation for loss of land, indeed section 107 states:

A holder of Mineral title may, in addition to any other amounts payable under the provision of this Act and subject to valuation report by a Government licensed valuer, pay to the occupier of land held under a State lease or the subject of right of occupancy -

- a) Reasonable compensation for any disturbance of the surface rights of the owner or occupier and any damage done to the surface of the land on which the exploration or mining, is being or has been carried; and
- b) In addition pay to the owner of any crop, economic tree, building or work damaged, removed or destroyed by the holder of the mining title or by any of its agents servants,

---

<sup>644</sup> Ministry of Mines and Steel Development, 'Roadmap for the Growth & Development of the Nigerian Mining Industry: On the Road to Shared Mining Prosperity' (2016) available at [http://www.minesandsteel.gov.ng/wp-content/uploads/2016/09/Nigeria\\_Mining\\_Growth\\_Roadmap\\_Final.pdf](http://www.minesandsteel.gov.ng/wp-content/uploads/2016/09/Nigeria_Mining_Growth_Roadmap_Final.pdf) accessed 13th June 2017 pg 60

<sup>645</sup> Section, 31(1)(a) Zimbabwe Mines and Minerals Act Chap 21 05

<sup>646</sup> Bassey Udo, 'How Corrupt Government Officials Helped Ruin Nigeria's Mining Sector – Minister' *Premium Times* (Abuja, 15<sup>th</sup> October 2016) available online at <http://www.premiumtimesng.com/news/headlines/212822-interview-corrupt-govt-officials-helped-destroy-nigerias-mining-sector-minister.html> accessed 15<sup>th</sup> October 2016



compensation for the damage, removal or destruction of the crop, economic tree, building or work.<sup>647</sup>

The above provision thus suggests communities are now entitled to compensation for economic loss, which again is a welcome development from the 2007 Act, as simply paying compensation for loss of land cannot be deemed sufficient enough for the loss in most communities. However, a closer look at this provision reveals the use of the word ‘may’ suggests it is discretionary thus weakening the strength of such an important provision. On the other hand, section 113 of the Act states:

In addition to any reimbursement payable to the Federal Government, the Holder of a Mineral title shall pay to the owner or occupier of any land within the area of the lease or license, compensation for any crop, economic tree, building or work damaged, removed or destroyed by the holder of the lease or licence or by his agent or servant.<sup>648</sup>

Therefore going by section 113 the Act makes it mandatory for licence or lease holders to compensate for economic losses arising from mining activities, which is a positive development if fully implemented. However, the above sections only cover damage to economic trees or crops caused by immediate mining activities and do not actually cover loss of future earnings, which will cause land owners the most difficulties. This is because they may have to find a new source of income due to their lands being used for mining activities as opposed to for instance, farming activities they have been engaged in as a source of living. However, one might argue that this concern is covered under section 116 of the 2007 Act.

Section 116 of the 2007 Act requires holders of a mining lease, small scale mining lease, or quarry lease to conclude with the host community where operations are to be conducted an agreement referred to as a ‘Community Development Agreement’ which shall ensure the transfer of social and economic benefits to the host community.<sup>649</sup> The Community Development Agreement (CDA) shall address some or all of the following issues:

- (a) Educational scholarships, apprenticeship, technical training and employment opportunities for indigenes of the communities;
- (b) Financial or other forms of contributory support for infrastructural development and maintenance such as education, health or other community services, roads, water and power;
- (c) Assistance with the creation, development and support to small scale and micro enterprises;
- (d) Agricultural product marketing; and

---

<sup>647</sup> Section 107, Nigerian Minerals and Mining Act, 2007

<sup>648</sup> Section 113, Nigerian Minerals and Mining Act, 2007

<sup>649</sup> Section 116, Nigerian Minerals and Mining Act, 2007

(e) Methods and procedures of environmental and socio-economic management and local governance enhancement.<sup>650</sup>

The Community Development Agreement requires the participation of the host community in planning and implementing the contents of the agreement.<sup>651</sup> Therefore where one might have suffered loss of future earnings due to mining activities they can ensure their loss is compensated within the Community Development Agreement. The Community Development Agreement has a binding effect, and where a mining company fails to live up to the agreement, the host community may initiate a legal action. This section therefore offers local communities protection from social abuses seen around the world by major mining companies. However, due to Nigerian mining being at the development phase and the lack of literature this research was unable to find cases where Community Development Agreements were enforced in the Nigerian courts. Furthermore, unlike the EIA Act and earlier acts mentioned above, which did not significantly apply to small scale miners, section 116 explicitly applies to small scale or artisanal miners who hold small scale mining leases. This is a very important development, taking into account that over 80% of mining in Nigeria is undertaken by small scale miners. However, despite section 116 providing some needed protection on social and environmental issues to local communities, one might argue it is rather broad and not specific enough, thereby allowing established companies to negotiate with host communities who are usually uneducated and thus not the most skilled negotiators. This provides a window of abuse by mining companies, which host communities may be unaware of. Indeed, being aware of such concerns, in its review of the 2007 Act, the Nigerian roadmap for the growth and development of the Nigerian Mining Industry report highlighted the need to educate mining companies about their obligations under Community Development Agreements (CDA).<sup>652</sup>

On the other hand, one might not necessarily have to be a skilled negotiator to be able to get a great deal out of a community development agreement, what matters most is their bargaining position. Indeed, O'Faircheallaigh argues that community development agreements can play a positive role in community development if they result from negotiations in which the

---

<sup>650</sup> Section 116, Nigerian Minerals and Mining Act, 2007

<sup>651</sup> *ibid*

<sup>652</sup> Ministry of Mines and Steel Development, 'Roadmap for the Growth & Development of the Nigerian Mining Industry: On the Road to Shared Mining Prosperity' (2016) available at [http://www.minesandsteel.gov.ng/wp-content/uploads/2016/09/Nigeria\\_Mining\\_Growth\\_Roadmap\\_Final.pdf](http://www.minesandsteel.gov.ng/wp-content/uploads/2016/09/Nigeria_Mining_Growth_Roadmap_Final.pdf) accessed 13th June 2017 pg 59

<sup>652</sup> Section, 31(1)(a) Zimbabwe Mines and Minerals Act Chap 21:05

bargaining power is not heavily skewed in favour of project proponents.<sup>653</sup> According to O’Faicheallaigh community bargaining power can be enhanced where the community is united and prepared. Prepared in the sense that local groups should obtain information about companies and projects, information about agreements negotiated by a project proponent in other situations, communicating with other communities in similar situations, and seeking the support of national and international non-governmental agencies.<sup>654</sup> While this thesis agrees with O’Faicheallaigh that a community bargaining position can be enhanced thus allowing them to effectively negotiate community development agreements as contained in section 116 of the 2007 Act, it is argued here that currently mining communities in Nigeria do not have a good bargaining position. This is because the mining sector in Nigeria is currently at a developmental stage, therefore mining communities are unaware of what appropriate agreements should contain, and access to sample CDAs across the country are very difficult, as they are viewed as sensitive material. Furthermore, lack of community experience in negotiating such agreements means they will not be well placed to prepare in terms of researching the developer’s prior projects. Additionally, as will be demonstrated below in section 4.4.3 there is very little NGO presence within the mining sector in Nigeria due to its relative underdevelopment therefore communities will find it difficult to identify easily accessible NGOs with experience to enhance their bargaining position. Therefore despite the availability of section 116 of the 2007 Act, in practice it is unlikely to protect local communities from the social abuses and exploitation it seeks to prevent as the mining companies have a skewed bargaining position. Indeed, where this is the case O’Faicheallaigh argues local communities should not enter a CDA with project developers as the terms will be unfavourable and it prevents local communities from legal redress in courts as they have entered into a binding contract.<sup>655</sup>

Furthermore, it is worth noting that a CDA is only required under section 116 of the 2007 Act where the project developer is a mining lease holder. This therefore means an exploration title holder is only required to compensate the land owner for immediate loss resulting from their activity in accordance with section 113 of the Act and not for future losses as would have been covered in a CDA. This is rather unfortunate taking into account that mining companies may explore for up to seven years in Nigeria, and also does little to protect the

---

<sup>653</sup> Ciaran O’Faicheallaigh, ‘Community development agreements in the mining industry: an emerging global phenomenon’ (2013) 44:2 *Community Development*, 222-238, 236

<sup>654</sup> *ibid*

<sup>655</sup> *ibid*

interest of local mining communities.<sup>656</sup>

A more positive approach than requiring communities with weak bargaining positions to negotiate CDAs supported by this thesis is to open a community development fund to be managed by appointed trustees and require mining companies operating in such communities to contribute a specific amount yearly. Indeed, this is similar to the position in Burkina Faso under the 2015 Mining Code. Under the 2015 Mining Code exploitation licence holders are required to pay 1% of their monthly gross turnover (or the value of the extracted products) to the local development fund.<sup>657</sup> Such a fund thus guarantees a host community will have funds applied for their development rather than negotiating a deal by themselves and risk losing out. However, it can be argued that failure to enter into a CDA and simply opting for payments into a fund by mining companies denies local communities the opportunity to seek local business and employment agreements within a CDA, as well as possible monetary payments into a fund. Indeed, it is argued that the economic opportunities from local business and employment requirements within CDAs far exceed cash revenues.<sup>658</sup> In 2008 royalty payments to communities from the Lihir gold mine in Papua New Guinea were about PNG Kina 20,000,000, on the other hand, the value of local salaries and land owner contracts was ten times this amount.<sup>659</sup> The above therefore demonstrates that CDAs are a better option for communities in the long run, this thesis is therefore of the view that Nigeria should maintain the CDA provision, however, rather than allow communities to negotiate from a weak bargaining position government should assist them in such negotiations. This is supported by the Mining Road Map report which noted that State and Local governments should facilitate negotiations between mining companies and host communities in CDAs.<sup>660</sup>

Moreover, realizing that it is practically impossible to undertake mining activities without environmental damage section 118 of the 2007 Act requires every holder of a mineral title to minimize, manage and mitigate any environmental damage from mining activities.<sup>661</sup> The

---

<sup>656</sup> Section 62, Nigerian Minerals and Mining Act, 2007

<sup>657</sup> Alban Dorin, '2015 Burkina Faso Mining Code' (July 2015), available at <[https://www.mayerbrown.com/files/Publication/e46c25d2-177a-4d54-bb05-6ddc6cc59bbc/Presentation/PublicationAttachment/70a1a597-4938-4da2-810c-77c2ba7f214d/July2015\\_Burkina\\_Faso\\_Mining\\_Code.pdf](https://www.mayerbrown.com/files/Publication/e46c25d2-177a-4d54-bb05-6ddc6cc59bbc/Presentation/PublicationAttachment/70a1a597-4938-4da2-810c-77c2ba7f214d/July2015_Burkina_Faso_Mining_Code.pdf)> accessed 21<sup>st</sup> March 2016

<sup>658</sup> Ciaran O'Faicheallaigh, 'Community development agreements in the mining industry: an emerging global phenomenon' (2013) 44:2 Community Development, 222-238, 229

<sup>659</sup> *ibid*

<sup>660</sup> Ministry of Mines and Steel Development, 'Roadmap for the Growth & Development of the Nigerian Mining Industry: On the Road to Shared Mining Prosperity' (2016) available at [http://www.minesandsteel.gov.ng/wp-content/uploads/2016/09/Nigeria\\_Mining\\_Growth\\_Roadmap\\_Final.pdf](http://www.minesandsteel.gov.ng/wp-content/uploads/2016/09/Nigeria_Mining_Growth_Roadmap_Final.pdf) accessed 13th June 2017 pg 59

<sup>661</sup> Section 118(a), Nigerian Minerals and Mining Act, 2007

section further requires that the land disturbed, excavated, explored, or mined be rehabilitated and reclaimed, where applicable to its natural or predetermined state.<sup>662</sup> Indeed, the Nigerian government as the main actor in the large scale mining sector in Nigeria, claims it has followed this provision by reclaiming twenty abandoned mines in Kano, Borno, Edo, Plateau, Akwa Ibom, Abia, Nasarawa, Bauchi and Ebonyi States, between 2007 and 2014.<sup>663</sup> However, recent studies have demonstrated that abandoned tin mines are still littered around Nigeria, in Jos poor locals use such mine sites as housing development sites to the detriment of their health in the long run as hazardous heavy metals and radioactive substances have been found at such development sites.<sup>664</sup> Furthermore, Adabanija and Oladunjoye also recently reported that there are thousands of inactive and/or abandoned mine sites on federal, state, tribal, and private land in Nigeria.<sup>665</sup> Therefore while the Nigerian government in compliance to section 118 claims to have reclaimed some abandoned mines it is clear abandoned mines remain spread all over the country. However, it must be noted that this is not a reflection of the non-compliance of section 118 of the 2007 Act but evidence of a lack of care and planning in the past mining regulations which the 2007 Act seeks to address under section 118. This is because most of the abandoned mines are as a result of mining activities which occurred in the 1920s through to the 1960s when Nigeria was a major mining country as noted in section 4.2. Therefore it remains to be seen whether section 118 will be fully complied with as Nigeria develops its mining sector and major players begin large scale mining in Nigeria.<sup>666</sup>

Furthermore, unlike the EIA Act of 1992 discussed above which may have allowed some small scale miners to skip its purview where their area of activity does not exceed 250 hectares, section 119 of the 2007 Act requires all title holders including small-scale title holders to provide an Environmental impact Assessment report.<sup>667</sup> Additionally, to ensure the protection of the environment further, section 119 requires title holders to also provide an

---

<sup>662</sup> Section 118(b), Nigerian Minerals and Mining Act, 2007

<sup>663</sup> Ministry of Mines and Steel development, A Brief on The Minerals and Metals Sector and Its Potentials To Diversify The Nigerian economy, A Presentation to President Muhammadu Buhari, GCFR' (July 2015)

<sup>664</sup> Samuel Danjuma Wapwera, C.O. Egbu, A.G. Parsa, and G.M. Ayanbinpe, ' Abandoned mines, homes for the people: case study of Jos Tin-mining region', (2015), Vol.8 No.2, International Journal of Housing Markets and Analysis, 239-264, 257

<sup>665</sup> Moruffdeen Adedapo Adabanija and Michael Adeyinka Oladunjoye, 'Geoenvironmental assessment of abandoned mines and quarries in South-Western Nigeria', (2014) 145 Journal of Geochemical Exploration, 148-168, 148

<sup>666</sup> Isiaka Wakili, 'Federal Executive Council Approves N30bn For Mining' *Daily Trust* (Abuja, 20<sup>th</sup> October 2016) available at <<http://www.dailytrust.com.ng/news/general/fec-approves-n30bn-for-mining/167754.html>> accessed 21st October 2016

<sup>667</sup> Section 119, Nigerian Minerals and Mining Act, 2007

Environmental Protection and Rehabilitation Program.<sup>668</sup> Such program is to provide specific rehabilitation and reclamation actions, inspections, and annual reports, which shall be regulated by the Mines Environmental Compliance Department. The requirements under section 119 further reinforces the 2007 Act's resolve to ensure environmental damage is mitigated. However, the main issue as with many laws is whether they are actually followed and enforced. With regards to the former it would appear section 119 is being adhered to. For instance, PW Nigeria Limited which operates a stone quarry and asphalt production plant in Kaduna State of Nigeria in accordance with the 2007 Act produced an Environmental Protection and Rehabilitation Program for its Kaduna quarry and Asphalt Plant.<sup>669</sup> A review of this report reveals that PW Nigeria produced a rather detailed description of the mining site, environmental rehabilitation measures for the mine and potential residual risks from post mine closure.<sup>670</sup> This is positive as it demonstrates the 2007 Act is being followed by actors within the industry. However, a closer look at the report reveals that it is rather descriptive and non-committal with regards to the solutions to the issues caused by their activities. For instance the report states:

Air pollution is the presence in the atmosphere of one or more contaminants in such quantities, characteristics, duration as to make them actually or potentially injurious to human, plant, or animal life or to property, or which unreasonably interfere with the comfortable enjoyment of life and property.<sup>671</sup>

The above does not actually describe methods of reducing such air pollution, rather it dwells too much on what is general knowledge, which is done repeatedly throughout the 59 page report. Similarly, the report spent too much time outlining the regulations available in Nigeria, which whoever is examining the said report should already be aware of. However, a positive highlight of the document is the fact that PW acknowledged international soft law regulations such as the World Bank ISO 1400; 2004 Environmental Management System Specifications; which they suggest they comply with.<sup>672</sup> This is a positive development as it shows soft laws are at least being referred to in Nigeria, meaning an enabling environment for them may currently exist as will be discussed further in the next section. Moreover, the report does discuss methods of mitigating environmental and social damage, within the mine site, which is positive. On the other hand, it also makes claims without establishing how it aims to

---

<sup>668</sup> Section 119, Nigerian Minerals and Mining Act, 2007

<sup>669</sup> PW Nigeria Limited, Environmental Protection & Rehabilitation Program for PW Kaduna Quarry & Asphalt Plant, Final Report, January 2014

<sup>670</sup> *ibid*

<sup>671</sup> *ibid*

<sup>672</sup> *ibid*

mitigate environmental disturbances. For example, with regards to site camp establishment it states:

The camp area shall be kept to a minimum. The site layout shall take cognizance of access routes for deliveries and services. Likely disturbance to neighbours as well as security implications shall be considered.

The above is simply a mere statement of intent to take into account of the neighbours rather than a strategy of how to avoid disturbing the neighbours, which is what the 2007 Act requires.

Therefore while the above demonstrates the 2007 Act is being followed to an extent with regards to section 119, there remains more to be followed with respect to the quality of reports. With regards to whether the 2007 Act is being enforced, this would require an analysis of case law or an empirical study, which this research has not been able to identify. This is not surprising taking into account the lack of interest within the Nigerian mining sector by Government or the private sector. Therefore this research will have to conclude this section by assessing the 2007 Act as currently laid out and in comparison to the previous environmental regulations discussed above.

The Nigerian Minerals and Mining Act 2007, from the above analysis is clearly a major step up from the discretionary language in terms of environmental protection contained in the 1999 Decree or the weaker regulations contained in the 1946 Act. The strong language of the Act when it comes to environmental regulation demonstrates that Nigeria has learnt that it is no longer a race to the bottom in terms of regulations when it comes to attracting investors to Nigeria. Indeed, economic development can be tied to a healthy environment as was established in the Rio Convention. However, while Nigeria through the 2007 Act has indeed come up with good environmental regulations as discussed above, enforcement of laws in Nigeria remains a major setback as with most developing countries. Indeed, Nigeria's Minister of Mines and Steel Development Dr Kayode Fayemi acknowledged this when he stated:

We are still not doing well with effective monitoring and enforcement of the law. Mining and Minerals Act is one of the best laws. But, having a good law is one thing. Ensuring that it is strictly adhered to is another.<sup>673</sup>

---

<sup>673</sup> Bassey Udo, 'How Corrupt Government Officials Helped Ruin Nigeria's Mining Sector – Minister' *Premium Times* (Abuja, 15<sup>th</sup> October 2016) available online at

With respect to the research question pertaining to whether there is a governance gap in the regulation of the negative impacts of mining in Nigeria the discussion above has made some revelations. With regards to the Environmental Impact Assessment Act 1992, while it was a positive move towards better regulation to avoid environmental and social issues at the time, this section also revealed its shortfalls. Foremost amongst its shortfalls is the fact that there is poor implementation and enforcement of the Act, actors within different sectors view compliance with the Act as just a formality. The Act is also seen to have been drafted poorly, thus making it rather confusing and difficult to apply. Despite this, twenty four years later and Nigeria has yet to review the Act, which does not show strong commitment in terms of protecting the environment from negative projects on the part of Nigeria. Corruption has also impacted the effectiveness of the Act, and finally the section argued the EIA Act 1992 was too ambitious for Nigeria given its resources. Nigeria should therefore tailor its EIA Act to its resources; making such an Act more enforceable. With respect to the Minerals and Mining Act 2007 the section above has shown the Act to be rather impressive on paper in terms of the wide array of provisions seeking to mitigate the negative effects of mining discussed in this chapter and earlier chapters. However, this thesis questioned the practicability of some provisions given Nigeria's weak economy and poor budgetary allocation to the mining sector. Additionally, the section also highlighted some weaknesses with regards to the lack of clarity surrounding the issue of consent and the lack of bargaining power mining communities have to be able to effectively negotiate positive outcomes for their indigenes.

Overall, this thesis argues that as a form of mining regulation the EIA Act 1992 is not strong enough to regulate mining in Nigeria, and a review of the Act is long overdue. On the other hand, the 2007 Act is a major step in the right direction in terms of provisions that regulate the negative impacts of mining. However, for the act to be strong enough to regulate the negative impact of mining activities, Nigeria will have to significantly invest in the mining sector, so that the act can be effectively enforced, which it has failed to do since the coming into force of the Act as budgetary figures mentioned earlier demonstrate. As with most acts in Nigeria the 2007 act is strong on paper however, the lack of resources to implement it creates a governance gap within the Nigerian mining sector.

---

<<http://www.premiumtimesng.com/news/headlines/212822-interview-corrupt-govt-officials-helped-destroy-nigerias-mining-sector-minister.html>> accessed 15<sup>th</sup> October 2016



Furthermore, it is currently rather difficult to assess how successful or stringent the Act is in regulating the negative impact of mining in Nigeria, given the paucity of activity and literature within the Nigerian mining sector. Additionally, this thesis argues that the 2007 Act may also be further hampered by the fact that the Act itself was made to drive foreign investment into Nigeria's mining sector, not to protect the environment. Therefore wherever a decision has to be made regarding whether to promote investment or protect the environment, investment may supersede. The argument that the Act was made to promote foreign investment into the sector is further supported by the statement made by the current Minister of Mines and Steel Development Dr Kayode Fayemi in London where he stated:

The Act and the supporting body of regulation have been designed to give Nigeria a competitive legal and regulatory framework for the sector. For example, in the design and set-up of the Mining Cadastre Office as the sole issuer of mineral titles today, a great deal of effort went into understanding the best practices globally. The cadastre's predecessor had overseen a cumbersome process fraught with unclear licenses, limited control, inefficiency, opacity and long delays. For this reason, the reformed Mining Cadastre Office adopted a "first-come-first-served" and non-discretionary granting of mineral titles rule.<sup>674</sup>

The above statement demonstrates Nigeria's focus of attracting foreign direct investment through a more efficient transparent licencing procedure under the Nigerian Mining Cadastre office, rather than focusing on the negative impact of mining in Africa. Therefore Nigeria's priority right now is attracting major foreign investment to the country to relaunch its mining sector, rather than enforcing the environmental and social provisions of the mining act thereby creating a governance gap within the sector.

Therefore with mining companies now willing to comply with the countless soft law mechanisms they have signed up to as discussed in chapter three, such as the World Bank ISO 1400 because of their non-penal nature; they might be a better option for Nigeria in terms of ensuring environmental and social justice. However, this thesis argues soft law may only be effective where there is an enabling environment. It is therefore essential to establish if soft law initiatives could assist in regulating the Nigerian mining sector and whether Nigeria has the enabling environment to make them more likely to be followed by companies. This will be discussed below.

---

<sup>674</sup>British All Party Parliamentary Group on Nigeria Transcript, 'Nigeria's Solid Minerals Sector: Alternative Investment Opportunities', 19<sup>th</sup> May 2016, available at: <https://www.chathamhouse.org/sites/default/files/events/2016-05-19-Nigeria-solid-minerals-appg-transcript.pdf> accessed 18<sup>th</sup> September 2018

#### **4.4 Providing an Enabling Environment for Soft Law Initiatives**

As discussed in chapter three and mentioned above, soft law initiatives can be very important when it comes to regulating mining activities in Africa, which has even led some to call them the fourth generation of mining codes in Africa, i.e. the latest generation of laws attempting to regulate mining.<sup>675</sup> However, chapter three demonstrated that soft law on their own find it difficult to regulate the negative impact of mining, especially due to their voluntary nature. They therefore require the assistance of an enabling environment as described in chapter two, to be more effective. It has therefore become essential to establish whether African countries have the enabling environment for soft law initiatives to be effective as their fourth generation mining codes that fill the governance gap left by the mining regulatory systems of some SSA countries as demonstrated by the section above with respect to Nigeria. In order to establish whether Nigeria has an enabling environment that will make soft law initiatives effective in regulating the mining industry this section will be using the Equator Principles which was discussed in chapter three as our sample soft law initiative, and will try to establish whether Nigeria provides an enabling environment for them. The Equator Principles were selected due to the fact as noted in chapter three that they are considered one of the most successful and widely adopted soft law initiatives which can be applied to the mining sector, therefore one would reasonably expect countries in SSA to be aware of them and thus provide an enabling environment for them. This section will therefore establish whether Nigeria provides an enabling environment as discussed in chapter two for the Equator Principles and by extension other soft law initiatives, thereby determining whether Nigeria provides an enabling environment for soft law initiatives in general.

##### **4.4.1 The Equator Principles in Nigeria**

The Equator Principles as noted above are widely adopted and as such have indeed reached Nigeria. However, out of over thirty financial institutions based in Nigeria only Access Bank, Fidelity Bank and Ecobank Plc are listed as Equator Principles Financial Institutions (EPFIs).<sup>676</sup> This therefore suggests that while it is positive that local banks have begun adopting the EPs, it also shows that the EPs have not received significant acceptance within

---

<sup>675</sup> See Hany Besada and Philip Martin, "Mining Codes in Africa: Emergence of a "Fourth" Generation? (2013), The North-South Institute, available at: <<http://www.nsi-ins.ca/wp-content/uploads/2013/03/Mining-Codes-in-Africa-Report-Hany.pdf>> accessed 18<sup>th</sup> September 2018

<sup>676</sup> See <<http://www.equator-principles.com/index.php/members-and-reporting>> accessed 21st March 2016

the Nigerian financial sector. According to the Equator Principles webpage this may be due to the fact that there is a low level of awareness about the EPs in Nigeria, they note that only a few organizations needing to access funds for projects know about the EPs.<sup>677</sup> However, with regards to the banks that are EPFIs in Nigeria it is essential to establish how the EPs have impacted on their activities and whether they are in compliance with the EPs, thus demonstrating the effectiveness of the EPs in Nigeria.

With regards to Access Bank, it is reported as compliant with the EPs' reporting requirement, thereby suggesting it has continued to apply the EPs with respect to project finance.<sup>678</sup>

Indeed, the Equator Principles provides a link to all its sustainability reports in accordance with the EPs. More interestingly, their Equator Principles Reports reveals more, with regards to the effects of the EPs in Nigeria and Access Bank. For instance, the report noted that in 2013 they had one proposed Category A<sup>679</sup> project which was denied project finance, and out of three Category B projects only two were approved.<sup>680</sup> This therefore demonstrates that EPs requirements are being followed in Nigeria by Access Bank. However, one might argue that the projects may have been rejected for different purposes, as the report does not specify the reason why the projects were rejected, making it difficult to ascertain the bank's compliance with the EPs from this alone. Therefore a look at the bank's approved projects would better reveal the impact of the EPs in Nigeria. Access bank noted that; in the year 2013 it applied the Equator Principles in the process leading to the granting of a US\$90 million term facility to OIS-Indorama Limited (OISIL) with respect to the construction of a multipurpose jetty to be used for evacuation of urea fertilizer product for export.<sup>681</sup> They also applied the same principles with regards a US\$800 million syndicated facility by Indorama Eleme Fertiliser &

---

<sup>677</sup> Equator Principles, 'Equator Principles and Nigeria's Financial Industry', (2012) available at <<http://www.equator-principles.com/index.php/in-the-media/in-the-media-by-year/89-media-2012/278-equator-principles-and-nigerias-financial-industry>> accessed 21st March 2016

<sup>678</sup> See <<http://www.equator-principles.com/index.php/members/access-bank>> accessed 21st March 2016

<sup>679</sup> Under the EPs, clients must conduct a Social and Environmental Assessment of a proposed project. EPFIs use common terminology to categorise (based on the International Finance Corporation's categorisation process) projects into high, medium and low, in terms of environmental and social risk, and apply this to all new projects globally and across all industry sectors. The Categories under the EPs are either A, B or C; Category A – Projects with potential significant adverse social or environmental impacts which are diverse, irreversible or unprecedented; Category B – Projects with potential limited adverse social or environmental impacts that are few in number, generally site-specific, largely reversible and readily addressed through mitigation measures; and Category C – Projects with minimal or no social or environmental impacts. See <<http://equator-principles.com/resources/Frequently%20Asked%20Questions.pdf>> accessed 29<sup>th</sup> October 2016

<sup>680</sup> Access Bank 2013 Equator Principles Report, available at

<sup>681</sup> Access Bank 2013 Equator Principles Report, available at: <[https://www.banktrack.org/download/2013\\_equator\\_principles\\_report/accessbank2013equatorprinciplereporting.pdf](https://www.banktrack.org/download/2013_equator_principles_report/accessbank2013equatorprinciplereporting.pdf)> accessed on 19<sup>th</sup> September 2018

Chemicals Ltd. (IEFCL) with regards to the provision of debt financing of US\$10 million for a Nitrogenous Fertiliser Complex.<sup>682</sup>

Applying the Equator Principles to its decision making process for the IEFCL, Access seemed to apply the Equator Principles requirements, for instance; under Principle 2 (Social and Environmental Assessment) Access noted:

The E&S issues inherent in the project were identified and an action proposed. Given the commitment of the sponsor, we believe that this will be done. There are covenants and conditions in place to address the identified E&S risks.<sup>683</sup>

With regards to Principle 5 (Stakeholder Engagement) Access noted:

We reviewed the documents and approval obtained by IEFCL and we found out that appropriate consultation and disclosure has been made with the various stakeholders and thus do not constitute any risk to the project.<sup>684</sup>

And in order to ensure compliance by their clients with regards to Principle 8 (Covenants) they noted:

Adequate affirmative covenants and negative covenants are contained in the facility documentation, this is to ensure monitoring and compliance with agreed action plans.<sup>685</sup>

Indeed, a review of Access Bank's 2013 Equator Principles Report reveals that every principle is applied in the decision making process of the above mentioned projects. This therefore highlights the fact that environmental and social issues are now taking centre stage in the project finance decision making of Access Bank, thereby in compliance with its commitment to the EPs. However, as with other EPFIs without field research on the projects it is difficult to ascertain whether the banks and clients are making a difference on the environment, which is where an enabling environment in the form of civil society can be very useful, as will be discussed below.

With respect to Fidelity Bank, it would appear that it is one of the EPFIs which have been accused of freeriding. Apart from mentioning that it is part of the EPs, Fidelity has not complied with the EPs.<sup>686</sup> Importantly, it has failed to comply with the EPs reporting

---

<sup>682</sup> Access Bank 2013 Equator Principles Report, available at: [https://www.banktrack.org/download/2013\\_equator\\_principles\\_report/accessbank2013equatorprinciplereporting.pdf](https://www.banktrack.org/download/2013_equator_principles_report/accessbank2013equatorprinciplereporting.pdf) accessed on 19<sup>th</sup> September 2018

<sup>683</sup> ibid

<sup>684</sup> ibid

<sup>685</sup> ibid

<sup>686</sup> Fidelity Bank Corporate Social Responsibility, available at: <https://www.fidelitybank.ng/corporate-social-responsibility/> accessed on the 23<sup>rd</sup> of March 2016

requirements, therefore one cannot study or report on any activity they have conducted to reveal compliance with the EPs. Therefore one can reasonably conclude that the principles haven't had an impact within Fidelity Bank. Indeed, the Equator Principles Association have classed Fidelity Bank as a non-compliant bank in terms of reporting as of 2016. Taking into account Fidelity Bank adopted the principles in 2012, this does not bode well for the future, thereby suggesting a need for an enabling environment in Nigeria to make the principles more effective.

Unlike Fidelity bank, as of 2016 EcoBank is still considered to be EPs reporting compliant.<sup>687</sup> EcoBank notes that it has integrated the EPs within its internal Environmental and Social Management System (ESMS) and has gained a better understanding in ensuring that projects financed and other eligible transactions are developed in socially and environmentally responsible ways.<sup>688</sup> However, unlike the Access Bank Equator Principles Report which is rather detailed and specific, EcoBank's report is rather short (three pages) and vague. The report notes there were twenty one eligible transactions in 2014, seven were Category B while eleven were Category C, the projects involved were within the oil and gas, infrastructure, manufacturing, and mining sectors.<sup>689</sup> However, there is no indication that any of the twenty one projects were rejected, which suggests a lenient attitude towards approval. Furthermore, the report does not demonstrate action taken with regards to specified projects, rather it makes good endeavour statements regarding its policies, without giving specific examples, for instance;

Ecobank will implement and monitor the Environmental and Social Management System (ESMS) through a collective and collaborative approach of staff in the businesses, country risk management and the Group risk management units.<sup>690</sup>

The only mention of a project, was with regards to an 'oil exploration and production in an Ecobank subsidiary country' in which they note an external consultant report certified by the national regulatory entity and verified by Ecobank demonstrate the client as clearly ready to implement the project in an environmentally friendly and socially acceptable manner.<sup>691</sup> They further note that the commitment is guided and monitored by the Ecobank ESMS, which is

---

<sup>687</sup>Equator Principle Members, available at: < <http://www.equator-principles.com/index.php/members/ecobank>> accessed on the 23<sup>rd</sup> of March 2016

<sup>688</sup> EcoBank, Equator Principles Reporting 2014, available at <http://www.ecobank.com/group/EcobankReport2014.pdf> accessed on the 23<sup>rd</sup> of March 2016

<sup>689</sup> *ibid*

<sup>690</sup> *ibid*

<sup>691</sup> *ibid*

based on the EPs.<sup>692</sup> The Ecobank report, although said to be compliant with the EPs is clearly not up to the standard of the Access Bank report especially in terms of transparency. The Ecobank report mentions no specific projects that can be verified, in contrast to the Access bank report, making it even more difficult to monitor the impact of the EPs directly on the environment. While on paper Ecobank is a compliant bank, it is quite clear it still has more to do, which may be assisted by an enabling environment for the Equator Principles in Nigeria.

In sum, of the three banks that have adopted the EPs, a closer look reveals that only Access Bank can be authoritatively considered a truly EPs compliant EPFI. The lack of reception of the EPs by the Nigerian financial industry therefore threatens the effectiveness of EPs in Nigeria, which is a shame as the EPs could surely improve Nigeria's poor image in terms of managing and regulating environmental degradation. One might argue that the failure of the financial community to widely accept the EPs in Nigeria may be due to an absence of an enabling environment and it is therefore essential to establish whether Nigeria has an enabling environment for the EPs and other soft law initiatives, which may improve the regulation of Nigeria's developing mining activities.

#### **4.4.2 Nigeria and the provision of an Enabling Environment for the Equator Principles and other Soft Law Initiatives**

As discussed in chapter two an enabling environment with respect to soft law initiatives is the sum of the drivers, tools, human capacities and institutions directed towards achieving the effective implementation of soft law codes in States.<sup>693</sup> However, for the sake of clarity, Chapter two was able to classify the key players/components when it comes to providing an enabling environment for soft law codes into four groups; the public sector (i.e. central government), local governance, civil society, and the international community. We shall therefore consider whether the three key players where the State is concerned (i.e. the public sector, local governance, and civil society) are active and have put in place drivers for the provision of an enabling environment for the equator principles and soft law initiatives in Nigeria, below.

---

<sup>692</sup> EcoBank, Equator Principles Reporting 2014, available at <http://www.ecobank.com/group/EcobankReport2014.pdf> accessed on the 23<sup>rd</sup> of March 2016

<sup>693</sup> Halina Ward, 'Public Sector Roles In Strengthening Corporate Social Responsibility: Taking Stock' [2004] The World Bank, available at: <<http://pubs.iied.org/pdfs/16014IIED.pdf>> accessed 28th March 2016

#### **4.4.2.1 The Nigerian Public Sector (Central Government)**

As noted in chapter two governments may create an enabling environment for soft law initiatives such as the Equator Principles in numerous ways. However, for ease of understanding Fox et al divided such numerous ways into four main categories; mandating, facilitating, partnering, and endorsing.<sup>694</sup> Therefore using the Equator Principles as our example we shall examine whether in creating an enabling environment the Nigerian government has; mandated, facilitated, partnered and endorsed the Equator Principles.

##### **4.4.2.1.1 Mandating in Nigeria**

Mandating as an enabling mechanism where soft law is concerned may involve passing specific regulation to enhance the effectiveness of a soft law initiative, for instance, this was examined in Chapter three with respect to the Extractive Industries Transparency Initiative (EITI) and the Nigerian Extractive Industries Transparency Initiative Act 2007. However, where mandating does not create a specific law for a soft law initiative, it involves the creation of legislation, regulation, penalties, and associated public sector agencies which may control some aspect of business investment or operations. By taking such action government creates a minimum standard which enables soft law initiatives to build on within a particular sector.

Unlike the EITI Nigeria has not mandated specific regulation with respect to the Equator Principles in order to enable their effectiveness in Nigeria. However, where mining, environmental and social issues are concerned, through the analysis of the Nigerian mining regulation in section 4.3.3 it is clear the Nigerian government has mandated numerous legislation which may enable the Equator Principles in terms of minimum legal backing for its soft law provisions on Environmental and Social issues which are applicable to the mining sector. For instance; under the EPs Principle 2: Environmental and Social Assessment requires clients to conduct an environmental and social impact assessment for all Category A and B projects. This soft provision is enabled through the mandating of first, the Environmental Impact Assessment (EIA) Decree 1992 which makes it mandatory for mining

---

<sup>694</sup> Tom Fox, Halina Ward, Bruce Howard, 'Public Sector Roles In Strengthening Corporate Social Responsibility: A Baseline Study' [2002] The World Bank available at: <http://pubs.iied.org/pdfs/16017IIED.pdf?>> Accessed 20<sup>th</sup> March 2016

projects to produce an EIA before the commencement of activities.<sup>695</sup> Secondly, Principle 2 is further enabled by the Nigerian government which mandated the Minerals and Mining Act 2007, where section 119 requires all title holders to provide an Environmental Impact Assessment report before the commencement of operations.<sup>696</sup> Such acts of mandating enable Principle 2 because by having legal backing it makes compliance with the Principle more likely. This is because clients involved in mining would already have undertaken an EIA in accordance with the Environmental Impact Assessment (EIA) Decree 1992 and section 119 of the Minerals and Mining Act 2007 thereby also complying with Principle 2.

Furthermore, another example of Nigeria mandating law and enabling the equator principles is seen under Principle 5: Stakeholder engagement. While Principle 5 requires Category A and B project clients to demonstrate effective stakeholder engagement and also obtain the free, prior and informed consent of indigenous people, Section 116 of the Minerals and Mining Act 2007 does the same, thus enabling this principle. As mentioned above Section 116 requires mineral title holders to engage the community where they aim to be active, seek their consent, and conclude a 'Community Development Agreement' which will make sure there is a transfer of social and economic benefits to the host community.<sup>697</sup> Again just as was the case with Principle 2, again we see the government mandating laws to enable the Equator Principles, in this case Principle 5.

The above paragraphs and section 4.3.3 demonstrate that when it comes to mandating laws and regulations that enable the Equator Principles the Nigerian government is clearly providing an enabling environment for the Equator Principles in the form of regulation. However, chapter three has demonstrated that mandating laws to enable soft law initiatives on their own may not create the enabling environment necessary to make soft law initiatives and thus the Equator Principles more effective. Therefore it is essential to establish whether the Nigerian government have adopted one of the other categories mentioned earlier below.

#### **4.4.2.1.2 Facilitating in Nigeria**

Facilitating involves government agencies enabling companies to engage and follow soft law initiatives in order to drive social and environmental improvements. As discussed in chapter two the facilitator role of government may be through legislation, government policy, or

---

<sup>695</sup> Environmental Impact Assessment Decree, Act No. 86 (1992)

<sup>696</sup> Section 119, Nigerian Minerals and Mining Act, 2007

<sup>697</sup> Section 116, Nigerian Minerals and Mining Act, 2007



government incentives. Where the Equator Principles are concerned in Nigeria, the government agency best placed to facilitate the adoption of the EPs, thus creating an enabling environment for them is the Central Bank of Nigeria (CBN), which regulates the Nigerian Banking sector. As a public bank the CBN is not a part of the Equator Principles, however, it may facilitate the adoption the EPs through government policy.

Indeed, through policy one might argue that the CBN has facilitated the adoption of the EPs through its Sustainable Banking Principles policy which was implemented in 2012.<sup>698</sup> The Nigerian Sustainable Banking Principles are nine Environmental and Social (E&S) Principles<sup>699</sup> which the CBN encourages Nigerian local banks to adopt in order to include environmental and social considerations in the financing of their client's projects. The CBN notes:

Successful implementation of these principles and guidelines will require banks, discount houses and development finance institutions to develop a management approach that balances the environment and social (E&S) risks identified with the opportunities to be exploited through their business activities.<sup>700</sup>

While the Nigerian Sustainable Banking Principles are not law, and failure to adopt them does not result in legal action against a bank, the CBN are optimistic regarding their adoption by Nigerian banks, and sought to facilitate their adoption through incentives. In a statement the CBN noted;

The Central Bank of Nigeria (CBN) directs full adoption and implementation of these principles and guidelines by all banks discount houses and development finance institutions and will provide incentives, as necessary, to those institutions that take concrete measures to embed the provisions of these principles and guidelines into their operational, enterprise risk management and other governance frameworks.<sup>701</sup>

The adoption of the CBN Sustainable Banking Principles facilitate the adoption of the EPs by local banks because just like the EPs the Nigerian Principles do not provide for a strict E&S management scheme for banks to adopt, rather it allows them the flexibility to adopt an internal scheme they are comfortable with. The principles are more guidelines, than strict rules, therefore banks may adopt the EPs as their scheme. Indeed, the guidelines to the

---

<sup>698</sup> Central Bank of Nigeria, Nigerian Sustainable Banking Principles, (July 2012)

<sup>699</sup> Principle 1 - Our Business activities: Environmental and Social Risk Management, Principle 2 – Our Business Operations: Environmental and Social Footprints, Principle 3 – Human Rights, Principle 4 – Women's Economic Empowerment, Principle 5 – Financial Inclusion, Principle 6 – E&S Governance, Principle 7 – Capacity Building, Principle 8 – Collaborative Partnerships, Principle 9 - Reporting

<sup>700</sup> Central Bank of Nigeria, Nigerian Sustainable Banking Principles, (July 2012)

<sup>701</sup> *ibid*

Nigerian principles do note that the principles are based on leading international sustainable finance standards and established industry best practice, which include the EPs, thus facilitating the adoption of the EPs by local banks.<sup>702</sup> Additionally, reference to the adoption of the EPs is more specifically made with respect to the implementation of the principles, where it is stated that Nigerian Banks shall apply international E&S standards and industry best practice such as the IFC Performance Standards, the Equator Principles, and the World Bank Group Environmental, Health and Safety Guidelines for lending to different sector activities.<sup>703</sup>

Furthermore, a specific principle is actually dedicated to ensuring compliance with international soft law initiatives. Principle 8 notes that Banks shall;

...collaborate across the sector and leverage international partnerships to accelerate our collective progress and move the sector as one, ensuring our approach is consistent with international standards...<sup>704</sup>

This demonstrates that the CBN through the Sustainable Principles is providing an enabling environment for the EPs by facilitating the adoption of principles based on the EPs model, and even the EPs where a bank chooses to subscribe to them as a way of becoming compliant with the Nigerian Sustainable Banking Principles. Moreover, beyond the EPs the Sustainable Principles are also facilitating compliance with other soft law initiatives. For instance, banks are encouraged to refer to key sustainability initiatives and good practice relevant for sector projects during E&S due diligence and also require their clients to work towards enhanced performances which are consistent with such initiatives' standards and good practice.<sup>705</sup> Soft law initiatives noted to be complied with include; the Extractives Industries Transparency Initiative (EITI); the Voluntary Principles on Security and Human Rights; and the Global Gas Flaring and Venting Reduction voluntary Standards.<sup>706</sup>

The above clearly demonstrates that the Nigerian Public Sector has engaged in facilitating an enabling environment for the Equator Principles, through policy that encourages their adoption thereby suggesting the existence of an enabling environment in Nigeria. This finding contributes towards addressing this chapter's research question of whether current policy and regulatory regimes in Nigeria provide an enabling environment for soft law

---

<sup>702</sup> Nigerian Sustainable Banking Principles, Guidance Note, July 2012

<sup>703</sup> *ibid* 5

<sup>704</sup> Principle 8: Collaborative Partnerships, Nigerian Sustainable Banking Principles, (July 2012)

<sup>705</sup> Nigerian Sustainable Banking Principles, Oil and Gas Sector Guideline, July 2012, 5

<sup>706</sup> *ibid*

initiatives. More, relevantly, through the Nigerian Sustainable Banking Principles example, it is demonstrated that the Nigerian public sector endeavours to provide an enabling environment for soft law initiatives through encouraging its private sector to comply with international soft law initiatives. However, whether this is enough to provide an enabling environment for soft law initiatives remain to be seen, as despite the Nigerian principles coming into force in 2012 there are still only three banks in Nigeria subscribed to the Equator Principles. Although it is worth noting that Fidelity Bank, a local Nigerian Bank adopted the Equator Principles on the 1<sup>st</sup> of November 2012, four months after the introduction of the Nigerian Sustainable Banking Principles. One might therefore argue their adoption of the EPs was facilitated through the introduction of the Nigerian Sustainable Banking Principles, thus enabling the EPs. Additionally, it may also be argued that the Sustainable Banking Principles actually facilitate the adoption of all international soft law initiatives that promote sustainable development, not just the EPs, therefore other Nigerian banks not subscribed to the EPs may be subscribed to other initiatives. For instance, one of the biggest banks in Nigeria, Guaranty Trust Bank does not subscribe to the EP, however, in 2012, it became a signatory to the United Nations Environmental Programme Finance Initiative on Sustainable Development.<sup>707</sup> WEMA Bank of Nigeria also became a signatory in December 2015.<sup>708</sup> This therefore shows that while the Nigerian Sustainable Banking Principles have not significantly facilitated the adoption of the Equator Principles, they may have facilitated the adoption of other soft law initiatives as the above examples suggest. This leaves one to conclude that the Nigerian public sector is capable of facilitating soft law initiatives.

#### **4.4.2.1.3 Partnering in Nigeria**

Partnering involves public sector agencies (the central government of a country and its parastatals) collaborating with stakeholders (e.g local communities and the private actors) within a particular sector to tackle social and environmental concerns, thus meeting soft law commitments. With respect to soft law initiatives public sector partnerships are usually found in multi-stakeholder soft law initiatives, as demonstrated in chapter three using the Extractive Industries Transparency Initiative as an example. However, even where a soft law initiative is not a multi-stakeholder initiative, government may still partner with stakeholders to ensure

---

<sup>707</sup> Guaranty Trust Bank, 'The GTBANK Corporate Social Responsibility Report', (2014) available at: <<https://www.gtbank.com/uploads/csr-reports/2014-report/2014-csr-report-small.pdf>> accessed 19<sup>th</sup> September 2018

<sup>708</sup> See UNEP Finance Initiative, available at: <<http://www.unepfi.org/member/wema-bank-plc/>> accessed 13<sup>th</sup> November 2017

commitment to a soft law initiative, thus enabling such an initiative. As noted in chapter two in a 2003 World Bank Business Survey Report, ‘Race to the Top’ which surveyed the views of over 100 million multi-national enterprises (MNEs) in the extractive, agribusiness, and manufacturing sectors it was established that the public sector are very important partners for the extractive sector in meeting soft law commitments.<sup>709</sup>

With regards to the equator principles, while they are not a multi-stakeholder initiative which requires the partnership of the public sector, government has showed willingness to partner with banks to promote similar principles (Nigerian Sustainable Banking Principles) to the EPs which may result in the adoption of the EPs as discussed above. Indeed, government in the form of the CBN will be a key partner in the implementation of the Nigerian Sustainable Banking Principles as CBN notes;

To enable the CBN track the progress of implementation and adherence to the Principles and Guidelines, banks, discount houses and development finance institutions will be required to submit regular reports to the CBN in line with reporting requirements which will be made available to the industry.<sup>710</sup>

With regards to the EPs, the above therefore clearly demonstrate that the Nigerian public sector do provide an enabling environment to soft law initiatives through partnering with sector stakeholders to develop and implement soft law initiatives in order to secure sustainable development and to avoid environmental and social issues.

Moreover, the Nigerian public sector has demonstrated a willingness for partnering in order to successfully implement soft law initiatives, the best and most popular example being the Nigerian Extractive Industries Transparency Initiative which was discussed in chapter three, where it was demonstrated that the Nigerian government took an active role in making the Nigerian EITI the flagship for the initiative, thereby demonstrating the Nigerian public sector’s role of partnering to enable soft law initiatives. Furthermore, the Nigerian public sector has also demonstrated a willingness to partner with stakeholders within a particular sector in order to fulfil international law and soft law obligations. An example from the Nigerian oil and gas sector (as the mining sector is still developing in Nigeria) is the public sector’s effort in establishing the Niger Delta Development Commission (NDDC), in order to cater for social and environmental issues developing in the region and international soft law

---

<sup>709</sup> The World Bank Group, Corporate Social Responsibility Practice, ‘Race to The Top: Attracting and Enabling Global Sustainable Business’ [2003] Business Survey Report 1-28, 22

<sup>710</sup> Central Bank of Nigeria, Nigerian Sustainable Banking Principles, (July 2012)

standards.<sup>711</sup> The NDDC is a collaboration of all the stakeholders within the exploration sector of the Nigerian oil and gas sector. Under Section 2(i) of the Act all stakeholders including; the oil producing states, the oil producing companies, the federal ministry of finance, and the federal ministry of environment are represented in the Board of the Commission.<sup>712</sup> Furthermore, under section 14 (2) the Federal Government and the oil producing companies operating on-shore and off shore, in the Niger-Delta area are to provide the majority of the initiative's funding.<sup>713</sup> This therefore further demonstrates that the Nigerian public sector is comfortable partnering with different stakeholders in order to enable soft law initiatives, especially those regulating social and environmental issues. However, one must be cautious, as simply partnering with stakeholders may not be enough to enable an initiative. For example, the NDDC initiative was noted to be thwarted by poor funding on the part of the government themselves as although multi-national oil corporations (MNCs) met their funding obligations to the NDDC, the Commission has been unable to deliver development.<sup>714</sup>

#### **4.4.2.1.4 Endorsing in Nigeria**

Endorsing usually involves the recognition and support of soft law initiatives by the public sector, i.e. central government ministries and their parastatals, either through public announcements, policy documents, public sector management practices, or the direct recognition of companies through award initiatives.<sup>715</sup> With respect to the EPs while there were no public announcements endorsing the initiative by the Nigerian government, which would explain why the initiative is not very popular in the country as mentioned above, the Nigerian Sustainable Banking Principles do recognise them as noted above. Such recognition may therefore serve as an endorsement of the EPs, however, more must be done in terms of endorsement, if the initiative is to become widely adopted in Nigeria, as there is still very little awareness about the EPs as mentioned above.

---

<sup>711</sup> Niger Delta Development Commission Act, 2000

<sup>712</sup> Section 2(1), Niger Delta Development commission Act, 2000

<sup>713</sup> Section 14(2), Niger Delta Development commission Act, 2000

<sup>714</sup>Uwafiokun Idemudia and Uwem E. Ite, 'Corporate-Community Relations in Nigeria's Oil Industry: Challenges and Imperatives' Corporate Social Responsibility and Environmental Management (2006), 13,194-206, 203

<sup>715</sup> Tom Fox, Halina Ward, Bruce Howard, 'Public Sector Roles In Strengthening Corporate Social Responsibility: A Baseline Study' [2002] The World Bank available at: <http://pubs.iied.org/pdfs/16017IIED.pdf?>> Accessed 20<sup>th</sup> March 2016

However, generally the endorsement of soft law initiatives by the Nigerian public sector has been quite positive. For instance, Nigeria endorsed and adopted the International Financing Reporting Standards (IFRS). Under the Financial Reporting Council of Nigeria Act, 2011, Nigeria made a public commitment towards IFRS as the single set of high quality global accounting standards.<sup>716</sup> Furthermore, another soft law initiative endorsed by Nigeria is the World Bank Group Voluntary Standard for Global Gas Flaring and Venting Reduction<sup>717</sup> through its membership of the Global Gas Flaring Reduction Partnership (GGFR). Here, the Nigerian Government, the GGFR, and oil & gas companies have developed a collaborative framework to flare reduction in Nigeria through the “Nigeria Flare Reduction Committee” (NFRC) set up in 2007.<sup>718</sup>

The above therefore suggests the Nigerian public sector seems willing to endorse initiatives should the need arise. It would therefore appear that the Nigerian public sector does provide an enabling environment to soft law initiatives through endorsements.

This section has demonstrated that going by the public sector requirements for providing an enabling environments for soft law initiatives i.e. mandating, facilitating, partnering, and endorsing, the Nigerian public sector has been found capable of meeting these requirements. With regards to the Equator Principles the above has demonstrated that the Nigerian public sector has mandated laws that will enable the EPs, through the Nigerian Sustainable Banking principles, has facilitated, partnered, and endorsed the Equator Principles. This leaves one to question so why are the EPs still yet to be widely accepted. One might argue that this may be due to the Nigerian public sector not doing enough for instance, endorsing the principles by providing more rewarding incentives or through other mechanisms, as will be demonstrated in our case study in Chapter 5. However, one might simply argue that the public sector on its own may not be enough to provide an enabling environment for soft law initiatives, and other actors are required, which we shall consider below.

---

<sup>716</sup> IFRS, ‘IFRS Application Around the World Judicial Profile: Nigeria’ available at < <http://www.ifrs.org/Use-around-the-world/Documents/Jurisdiction-profiles/Nigeria-IFRS-Profile.pdf>> accessed on 28<sup>th</sup> March 2016

<sup>717</sup> Global Gas Flaring Reduction (GGFR): A Public Private Partnership, ‘A Voluntary Standard for Global Gas Flaring and Venting Reduction’ Report Number 4, World Bank Group, May 2004

<sup>718</sup> Bent, R. Svensson, ‘Global Gas Flaring Reduction in Key Countries’ (2012) International Gas Union, pp7, available at < <http://members.igu.org/old/IGU%20Events/wgc/wgc-2012/wgc-2012-proceedings/programme-committee-papers/programme-committee-a-pgca/committee-session-6.2/global-gas-flaring-reduction-in-key-countries/@@download/download>> accessed 28<sup>th</sup> March 2016

#### 4.4.2.2 Local Governance in Nigeria

Gboyega defines local government as “a competent unit of Government that is capable of assessing the needs of the local communities and dwellers; that can mobilize and harness local resources and talents to satisfy these local needs for sustainable human development.”<sup>719</sup> This thesis subscribes to the same definition. Local governance is especially important when it comes to soft law initiatives relating to mining activities. This is because most mining projects are carried out in rural areas, away from the watchful gaze of the majority of a country, which may provide TNCs with the opportunity to abuse the rights of locals, without much notice. Therefore local government empowerment by the State is important in creating an enabling environment for soft law initiatives so that liaison between local government, communities, and TNCs is easily attainable, for the purposes of implementing soft law initiatives.

With regards to the EPs an enabled local government in Nigeria may be able to monitor environmental and social issues caused by those engaged in mining activities financed by EPFIs in their local communities. Where the Local Government structure is enabled they would be able to report instances of non-compliance to the financing EPFIs as the governance system closest to the community. This therefore helps enforce soft law initiatives such as the EPs thereby making them more effective, and thus enabling them.

A local governance structure in Nigeria is provided by Section 7 of the 1999 Constitution of the Federal Republic of Nigeria, which states;

The system of local government by democratically elected local government councils is under this constitution guaranteed; and accordingly the government of every State shall, subject to Section 8 of this Constitution ensure their existence under a law which provides of the establishment, structure, composition, finance and functions of such councils.<sup>720</sup>

Section 7(5) of the 1999 Constitution empowers a Local Government to among other things do the following; make recommendations to a State Commission on economic planning or any similar body on economic development of the State, particularly the areas pertaining to the local council; collection of some taxes; establishment, maintenance and regulation of slaughter slabs, markets, motor parks and public conveniences; provision and maintenance of

---

<sup>719</sup>Alex Gboyega, “Local Government reform in Nigeria”, in Phillip Mawhood (ed) *Local Government in the Third World*, (John Wiley and Sons 1983)

<sup>720</sup> Section 7, The Constitution of the Federal Republic of Nigeria, 1999

sewage and refuse disposal; participation in a State's provision and maintenance of primary and vocational education, participation in a States development of agriculture and natural resource, other than the exploitation of minerals; and participation in a State's provision and maintenance of health services.<sup>721</sup> The above are just some of the functions of Local Governments in Nigeria, thereby establishing Local Government as the all-important third tier of governance under Nigeria's Federal system.

More importantly, with respect to mining and soft law initiatives, the ability of local governments to regulate damage caused from mineral exploration appears to be clearly restricted by the Nigerian Constitution. This is because it clearly states that they may participate in developing agriculture and natural resources other than the exploitation of minerals, thereby stopping them from providing an enabling environment for soft law initiatives pertaining to mineral exploitation.<sup>722</sup> This is unfortunate taking into account that Local Governments are the closest level of Government to the Nigerian masses, and are capable of possessing knowledge of the people's needs, and problems that may arise from mineral exploitation, which may then lead the local governments to act either through soft laws or even hard laws where necessary.

In practice one may even argue that the lack of an enabled local government system in Nigeria may have contributed to the devastation witnessed in the oil and gas sector in the Niger Delta region of Nigeria. This is because oil exploitation as with mining exploitation usually occur in remote localities where people are often uneducated and unprotected, therefore without an effective local governance system to check the activities of TNCs and ensure they are meeting their commitments to soft law initiatives and hard laws TNCs may abuse such commitments. For instance, despite signing up to initiatives such as the Global Compact, TNC Royal Dutch Shell PLC ignored environmental principles and laws thus causing significant damage to the environment during mineral exploitation in the Niger Delta region of Nigeria. In Nigeria oil was first discovered in commercial quantities in the Ijaw community of Oloibiri in 1956 which is within the Ogbia Local Government Area of Bayelsa State. Despite the presence of a local government authority here, the inhabitants of this village/community have been left with nothing but damaged farmlands and polluted rivers

---

<sup>721</sup> Section 7(5), The Constitution of the Federal Republic of Nigeria, 1999

<sup>722</sup> Section 7(5), The Constitution of the Federal Republic of Nigeria, 1999



with no electricity, potable drinking water and other basic amenities.<sup>723</sup> This is the case throughout the Niger Delta region of Nigeria where oil exploration by TNC's is common, thus demonstrating the ineffectiveness of local governments in Nigeria thereby leading TNCs to ignore soft law and even hard law commitments. This is due to the fact as noted above that Local Governments are prevented by the constitution from being involved in the exploitation of mineral resources, as will also be discussed below they also operate on the dictates of the State government which sometimes withholds funds due to them. Indeed, Oviasuyi and Uwadiae also noted that TNCs involved in oil exploration in Nigeria over the years have not impacted on their host communities as while TNCs and their workers have been living in affluence, the inhabitants of their host communities have been subjected to extreme poverty. They also highlighted that the laws put in place by the federal Government of Nigeria for the exploitation of oil and gas resources in the Niger-Delta did not take locals into consideration and have thus been routinely abused by the oil companies.<sup>724</sup> The legal system does not empower local governments and communities thus paving the way for TNCs to ignore soft law initiatives signed up by the TNCs in most cases as the Ogoni land case illustrates.

As illustrated above with respect the oil and gas sector, clearly the Nigerian Local Government system by design as stipulated in the constitution is too weak to influence TNCs compliance with any form of law, therefore it is worth considering if other local authority systems are available, namely the traditional or native system where SSA is concerned.

Traditional local authority referred to here are political arrangements whereby leaders with proven track records are appointed and installed in line with the provisions of their native laws and customs, such leaders may be referred to as Emirs(Kings) or Chiefs. Their roles are to preserve the customs and traditions of the people within their locality, represent the interest of their people, and to manage conflicts arising among or between members of the community by the instrumentality of laws and customs of the people.<sup>725</sup> This system of local authority also exists throughout Nigeria, however, just like the formal system of local government provided under the Nigeria constitution it has also been rather ineffective in

---

<sup>723</sup> P.O. Oviasuyi and Jim Uwadiae, 'The Dilemma of Niger-Delta Region as Oil Producing States of Nigeria'[2010] Issue 16 Journal of Peace, Conflict and Development

<sup>724</sup> P.O. Oviasuyi and Jim Uwadiae, 'The Dilemma of Niger-Delta Region as Oil Producing States of Nigeria'[2010] Issue 16 Journal of Peace, Conflict and Development, 116

<sup>725</sup> Kenneth Nweke, 'The Role of Traditional Institutions of Governance in Managing Social Conflicts in Nigeria's Oil-Rich Niger Delta Communities: Imperatives of Peace-Building Process in the Post-Amnesty Era' (2012) Vol. 5 No. 2 British Journal of Arts and Social Sciences, 206

protecting the interest of the people within the locality of these traditional authorities, therefore it would be difficult to make a case that they can enable soft law initiatives in Nigeria. This is because just like the formal local government system in Nigeria they too have not been enabled with any real power by the constitution or any other legislation. For instance, Nweke reported that in the oil rich Niger Delta region of Nigeria local traditional authority which are supposed to be depoliticized and neutral as they are supposed to be the symbol of their people's unity have abandoned this, largely due to the politicization of the institutions by successive governments from the colonial to post-colonial era.<sup>726</sup> Indeed, Orji and Olali also note that traditional local authority's roles are dwindling in Nigeria as federal, state, and local governments have taken away most of their political power, therefore oil companies pay them little heed, thus rendering them rather ineffective in enabling any soft law initiatives.<sup>727</sup> Vaughan further argued that the failure of contemporary Nigerian state oil multinational corporations operating in the Niger-Delta region to incorporate traditional institutions of governance in conflict management and peace building has prevented its effectiveness as an instrument of grassroots governance in the evolving political and social dispensation.<sup>728</sup> Therefore one might argue the Local government system provided under the Nigerian constitution as noted above despite being weak itself is a stronger system of local governance for Nigeria and enabling this system may enhance the likelihood of TNCs complying with soft law initiatives, as opposed to the traditional system which is clearly too weak.

Moreover, it is worth briefly noting that the Local Governance institution has generally been hampered in Nigeria and is a major set-back when it comes to creating an enabling environment for any soft law initiatives. This is because this institution which is the closest to the people that soft law initiatives seek to protect has been weakened and is rather inefficient in Nigeria, notwithstanding the provisions in the 1999 Nigerian Constitution. For instance, Isa notes that such weakness and inefficiency may be connected with poor financing, and corruption by local councils, as despite the increase in funds available to local government in

---

<sup>726</sup> Kenneth Nweke, *The Role of Traditional Institutions of Governance in Managing Social Conflicts in Nigeria's Oil-Rich Niger Delta Communities: Imperatives of Peace-Building Process in the Post-Amnesty Era* (2012) Vol. 5 No. 2 *British Journal of Arts and Social Sciences*, 212

<sup>727</sup> KE Orji and ST Olali, 'Traditional Institutions and Their Dwindling Roles in Contemporary Nigeria: The Rivers State Example' in T Babawale, A Aloa and B Adesoji (eds), *Chieftaincy Institution in Nigeria* (Concept Publication Ltd 2010)

<sup>728</sup> Olufemi Vaughan, *Indigenous Political structures and Governance in Nigeria* (Book Craft Ltd 2004) 7

Nigeria since the early 1990s, its economic and financial profile is very weak for the development programme it is expected to carry out.<sup>729</sup> This is supported by the fact that the Nigerian Economic and Financial Crimes Commission (EFCC) arrested a former Governor of Enugu State in Nigeria for allegedly diverting local government funds in the state.<sup>730</sup> Furthermore, there is a high level of indiscipline within the Nigerian Local Governance system, staff are poorly educated, unskilled, and are in the habit of playing truant with their jobs. Indeed, official duties are seen as an extension of private leisure, therefore such poor attitude to work has also arrested the efficiency of local government in Nigeria.<sup>731</sup> This demonstrates that Nigeria does not have an enabled local governance system to really monitor or regulate the activities of TNCs in their local communities in collaboration with soft law initiatives.

Furthermore, one might argue that the lack of an enabled local governance system in Nigeria may be why the drafters of the Nigerian Minerals and Mining Act 2007 under Section 19 established the Mineral Resources and Environmental Management committee for each State of the Nigerian Federation.<sup>732</sup> They therefore enabled some form of local governance outside the constitutional local governance system and the traditional local authority institutions in Nigeria. The committee ensures better protection of the environment and communities through closer monitoring of mining activities across the Federation, outside the scope of the local government. This may be the only form of an attempt to enable local governance in the mining sector in Nigeria and with mining gradually developing in Nigeria it remains to be seen whether it is successful. However, as discussed above, on paper it is a positive provision which if strongly implemented provides local governance for the mining sector, where none exists.

Overall, the above shows that Nigeria's attempt to create a local governance system which in turn will enable soft law initiatives is rather weak and requires major reform if soft law initiatives are to be successful in Nigeria.

---

<sup>729</sup> Muhammad Kabir Isa, 'Nigerian Local Government System and Governance: Lessons, Prospects and Challenges for Post 2015 Development Goals', in Eris Schoburgh, John Martin, and Sonia Gatchair (eds) *Developmental Local Governance: A Critical Discourse in Alternative Development* (Palgrave Macmillan 2016)

<sup>730</sup> Dare Arowolo, 'Local Government Administration and the Challenges of Rural Development in Nigeria' (2008) available at < <http://www.articlesbase.com/authors/dare-arowolo/49807> > accessed 1<sup>st</sup> April 2016

<sup>731</sup> Muhammad Kabir Isa, 'Nigerian Local Government System and Governance: Lessons, Prospects and Challenges for Post 2015 Development Goals', in Eris Schoburgh, John Martin, and Sonia Gatchair (eds) *Developmental Local Governance: A Critical Discourse in Alternative Development* (Palgrave Macmillan 2016)

<sup>732</sup> Section 19, Nigerian Minerals and Mining Act, 2007

#### 4.4.3.3 Civil Society in Nigeria

An effective enabled civil society is critical to the effective implementation of soft law initiatives such as the EPs. This is the case because civil society has the important role of raising awareness with respect to the availability of soft law initiatives signed up by TNCs which protect locals in areas affected by mining projects, especially where government is absent in enforcing regulations. Indeed, in chapter two South Africa was used as an example of where the concept of CSR is now embedded in society, as a result of the work of an active civil society, it was even highlighted that government now comes in at a later stage in South Africa as a result.<sup>733</sup> One might argue that the key enabling factor of an active civil society is that together with soft law initiatives civil society in itself is a regulator.<sup>734</sup> Therefore where an enabled civil society is absent within a country soft law initiatives suffer as there is no regulator for them, thus harming their effectiveness. Indeed, Schuller rightly sees NGOs as governance intermediaries between grassroots locals and elite global interests, especially where there are weak governments, as with a number of developing countries.<sup>735</sup>

With regards to the EPs in Nigeria, civil society plays an important role in promoting the effectiveness of the principles. For example, in their study Macve and Chen found that pressure from non-governmental organization such as BankTrack, Greenpeace, and Friends of the Earth who continually monitor Barclays Bank ensured Barclays' compliance with the EPs.<sup>736</sup> This therefore leaves one with the question; is there such monitoring of banks by civil society in Nigeria?

Civil society is indeed present in Nigeria, the issue is whether they are active enough to be considered enabled in Nigeria. The list of Civil Society Organizations (CSO) registered by the Nigerian Bureau of Public Procurement has 138 organizations listed and this is not exhaustive of the number of organizations in Nigeria.<sup>737</sup> This demonstrates there is a

---

<sup>733</sup> Tom Fox, Halina Ward, Bruce Howard, 'Public Sector Roles In Strengthening Corporate Social Responsibility: A Baseline Study' [2002] The World Bank available at: <<http://pubs.iied.org/pdfs/16017IIED.pdf?>> Accessed 20<sup>th</sup> March 2016

<sup>734</sup> Peter Utting, 'Corporate Responsibility and the Movement of Business' (2005) *Development in Practice*, Vol. 15, No. 3 / 4, pp 375-388

<sup>735</sup> Mark Schuller, "Seeing Like a 'Failed' NGO: Globalization's Impact on State and Civil Society in Haiti," (2007), Vol32 *Political and Legal Anthropology Review*, 84-104

<sup>736</sup> Richard Macve and Xiaoli Chen, 'The "equator principles": a success for voluntary codes?' (2010), Vol. 23 (7) *Accounting, Auditing & Accountability Journal*, 890-919, 908

<sup>737</sup> Nigerian Bureau of Public Procurement, available at: <[http://www.bpp.gov.ng/index.php?option=com\\_joomdoc&view=documents&path=CSO\\_LIST.pdf&Itemid=569](http://www.bpp.gov.ng/index.php?option=com_joomdoc&view=documents&path=CSO_LIST.pdf&Itemid=569)> accessed 17<sup>th</sup> November 2017

proliferation of CSOs, however, out of the 138 organizations listed only 8 had environmental and social issues as their main focus. The remaining 130 focused on; religion, ethnicity, transparency, corruption and good governance, women empowerment and health. Indeed, a further review of the civil society literature in Nigeria revealed there are no civil society activity with regards the banking sector of Nigeria.<sup>738</sup> This is supported by the fact that even BankTrack had no data regarding banking transactions in Nigeria, due to little civil society activity in Nigeria on the activities of actors within this sector. Therefore this research finds that civil society may not be in the position to help enable the EPs in Nigeria.

However, with respect to other soft law initiatives it is worth considering whether civil society has been effective and thus enabled. In modern Nigeria, civil society seems to have been effective in playing the regulator role it needs to play for soft law initiatives in two key areas; the struggle for democracy in Nigeria and the struggle by the people of the Niger-Delta region of Nigeria against the environmental and social issues caused by Multi-National Oil Companies (MNOOC) and the State, their roles here shall be considered below.

Civil society activities in Nigeria came to the fore in the mid-1980s due to several problems and policies. First, there was the economic crisis which imposed hardships and raised restiveness of the civil population, second, there was mass corruption by the state, failure of development efforts, abuses of power and repression.<sup>739</sup> These weaknesses became more glaring as time went on, further weakening the legitimacy of the military government and its hold of the State. Third, there was the inconsistencies and impure motives of the military's political transition programme.<sup>740</sup> Together, these catalysed and generated an upsurge in the formation and activities of civil society in Nigeria. Organizations were formed, and became radicalised, bold, undaunted and resilient in the struggle with the State.<sup>741</sup> The State became overly repressive in an effort to weaken and destroy the organised power of civil society. However, CSOs in Nigeria were to an extent able to exert pressure against military rule, the promotion of rule of law, protection of socioeconomic and political rights, and compel

---

<sup>738</sup> A.O Ikelegbe, 'The perverse manifestation of civil society: evidence from Nigeria' (2001) 39 (1) *Journal of Modern African Studies*, 1-24, Augustine Ikelegbe, 'Engendering civil society: oil, women groups and resource conflicts in the Niger Delta region of Nigeria', (2005) 43 (2) *Journal of Modern African Studies*, 241-270, S. Adejumobi, 'The civil society in conflict management and peace building in Africa', (2001) 7 (1) *Development Policy Management Bulletin*, 19-21

<sup>739</sup> Augustine Ikelegbe, 'The perverse manifestation of civil society: evidence from Nigeria' (2001) 39 (1) *Journal of Modern African Studies*, 1-24, 8

<sup>740</sup> *ibid*

<sup>741</sup> *ibid*

government into the revision of economic and political reforms.<sup>742</sup> Furthermore, the activities of civil society continued to mount pressure for democratisation throughout the period from 1986 to 1999 when democratisation was finally realised.<sup>743</sup>

With respect to civil society activity in the Niger Delta, the demands and anger in the Southern Nigerian region as a result of the oil exploration activities of MNOC and the State have given rise to a flourishing civil society. Civil organizations that developed include; the Niger Delta Human and Environmental rescue Organisation (ND-HERO), Environmental Rights Action (ERA), Oil Watch Group, Ijaw Council for Human Rights (ICHR), and Institute of Human Rights and Humanitarian Law (IHRHL).<sup>744</sup>

The activities of civil society in the region include; protesting against oil spillages and compensation practices of MNOCs; general protest against environmental damage and irresponsibility by the MNOCs, and more importantly, and relevant to soft law initiatives the monitoring of environmental degradation, and advocacy of environmental standards and actions on behalf of affected communities.<sup>745</sup> In order to get their message across, civil society here use press statements, interviews, conference communiques, peaceful protests, and publicised meetings.<sup>746</sup> The activities of CSOs in the Niger Delta such as Living Earth Nigeria Foundation, Our Niger Delta, and Environmental Rights Action to stop further destruction of the Niger Delta's fragile ecosystem through public awareness and conservation projects has actually resulted in a change of attitude from Oil TNCs.<sup>747</sup> Idemudia reports that such pressure from local CSOs and foreign stakeholders has led to TNCs accepting their social responsibility and developing community development partnership programmes thus enabling CSR initiatives they are subscribed to.<sup>748</sup> This clearly demonstrates the effective role of civil society in enabling soft law initiatives, therefore enabled NGOs have a responsibility to monitor and pressure TNCs into complying with the numerous soft law initiatives

---

<sup>742</sup> Attahiru Jega, 'Organising for Popular Democratic Change in Nigeria: Options and Strategies' (1997) London Centre for Democracy and Development

<sup>743</sup> Augustine Ikelegbe, 'The perverse manifestation of civil society: evidence from Nigeria' (2001) 39 (1) Journal of Modern African Studies, 1-24, 8

<sup>744</sup> Augustine Ikelegbe, 'Civil Society, oil and conflict in the Niger Delta region of Nigeria: Ramifications of Civil Society for a Regional Resource Struggle' (2001) vol 39(3) Journal of Modern African Studies, 437-469, 450

<sup>745</sup> *ibid* 452

<sup>746</sup> *ibid* 458

<sup>747</sup> Collins N.C. Ugochukwu and Dr. Jurgen Ertel, 'Negative impacts of oil exploration on biodiversity management in the Niger Delta area of Nigeria' (2008) 26(2) Impact Assessment and Project Appraisal, 139-147, 146

<sup>748</sup> Uwafiokun Idemudia, 'Oil Extraction and Poverty Reduction in the Niger Delta: A critical examination of Partnership Initiatives' (2009) Vol 90 (1) Journal of Business Ethics, 91-116, 93

promoting sustainable development they are subscribed to, thus enabling them. Indeed, in accordance with this Environmental Rights Action noted that;

“Our corporate accountability campaign was born out of the need to halt anti-people and deceptive practices by big corporations, while advocating strategies of influencing corporate behavior. Working in close collaboration with like-minded groups...to pressure corporate institutions to change their behavior.”<sup>749</sup>

Therefore as suggested above by Environmental Rights Action one of the key roles of CSOs is ensuring TNCs are behaving according to international best practices, which therefore enables soft law initiatives which promote such best practices.

Additionally, earlier it was noted that together with soft law, civil society are seen as regulators and this key role as regulators is aptly demonstrated by the NGOs Social and Economic Rights Action Center (SERAC) and Socio Economic Rights and Accountability Project (SERAP) in Nigeria. With the Nigerian government’s failure to effectively monitor and penalize the negative activities of oil TNCs in the Niger Delta region CSOs SERAC and SERAP acted as regulators of TNCs. They monitored the detrimental activities of oil TNCs in the region, gathered data and evidence, and challenged the oil TNCs in court on behalf of local communities. For their part SERAC on behalf of the people of Ogoniland challenged the Nigerian government for its failure to monitor the operations of oil companies operating in Ogoniland and their failure to require standard industry safety measures which resulted in direct environmental damage in the case *SERAC v Nigeria*.<sup>750</sup> In this case the commission found in favor of the plaintiffs and appealed to the Nigerian government to cease attacks on the Ogoni people, undertake effective investigations into human rights violations detailed in the case, ensure compensation for the victims and put safeguards in place to prevent future violations. While this case was against the Nigerian government which is a signatory to the African Charter and the party the court has jurisdiction over the case applied pressure to oil TNCs operating in the Niger Delta whom operate in partnership with the Nigerian government, to apply international industry best practices while operating in the Niger delta thus demonstrating the regulatory role of civil society by bringing the case to an international tribunal and securing a positive decision.

---

<sup>749</sup> Environmental Rights Action, Friends of the Earth, Nigeria, available at <<http://erafoen.org/index.php/corporate-accountability-campaign/>> accessed 10<sup>th</sup> September 2018

<sup>750</sup> *SERAC v. Nigeria* [2002], Case No. ACHPR/COMM/A044/1, Afr. Comm’n Human & People’s Rights

The case of *SERAP v Nigeria*<sup>751</sup> also further demonstrates the role of civil society as regulators and enforcers of soft law and hard law. In this case SERAP filed a lawsuit against Nigerian authorities and several oil companies, including Shell, for human rights violations committed in the Niger Delta region, before the Court of Justice of the Economic Community of West African States (ECOWAS). However, the Court ruled that it did not have jurisdiction in relation to the companies sued and the lawsuit was then reformulated against the Nigerian authorities. The court found Nigeria to be in breach of the right to a decent environment amongst other rights, with its failure to oversee the activities of companies operating within its borders. The Court therefore ordered Nigeria to (1) take effective measures to restore the environment of the Niger Delta, (2) take necessary measures to prevent the occurrence of further environmental pollution, and (3) hold the perpetrators of the environmental damage, including TNCs such as Shell accountable.<sup>752</sup> However, since this decision in 2012, Nigeria has done little to enforce the court's decision.<sup>753</sup> Nevertheless, this case is able to again demonstrate the effective role of civil society in regulating the activities oil TNCs along with the Nigerian government who exploit oil and gas in the Niger Delta with little regard for environmental laws and industry best practices, in the absence of government regulation and enforcement. This therefore illustrates the need for an effective civil society organizations such as SERAP and SERCAC that will enforce laws and soft law commitments subscribed to by TNCs.

Moreover, the tempo and agitation of the Niger Delta region has taken a more militant and aggressive form against both the State and oil TNCs, since the development of civil society in the 1990s.<sup>754</sup> This may be as a result of the Nigerian State's repressive approach to civil society especially the military governments, which deployed armed troops and armoured personnel carriers to the region to quell any unrest.<sup>755</sup> However, any hope of the State being more receptive of civil society under democratic rule in Nigeria and withdrawing troops from

---

<sup>751</sup> *Socio-Econ. Rights & Accountability Project (SERAP) v. Nigeria* [2012] Judgement No. ECW/CCJ/JUD/18/12, ECOWAS

<sup>752</sup> *ibid*

<sup>753</sup> Barisere Rachel Konne, 'Inadequate Monitoring and Enforcement in the Nigerian Oil Industry: The Case of Shell and Ogoniland' (2014) Vol 47 Cornell International Law Journal

<sup>754</sup> Ukoha Ukiwo, 'From "Pirates" to "Militants": A Historical Perspective on Anti-State and Anti-Oil Company Mobilization Among the Ijaw of Warri, Western Niger Delta', (2007), 106/425 African Affairs, 587-610

<sup>755</sup> Augustine Ikelegbe, 'Civil Society, oil and conflict in the Niger Delta region of Nigeria: Ramifications of Civil Society for a Regional Resource Struggle' (2001) vol 39(3) Journal of Modern African Studies, 437-469, 442



the region, were dampened as the State continued to maintain a heavy military presence in the region. This is because of the need to maintain order, due to the development of civil society into a more militant form in their struggle against the State and oil TNCs.<sup>756</sup>

Despite some organizations such as the Ijaw Youth Council becoming more aggressive, other organizations have remained peaceful and the activities of civil society within the region have achieved some gain. For instance, their struggle against a greater share of the revenue generated from oil activities has been addressed to an extent, as under Section 162 of the 1999 Constitution of the Federal Republic of Nigeria oil producing regions are to get a higher percentage (13% extra) of revenue accrued to the State.<sup>757</sup> Furthermore, the government is now more sensitive to the environmental and social responsibilities of oil companies in the region, which resulted in the coming into force of the Niger Delta Development Commission mentioned above.<sup>758</sup> Civil society activities in the Niger Delta region also resulted in International Environmental and Civil Rights groups taking interest and assisting locals in seeking redress against the multinationals operating in the region.<sup>759</sup> For example, with the help of Amnesty International the Ogoni community discussed above were able to secure a £55m settlement against Shell Petroleum in 2015 for the environmental devastation caused by Shell Petroleum.<sup>760</sup>

The above paragraphs clearly demonstrate that civil society is alive and present in Nigeria. Indeed, they have been rather effective, as demonstrated above, which may leave one to argue that an enabled civil society exists in Nigeria. However, a closer look at the civil society picture of Nigeria reveals a different picture. First, civil society activities in Nigeria seem to be rather ethnic, sectional or regional. For instance, the Niger Delta struggle is a purely Niger Delta issue, most of the organizations are based in the Niger Delta, and should similar issues arise in another region of the country such organizations may not participate in holding multinationals to account in other regions of the country. Therefore should the mining sector in the Northern region of Nigeria develop, a new civil society would need to be developed to act as regulators for soft law initiatives and the communities. However,

---

<sup>756</sup> Ukoha Ukiwo, 'From "Pirates" to "Militants": A Historical Perspective on Anti-State and Anti-Oil Company Mobilization Among the Ijaw of Warri, Western Niger Delta', (2007), 106/425 African Affairs, 587-610

<sup>757</sup> Section 162, Constitution of the Federal Republic of Nigeria, 1999

<sup>758</sup> Niger Delta Development Commission Act, 2000

<sup>759</sup> Augustine Ikelegbe, 'Civil Society, oil and conflict in the Niger Delta region of Nigeria: Ramifications of Civil Society for a Regional Resource Struggle' (2001) vol 39(3) Journal of Modern African Studies, 437-469, 450

<sup>760</sup> Jon Vidal, 'Shell Announces £55m Pay Out for Nigeria Oil Spills', *The Guardian* (London 7<sup>th</sup> January 2015)

presently civil society in Northern Nigeria is rather weak as there has been no struggle for resource control or other societal issues caused by the State or multinationals. Therefore while civil society exists in some regions of Nigeria, it does not exist in most regions, it therefore cannot be argued that there is an enabled civil society in Nigeria as a whole. The only era where civil society took a national rather than sectional dimension in Nigeria was the democratization struggle, and after democratization was attained most of the organizations involved dissolved or morphed into wings of political parties.<sup>761</sup>

Second, despite the existence of numerous Civil Society Organizations (CSO) as demonstrated by the Bureau of Public Procurement record of 138 registered organizations, a background check of some of the organizations listed, by this author reveals most of them are inefficient, produce little or no reports, and simply make occasional press statements. Indeed, this is supported by the argument that civil society groups in some cases proliferated in Nigeria because of opportunism in the competition for donor funds.<sup>762</sup> Kukah further noted that the human rights groups were frequently involved in squabbles due to a lack of accountability, tribalism, manipulation, treachery, and regionalism.<sup>763</sup> Therefore, clearly one may not rely on such a civil society to act as its regulator and monitor of soft law initiatives, especially where those involved are mostly engaged in self-interest rather than societal interests.

Third, apart from in the Niger Delta region, the aforementioned Bureau of Public Procurement CSO list showed that most CSOs are focused on democracy, transparency, health, or gender issues. For civil society to be truly enabled in Nigeria there is a need for more organizations which are strong enough financially to focus on the environmental and social issues that arise out of the activities of multinationals, not just in the Niger Delta, but all across Nigeria. As noted earlier the non-existence of such organizations in Nigeria may hamper the effective implementation of the Equator Principles and similar soft law initiatives.

In Sum, the above section has demonstrated that while civil society does exist and has played a prominent role in Nigeria, there is more needed from the Nigerian civil society if they are going to act as the regulators and monitors of soft law initiatives, making them more

---

<sup>761</sup> Augustine Ikelegbe, 'The perverse manifestation of civil society: evidence from Nigeria' (2001) 39 (1) *Journal of Modern African Studies*, 1-24

<sup>762</sup> *ibid* 10

<sup>763</sup> H.M Kukah, 'State of Current Actors: An Overview of Human Rights and Democratic Development in Nigeria' (1997), London Centre for Democracy and Development

effective, and capable of regulating the developing mining sector in Nigeria, in the absence of government enforcement of regulation. This is especially necessary taking into account most of the solid mineral potential of Nigeria is in the Northern region where civil society activity is weak. In order for civil society to be more effective in Nigeria this research is of the view that legislation supporting the creation of NGOs and providing them with finance should be provided by the State. In doing so civil society in Nigeria would have the financial backing to last beyond generational issues such as the struggle for democracy or the Niger Delta environmental protection struggle. It would also give civil society more finance to effectively carry out their role of monitoring and regulating the activities of TNCs especially in remote regions where mineral exploitation take place, thereby ensuring TNCs are complying with laws and soft law initiatives they are subscribed to, and thus enabling such initiatives. Such an approach would also provide civil society with the resources to monitor the activities of TNCs throughout the country and not just in a particular region due to financial constraints, thereby making them more effective in their roles as monitors and regulators within a country.

#### **4.5 Conclusion**

This section concludes the chapter by discussing the key findings from the key questions sought at the introduction of this chapter.<sup>764</sup> First, whether there is a governance gap in the Nigerian mining sector as a result of the absence of an effective set of regulatory measures to address environmental and social issues that arise as a result of mining activities. Second, the extent to which Nigeria's legal and policy regimes provide an enabling environment for soft law initiatives which may assist in regulating the mining sector, and the implication this has on SSA as a whole.

With respect to the first issue, this chapter has revealed that before Nigeria implemented the Environmental Impact Assessment (EIA) Act of 1992, environmental and social regulations were almost non-existent. However, even after the EIA Act came into force enforcement of environmental and social regulation continued to be weak, and it was further highlighted that

---

<sup>764</sup> Research Questions 1.3 and 1.4: is there a governance gap within the mining sector in SSA as a result of weak mining regulations or the enforcement of such regulation?' and 'do the existing legal and policy regimes in SSA provide an enabling environment for soft law initiatives to effectively fill any governance gap within African mining?

the main culprits of environmental devastation the ASM were not caught under the Act. The chapter found there is a need to review the EIA Act of 1992, this is so that it is made into an Act that is clear, precise, and tailored to Nigeria's economic capabilities, this will allow for better implementation and enforcement of the Act.

With regards to the Nigerian Minerals and Mining Act 2007, the chapter sees it as a turning point in terms of environmental and social protection in Nigeria. The Act was strong, specific and far-reaching in its protection of the Nigerian environment and communities from the activities of mining. However, as with most Nigerian laws enforcement remains the main stumbling block. Enforcement may prove difficult especially taking into account the chapter found very little resources have been allocated to the solid minerals sector in Nigeria. Additionally, although the Act under section 100 attempts to protect local communities from unlawful eviction from their land by requiring their consent must be obtained before a mineral license is awarded, this chapter found the Act lacking in clearly defining how consent is to be attained. This creates uncertainty and provides room for abuse, thereby failing to protect communities as was the intention of the provision. Furthermore, the requirement that lease holders conclude a community development agreement under section 116 of the 2007 Act was found to be unfavourable to local communities in Nigeria due to their weak bargaining position. This chapter therefore recommends that, rather than allowing communities to negotiate from a weak bargaining position the Nigerian government should assist them in such negotiations. This is a view point supported by the Mining Road Map report mentioned earlier.<sup>765</sup> This research further argues that failure to enforce the environmental and social provisions of the 2007 Act may arise due to the Nigerian government being very driven in attracting foreign investment to the mining sector that they fail to stringently enforce the environmental regulations of the Act. This is even more worrisome taking into account the 2007 Act is seen as an Act aimed at attracting foreign investment to Nigeria's underdeveloped mining sector as noted above.

The chapter therefore concludes that there is indeed a governance gap within the Nigerian mining sector. This is because while Nigeria has a strong set of provisions under the 2007 Act, enforcement has been lacking and will be its main issue for the foreseeable future, especially where the primary aim of the act is to attract foreign investment rather than protect

---

<sup>765</sup> Ministry of Mines and Steel Development, 'Roadmap for the Growth & Development of the Nigerian Mining Industry: On the Road to Shared Mining Prosperity' (2016) available at [http://www.minesandsteel.gov.ng/wp-content/uploads/2016/09/Nigeria\\_Mining\\_Growth\\_Roadmap\\_Final.pdf](http://www.minesandsteel.gov.ng/wp-content/uploads/2016/09/Nigeria_Mining_Growth_Roadmap_Final.pdf) accessed 13th June 2017 pg 59

the environment and local communities. Also, while the EIA Act of 1992 was a good development in 1992, it is due a review, as currently EIA reports are mere formalities in Nigeria and do not really offer further protection from the negative impacts of mining for communities and the environment.

With regards to the second issue, using the Equator Principles as an example of a soft law initiative that can make a difference in regulating damage caused from mining, given the right enabling environment. The Chapter found that Nigeria's public sector has made major strides in providing an enabling environment for soft law initiatives through; mandating, facilitating, partnering, and endorsing soft law initiatives. However, more needs to be done in terms of providing an enabled local governance institutions and a stronger more diverse civil society in Nigeria. The chapter therefore finds that Nigeria currently does not have an enabling environment for soft law initiatives in the mining sector, as for that to happen all the key actors in providing an enabling environment need to be functional. For example Chapter three, found that mandating legislation by the public sector on its own is not enough to create an enabling environment for soft law initiatives to be effective. Therefore promoting soft law initiatives would not be ideal for a country such as Nigeria, as they would not be too effective. The Nigerian environment and its impact on SSA as a whole will be discussed in more detail in the next chapter, when comparing it with the South African enabling environment as this thesis seeks to fully address research question 1.4 which has a South African aspect to it.<sup>766</sup>

---

<sup>766</sup> To what extent do current legal and policy regimes in Nigeria and South Africa provide an enabling environment for soft law initiatives and what implications does it have on the application of soft law initiatives within SSA mining?

## **Chapter 5: Mining in SSA and the Provision of an Enabling Environment for Soft Law Initiatives: South Africa**

### **5.1 Introduction**

For over a century South Africa's economy has heavily depended on mining activities and continues to do so today.<sup>767</sup> However, as noted in chapter four although mining has a very high impact in terms of increasing employment and economic profit for a country, it represents a threat to natural reserves due to landscape changes and pollution.<sup>768</sup> Indeed, South Africa is no different when it comes to the impacts of mining found in other countries where mining takes place. Mining has left South Africa with enormous economic, social and environmental problems. Having consistently been a major actor in the mining industry for over a century one might assume that South Africa is experienced enough to adequately regulate mining activities so that the negative impacts are mitigated. It is with this in mind that this thesis seeks to assess the mining regulations legislated by South Africa. So that we may establish whether it has been successful in regulating its mining industry to the benefit of its populace, rather than communities suffering from socio-economic and environmental injustices as is often the case where mining is concerned as demonstrated in chapter three. This is so that Sub-Saharan African countries such as Nigeria who are new players in the solid minerals mining industry may emulate their success and avoid pit falls in regulating mining. Such an analysis also affords us the opportunity to determine whether just as in Nigeria, South Africa also suffers from a governance gap. Subsequent to the analysis of South Africa's legislated regulation, the chapter further analyses whether South Africa has made provisions for enabling soft law initiatives to further protect its society from the environmental and socio-economic impacts of mining, thus strengthening its regulation of the mining industry.

This chapter contributes to the thesis by seeking to establish whether there is a governance gap within the mining sector in South Africa by analysing the strength of environmental and social regulations with regards to mining. It also seeks to determine if South Africa as an advance mining nation has an enabling environment which may enhance the effect of soft law

---

<sup>767</sup> Sphiwe Emmanuel Mhlongo and Francis Amponsah-Dacosta, 'A review of problems and solutions of abandoned mines in South Africa' (2015) *International Journal of Mining, Reclamation and Environment*

<sup>768</sup> I.G.E. Ibeanu, 'Tin Mining and processing in Nigeria: cause for concern?' (2003) 64, *Journal of Environmental Radioactivity*, 59-66, 64

as a form of regulating mining in Sub-Saharan Africa. The chapter will determine whether South Africa has an enabling environment based on the features of an enabling environment discussed in chapter two. The South African findings will then be compared to the Nigerian findings in the conclusion of this chapter. This will enable the thesis to determine what an enabling environment entails in practice and which country has it, thereby making it ready to implement the so called fourth generation soft law mining codes discussed earlier. In doing so, just as in chapter four this chapter will contribute to the thesis by addressing research questions 1.3 and 1.4.<sup>769</sup> In contrast to chapter four on Nigeria, this chapter concluded that South Africa has a strong set of regulation, which to an extent are enforced by the judiciary. As a result, the governance gap within the mining sector is minimal. The chapter also concluded that South African regulations, policies, and institutions provide an enabling environment for soft law initiatives as described in chapter two of this thesis.

This chapter is divided into five sections including this introduction; section two provides an overview of mining activities in South Africa; section three examines regulations available for social and environmental protection in the mining sector of South Africa; section four, analyses the Equator Principles as an example of a soft law initiative applicable to South Africa, and considers whether South Africa in comparison to Nigeria has provided an enabling environment for them; and section five concludes the chapter.

## **5.2 Overview of Mining Activities in South Africa and Their Impact**

It is no secret that South Africa is one of the biggest mining nations in the world. Indeed in the first half of the 1980s, the South African gold mines were producing between one-half and two-thirds of world output.<sup>770</sup> Overall, South Africa has supplied a staggering 40% of all gold ever produced in recorded history.<sup>771</sup> However, gold is not South Africa's only mineral resource, diamonds were discovered in 1867, and down the years South Africa is known to be a major producer of; coal, iron ore, platinum group metals, lead, zinc, silver, titanium

---

<sup>769</sup> 'is there a governance gap within the mining sector in SSA as a result of weak mining regulations or the enforcement of such regulation?' and 'to what extent do current policy and legal regimes in Nigeria and South Africa provide an enabling environment for soft law initiatives and what implications does it have on the application of soft law initiatives in SSA mining?'

<sup>770</sup> Francis Wilson, 'How the Mining Industry has shaped South Africa' (2001) Vol. 130, No. 1, MIT Press, American Academy of Arts & Sciences, 99-121, 102

<sup>771</sup> Anthony Turton, 'Untying the Gordian Knot: unintended consequences of water policy for the gold mining industry in south Africa' (2016), Vol. 41, No.3, Water International, 330-350, 330

minerals, uranium, phosphate rock, and over fifteen other minerals.<sup>772</sup> Such discoveries and production naturally allowed mining to become the backbone of the South African economy. For more than a century mining has significantly contributed to the welfare of the people of South Africa.<sup>773</sup> However, while mining has contributed to the economy and the welfare of the people, as with other developing countries such as Nigeria mining has also had negative consequences in South Africa. This was especially the case during apartheid. Indeed, David Fig noted that apartheid gave firms the licence to commit vast environmental damage which included compromising the ecology and health of workers and those that lived near mining sites.<sup>774</sup> The end of apartheid brought with it expectations of social and environmental dividends for townships, especially for the black communities, on whom the burdens of environmental pollution had fallen.<sup>775</sup> Indeed, it was hoped that post-apartheid new legislation would compel mining companies to minimize pollution which as will be discussed below have created severe health problems in communities around the Vaal Triangle, South Durban, Cape Town's Caltex refinery, Richard's Bay, the platinum belt and others.<sup>776</sup> Whether such expectations were realised through the regulations will be discussed in section 5.2.2 with respect to regulation in South Africa. However, with over a century of mining one might reasonably expect South Africa to be advanced and have a higher standard of care when it comes to minimizing environmental damage caused by mining similar to the standards employed by western manufacturing nations. Indeed, Utembe et al have argued that due to policy and legislative reform the techniques for mining in South Africa have improved to include sophisticated ventilation and chemical extraction of minerals from low-grade ores.<sup>777</sup>

While improvements have been made especially post-apartheid, mining has continued to cause social and environmental issues in South Africa. As will be discussed in the section below such problems include health issues from inhaling dust and dangerous chemicals as a result of mining, tailings dumped into rivers, abandonment of mines, displacement of local

---

<sup>772</sup> Francis Wilson, 'How the Mining Industry has shaped South Africa' (2001) Vol. 130, No. 1, MIT Press, American Academy of Arts & Sciences, pp 99-121, 116

<sup>773</sup> Sphiwe Emmanuel Mhlongo and Francis Amponsah-Dacosta, 'A review of problems and solutions of abandoned mines in South Africa' (2015) International Journal of Mining, Reclamation and Environment

<sup>774</sup> David Fig, 'Manufacturing amnesia: Corporate Social Responsibility in South Africa', (2005), Vol 81(3), International Affairs, 599-617, 602

<sup>775</sup> *ibid*

<sup>776</sup> *ibid*

<sup>777</sup> W.Utembe, EM Faustman, P Matatiele and M Gulumian, 'Hazards identified and the need for health risk assessment in the South African mining industry' (2015), Vol 34(12), Human and Experimental Toxicology, 1212-1221, 1212



communities and many other issues.<sup>778</sup> Contrary to the current situation in Nigeria where artisanal miners dominate the mining sector, in South Africa mining is on a large scale, i.e. mechanized.<sup>779</sup> Artisanal miners usually work on abandoned commercial mines, which leaves them open to health risks and increasing environmental damage.

### **5.2.1 Impact of Solid Minerals Mining In South Africa**

As discussed above and mentioned in chapter four, it is internationally recognized that large scale mining and even artisanal mining cause local communities' adverse social and environmental impacts. While it is fair to also state that mining does also bring economic benefits as mentioned above, some have gone as far as to argue that local mining communities derive few benefits from the mineral wealth generated within their immediate environment.<sup>780</sup> This is a valid point which this author subscribes to given numerous examples of such cases in SSA. In South Africa this point is demonstrated by Mnwana in his case study of the Sefikile village in the North West Province of South Africa.<sup>781</sup> In his case study Mnwana found the impact of mining operations to be glaring, the loss of pastoral and agricultural crops amongst the most visible consequences. Overall, he noted that mining had actually intensified village struggles, especially at Sefikile, as in all its years of operation next to this village, Union Mine, owned by Anglo American has made an 'infinitesimal' contribution towards the social and economic wellbeing of villagers from whose land its platinum is extracted.<sup>782</sup>

More specifically, environmental damage continue to occur as a result of mining in South Africa. Indeed, mine dumps and slime dams of the Gauteng and the Northwest in South

---

<sup>778</sup> Sonwabile Mnwana, 'Mining and "Community" struggles on the platinum belt: A case of Sefikile village in the North West Province, South Africa' (2015), Vol 2 The Extractive Industries and Society, 500-508, Anthony Turton, 'Untying the Gordian Knot: unintended consequences of water policy for the gold mining industry in south Africa' (2016), Vol. 41, No.3, Water International, 330-350, S.G. Dlamini, M.M. Mathuthu, V.M. Tshivhase, 'Radionuclides and toxic elements transfer from the princess dump to water in Roodepoort, South Africa' (2016) 153 Journal of environmental radioactivity, 201-205, Lochner Marais and Etienne Nel, 'The dangers of growing on gold: Lessons for mine downscaling from the Free State Goldfields, South Africa', (2016) Vol. 31 (1-2) Local Economy, 282-298

<sup>779</sup> H. Wagner, 'The Challenge of Deep-Level Mining in South Africa' (1986) Vol 86(9) Journal of Southern African Institute of Mining and Metallurgy

<sup>780</sup> K. Mate, 'Communities, Civil Society Organizations and the Management of Mineral Wealth' (2002) No. 16 Mining, Minerals and Sustainable Development, available at <<http://pubs.iied.org/pdfs/G00872.pdf>> accessed on 19<sup>th</sup> June 2016, F. Cronje and C. Chenga, 'Sustainable Social development in the South African Mining Sector' (2009) 26(3) Dev. South. Afr, 413-427

<sup>781</sup> Sonwabile Mnwana, 'Mining and "Community" struggles on the platinum belt: A case of Sefikile village in the North West Province, South Africa' (2015), Vol 2 The Extractive Industries and Society, 500-508

<sup>782</sup> *ibid* 507

Africa continue to leak uranium and its spawns into water.<sup>783</sup> The wastage emanating from the mines contain radium, polonium, thorium, uranium and isotopes of lead.<sup>784</sup> Such pollution of South Africa's soil and water resources affect the food chain and consequently the health of the population and surrounding ecosystem.<sup>785</sup> The leakage of acidic chemicals such as sulphide from gold tailings into water is known as acid mine drainage, which is a major cause of water pollution around the world. Acid mine drainage is a major concern in South Africa as highly acidic and heavy metal laden water has been pouring unrestricted from the Western Basin since 2002.<sup>786</sup> This is as a result of the majority of South Africa's gold resources being mined out, and three of four major ground water basins either being flooded or in an advanced stage of flooding, thus polluting its surroundings through water.<sup>787</sup> The acid mine drainage problem of South Africa is likely to continue for centuries to come due to the fact that the Witwatersrand region alone has major pyrite-bearing tailings, 6 billion tonnes over 400km<sup>2</sup>, to be precise.<sup>788</sup> These are expected to continue releasing acidic water that leaches iron and sulphides to the environment, to the detriment of local communities. Furthermore in Johannesburg famous for its mine dumps, a major problem looms, as a staggering 600,000 tonnes of uranium, discarded as waste over the last 135 years of mining is being mobilized into waters and distributed over a wide area by dust storms.<sup>789</sup>

However, the environment is not the sole casualty of mining activities in South Africa, mining has had a serious impact on the health of workers. Indeed, Uteme notes that mining in South Africa has a history of silica exposure, silicosis and tuberculosis, which greatly contributes to the morbidity and mortality of miners.<sup>790</sup> This is supported by the fact that a 33 year old study revealed that there has been no reduction in the proportion of miners coming to autopsy with pathologic evidence of silicosis.<sup>791</sup> Furthermore, for coal mine workers there is

---

<sup>783</sup> S.G. Dlamini, m.M. Mathuthu, V.M. Tshivhase, 'Radionuclides and toxic elements transfer from the princess dump to water in Roodepoort, South Africa' (2016) 153 *Journal of Environmental Radioactivity*, 201-205, 201

<sup>784</sup> *ibid*

<sup>785</sup> *ibid*

<sup>786</sup> Anthony Turton, 'Untying the Gordian Knot:unintended consequences of water policy for the gold mining industry in south Africa' (2016), Vol. 41, No.3, *Water International*, 330-350, 330

<sup>787</sup> *ibid*

<sup>788</sup> Sphiwe Emmanuel Mhlongo and Francis Amponsah-Dacosta, 'A review of problems and solutions of abandoned mines in South Africa' (2015) *International Journal of Mining, Reclamation and Environment*

<sup>789</sup> Anthony Turton, 'Untying the Gordian Knot:unintended consequences of water policy for the gold mining industry in south Africa' (2016), Vol. 41, No.3, *Water International*, 330-350, 331

<sup>790</sup> W.Utembe, EM Faustman, P Matatiele and M Gulumian, 'Hazards identified and the need for health risk assessment in the South African mining industry' (2015), Vol 34(12), *Human and Experimental Toxicology*, 1212-1221, 1212

<sup>791</sup> Gill Nelson, Brendan Girdler-Brown, Ntombizodwa Ndlovu, and Jill Murray, 'Three Decades of Silicosis: disease trends at autopsy in South African gold miners' (2010) 118 (3) *Environ Health Perspect*, 421-426

coal workers' pneumoconiosis and asbestosis among workers and individuals who live within proximity of asbestos mines and diamond mines as asbestos and asbestos-like deposits exist very near to diamond deposits.<sup>792</sup> Overall the frequency of occupational diseases has been consistently high amongst miners<sup>793</sup>, for instance, a study by Churchyard et al on the prevalence of silicosis among black migrant contract workers on a South African goldmine observed prevalence levels of 18.3 to 19.9%.<sup>794</sup> The above demonstrates the detrimental impact mining has had on the health of miners over decades of mining in Africa, one would assume the government, private sector, and civil society have worked together to improve conditions as will be discussed below in the section on regulating mining in South Africa. However, before this it is important to consider the social impacts of mining especially those caused by abandoned mines, with over 5000 abandoned mines being littered all over South Africa<sup>795</sup> the socio-economic problems from abandoned mines are severe, as there is no party willing to take responsibility for them. South Africa classifies those mines which have not been issued a closure certificate and no party can be traced to assume responsibility for their liabilities as abandoned.<sup>796</sup> The socio-economic issues that arise from the environmental impacts of inactive or poorly rehabilitated mines include loss of productive land, degradation of water resources which then has a harmful effect on aquatic life, change in river regimes, risk of injury or death as a result of falling into open shafts and pits, air pollution from dust and toxic gases, and risk of landslides.<sup>797</sup> In South Africa, according to Swart before the endorsement of the Minerals Act 1991<sup>798</sup> countless mining companies used irresponsible mining methods without regard for the environment and left the mines un-rehabilitated prior to them leaving the country.<sup>799</sup> However, as will be demonstrated in the section below on regulation, after years of experience South Africa has improved its regulation on mine closure in order to reduce the number of abandoned mines creating issues in the country.

---

<sup>792</sup> W.Utembe, EM Faustman, P Matatiele and M Gulumian, 'Hazards identified and the need for health risk assessment in the South African mining industry' (2015), Vol 34(12), Human and Experimental Toxicology, 1212-1221, 1213

<sup>793</sup> *ibid*

<sup>794</sup> G J Churchyard, R Ehrlich, J M TewaterNaude, L Pemba, K Dekker, M Vermeij, N White, and J Myers, 'Silicosis prevalence and exposure-response in South African goldminers' (2004) 61 Occup Environ Med, 811-816, 811

<sup>795</sup> Paul Sorensen, 'Mining in South Africa: a mature industry' (2011) 68(5) International Journal of Environmental Studies, 625-649, 641

<sup>796</sup> Sphiwe Emmanuel Mhlongo and Francis Amponsah-Dacosta, 'A review of problems and solutions of abandoned mines in South Africa' (2015) International Journal of Mining, Reclamation and Environment

<sup>797</sup> *ibid*

<sup>798</sup> Minerals Act No. 50 of 1991, Republic of South Africa

<sup>799</sup> E. Swart, 'The South African Legislative Framework for Mine Closure' (2003) The Journal of the South African Institute of Mining and Metallurgy, 489-492

A further impact of mining and abandoned mines is the issue of artisanal mining taking place in areas where mines have been abandoned. Although the mining sector in South Africa is not dominated by artisanal miners like in Nigeria, thereby limiting its risks as discussed in chapter four, abandoned mines in South Africa presents mining opportunities for artisanal miners with all the risks attached. Steenkamp and Clark-Mostert reported that abandoned mines together with illegal artisanal mining operations were affecting water courses in the vicinity of Giyani area of South Africa.<sup>800</sup> Not only are their activities dangerous to the environment, and the rehabilitation of mines but they also pose a threat to their wellbeing. Indeed, in 2006 and 2007 five (5) and sixty one (61) illegal miners died as a result of rock fall and mine fire in inactive shafts of Fairview Mine in Barbeton and Harmony Gold Mine in the Witwatersrand, respectively.<sup>801</sup>

However, as large scale mechanized mining dominates the mining industry in South Africa in contrast to Nigeria, and with the mining experience it has, one would expect mining methods to have developed significantly to have little negative impact on the environment and socio economic conditions of local communities in South Africa. Indeed Mhlongo and Amponsah-Dacosta report that currently in South Africa, the environmental problems associated with mining operations are minimised through the use of ‘well-designed, well-operated and well-regulated mining operations.’<sup>802</sup> Mining in South Africa has improved with techniques that include sophisticated ventilation and chemical extraction of minerals from low-grade ores.<sup>803</sup> With regards to the mining companies, Fig observed that many firms operating in South Africa have implemented stronger environmental management systems since the commencement of democracy in the country.<sup>804</sup> They have also provided better working conditions for mine workers. Mswana noted that workers are no longer confined to

---

<sup>800</sup> Nicolaas Casper Steenkamp and Vanessa Clark-Mostert, ‘Impact of Illegal Mining at Historic Gold Mine Locations, Giyani Greenstone Belt Area, South Africa’ 9<sup>th</sup> Interbational Mining History Congress, 17-20 April 2012, available at

<[https://www.researchgate.net/publication/268004416\\_Impact\\_of\\_Illegal\\_Mining\\_at\\_Historic\\_Gold\\_Mine\\_Locations\\_Impact\\_of\\_Illegal\\_Mining\\_at\\_Historic\\_Gold\\_Mine\\_Locations\\_Giyani\\_Greenstone\\_Belt\\_area\\_South\\_Africa](https://www.researchgate.net/publication/268004416_Impact_of_Illegal_Mining_at_Historic_Gold_Mine_Locations_Impact_of_Illegal_Mining_at_Historic_Gold_Mine_Locations_Giyani_Greenstone_Belt_area_South_Africa)> accessed 28<sup>th</sup> June 2016

<sup>801</sup> Sphiwe Emmanuel Mhlongo and Francis Amponsah-Dacosta, ‘A review of problems and solutions of abandoned mines in South Africa’ (2015) International Journal of Mining, Reclamation and Environment

<sup>802</sup> *ibid*

<sup>803</sup> W.Utembe, EM Faustman, P Matatiele and M Gulumian, ‘Hazards identified and the need for health risk assessment in the South African mining industry’ (2015), Vol 34(12), Human and Experimental Toxicology, 1212-1221, 1212

<sup>804</sup> David Fig, ‘Manufacturing amnesia: Corporate Social Responsibility in South Africa’, (2005), Vol 81(3), International Affairs, 599-617, 603

overcrowded single-sex hostels since the advent of democracy. They also now received an incentive called a 'living-out allowance' if they opt to live outside the mine premises.<sup>805</sup>

While the above is not exhaustive of the impacts or the developments made in mitigating the impacts of mining in South Africa, it demonstrates that just as in Nigeria, mining has had a negative impact on the environment and the socio-economic conditions of local communities, as is typically expected where mining takes place in developing countries. However, unlike Nigeria, it would appear that South Africa is making progress with regards to mining techniques and regulation that significantly mitigate the negative effects of mining especially post-apartheid as will be demonstrated in the section on regulation below. One might argue that this may be expected from South Africa having been actively mining for about a century, thereby acquiring more experience on mining techniques than a new comer like Nigeria. On the other hand, one might also argue the development of its mining techniques and better environmental management by companies may be as a result of better regulation which Nigeria can also pass.

### **5.3 Regulating Mining in South Africa**

Where enforced stringently, on their own strong hard law regulations may regulate the mining industry sufficiently. Where soft law initiatives are concerned, as discussed in chapters two and three, hard law regulations are important facets when creating an enabling environment for them, in that they provide soft law within their remit with legitimacy where such is needed. In other cases they offer minimum standards and a building block for soft law initiatives. Together with other factors discussed in chapter two they provide an enabling environment for soft law to further strengthen regulation in the mining industry. It is also essential to establish the hard law regulation available in South Africa for mitigating the impact of mining as discussed above and establish whether there is a governance gap which needs filling in accordance with research question 1.3. The governance gap in South Africa should be limited, taking into account mining has been ongoing for about a century therefore such laws should be considered amongst the most advanced in SSA, and thus a benchmark for countries such as Nigeria to follow.

---

<sup>805</sup> Sonwabile Mnwana, 'Mining and "Community" struggles on the platinum belt: A case of Sefikile village in the North West Province, South Africa' (2015), Vol 2 *The Extractive Industries and Society*, 500-508

With regards to environmental regulation in South Africa although there were some efforts to regulate mining activities with respect to its negative environmental and social impacts under laws such as the Mines and Works Amendment Act (1956)<sup>806</sup> and the Minerals Act (1991)<sup>807</sup> most of the laws pertaining to mining and its regulation have been overhauled since the advent of democracy in 1994. Therefore this section will be focused on the regulations established in South Africa post-Apartheid. Where post-Apartheid mining in South Africa is concerned, South Africa has extensive environmental, pollution, and waste management instruments and legislation regulating the impacts of mining activities to society and the environment. These include the 1996 Constitution of South Africa,<sup>808</sup> the National Environmental Management Act 1998 amended by Act 62 of 2008,<sup>809</sup> the National Water Act 1998,<sup>810</sup> the National Environmental Management: Air Quality Act 2004,<sup>811</sup> and the Mineral and Petroleum Resources Development Act, 2002.<sup>812</sup> With respect to mining in South Africa, the most important instruments of regulation are the 1996 Constitution of South Africa, the National Environmental Management Act 1998 as amended, and the Mineral and Petroleum Resources Development Act, 2002. Therefore this section will focus analysis on the aforementioned instruments below.

### **5.3.1 The 1996 Constitution of the Republic of South Africa**

Before the advent of democracy in 1994 it is fair to state that policies in South Africa were not favourable to the majority of South Africans, after 1994 major efforts were made to provide for more equity.<sup>813</sup> Such efforts were especially directed towards the protection of the environment and improving the socio-economic conditions of mining communities, who as discussed above were negatively impacted by mining activities. As a result the supreme law of South Africa, the 1996 Constitution and the most fundamental legal provision within it, the

---

<sup>806</sup> Mines and Works Amendment Act No 27 of 1956, Republic of South Africa

<sup>807</sup> Minerals Act No. 50 of 1991, Republic of South Africa

<sup>808</sup> The Constitution of the Republic of South Africa, 1996, available at <<http://www.gov.za/sites/www.gov.za/files/images/a108-96.pdf>> accessed 1<sup>st</sup> August 2016

<sup>809</sup> National Environmental Management Act, Act No. 107, 1998, vol 401, Republic of South Africa, Government Gazette, 27<sup>th</sup> November 1998, National Environmental Management Act, Act No. 62, 2008, vol. 523, Republic of South Africa, Government Gazette, 9 January 2009

<sup>810</sup> National Water Act No. 36 of 1998, Republic of South Africa

<sup>811</sup> National Environmental Management: Air Quality Act No. 39 of 2004, Republic of South Africa

<sup>812</sup> Mineral and Petroleum Resources Development Act No. 28 of 2002, Republic of South Africa

<sup>813</sup> Jana Honke, Nicole Kranz, Tanja A. Borzel, Adrienne Heritier, 'Fostering Environmental Regulation? Corporate Social Responsibility in Countries with Weak Regulatory Capacities The Case of South Africa' (2008) SFB Working Paper Series No9, available at <[http://userpage.fu-berlin.de/ffu/akumwelt/bc2008/papers/bc2008\\_341\\_Kranz.pdf](http://userpage.fu-berlin.de/ffu/akumwelt/bc2008/papers/bc2008_341_Kranz.pdf)> accessed 3<sup>rd</sup> August 2016

Bill of Rights, provides for a fair and sustainable management of South Africa's natural resources by promoting ownership and empowering the people.<sup>814</sup>

More specifically under Section 24 of the Bill of Rights, the Constitution guaranteed environmental rights to all South African citizens, it stated that:

Everyone has the right—

- (a) to an environment that is not harmful to their health or wellbeing; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—
  - (i) prevent pollution and ecological degradation;
  - (ii) promote conservation; and
- (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.<sup>815</sup>

The fact that a healthy environment is a constitutionally entrenched right in South Africa highlights the importance of a healthy environment to the people of South Africa and ensures that any violation of this right will be dealt with by the highest courts, thereby offering the people a significant level of protection. Furthermore, as the supreme law of the country no other policy document or law may contradict it. Therefore it lays the foundation for the development of a comprehensive legal system for the protection of the environment and socio economic justice. Constitutional backing significantly enhances the number, nature and array of legal remedies available to enforce it, especially where one relies on all available constitutional remedies to assert this right.<sup>816</sup> The wording of section 24 of the 1996 constitution outlined above, also demonstrates it has vertical and horizontal application, which means it can be applied against all state organs, and natural or juristic persons by individuals, giving it more reach.

The provision of an environmental right in the constitution is a novel concept alien to most developing SSA countries. For instance, in Nigeria, despite the monumental damage caused to its eco system especially in the Niger-Delta region due to the exploration of mineral resources there are no environmental rights guarantee in its constitution. Nevertheless, the guarantee of an environmental right is not novel to Africa as a whole, as Article 24 of the

---

<sup>814</sup> Jana Honke, Nicole Kranz, Tanja A. Borzel, Adrienne Heritier, 'Fostering Environmental Regulation? Corporate Social Responsibility in Countries with Weak Regulatory Capacities The Case of South Africa' (2008) SFB Working Paper Series No9, available at <[http://userpage.fu-berlin.de/ffu/akumwelt/bc2008/papers/bc2008\\_341\\_Kranz.pdf](http://userpage.fu-berlin.de/ffu/akumwelt/bc2008/papers/bc2008_341_Kranz.pdf)> accessed 3<sup>rd</sup> August 2016

<sup>815</sup> Section 24, Chapter 2: Bill of Rights, Constitution of the Republic of South Africa, Act 108 of 1996

<sup>816</sup> Louis J. Kotze, 'The Judiciary, the Environmental Right and the Quest for Sustainability in South Africa: A Critical reflection', (2007) vol 16 (3) Review of European, Comparative and International Environmental Law (RECIEL) 298-311, 298

African Charter states that; ‘all peoples shall have the right to a general satisfactory environment favourable to their development.’<sup>817</sup> However, South Africa appears to be one of very few African countries to have given such a right constitutional backing demonstrating its willingness to protect the environment from negative impacts, such as those caused when mining. While section 24’s constitutional backing is essential in protecting the environment from the impact of mining activities as a foundation for the development of further legislation by the State, its availability is not enough to demonstrate strong protection of the environment in South Africa. This to a large extent would depend on how the right has been interpreted and enforced in South Africa. This is supported by Kotze who argues that rights on their own are of little value if they are not adequately or properly translated through legislation, executive and administrative functions, and most importantly adjudicative functions.<sup>818</sup>

With regards to legislation to give effect to section 24 of the 1996 constitution a wide array of legislation that include; the National Road Traffic Act 1996<sup>819</sup>, the National Environmental Management: Biodiversity Act 2004<sup>820</sup>, the National Environmental Management: Air Quality Act 2004<sup>821</sup>, the National Water Act 1998<sup>822</sup>, and the Mineral and Petroleum Resources Development Act 2002,<sup>823</sup> were passed. With respect to section 24 of the 1996 constitution, according to Honke et al the National Environmental Management Act (NEMA) 1998<sup>824</sup> is the central document in South African environmental law, and will be discussed in more detail in the section below.<sup>825</sup> The wide array of legislation demonstrates that the South African legal system has subscribed to protecting the right provided under section 24 of the 1996 constitution, and within these laws administrative and executive functions have been

---

<sup>817</sup> Article 24, African Charter on Human and People’s Rights, Adopted 27<sup>th</sup> June 1981, OAU Doc, CAB/LEG/67/3 rev 5, 21 I.L.M.58 (1982) entered into force 21 October 1986

<sup>818</sup> Louis J. Kotze, ‘The Judiciary, the Environmental Right and the Quest for Sustainability in South Africa: A Critical reflection’, (2007) vol 16 (3) *Review of European, Comparative and International Environmental Law (RECIEL)* 298-311, 298

<sup>819</sup> National Road Traffic Act 93 of 1996, Republic of South Africa

<sup>820</sup> National Environmental Management: Biodiversity Act 10 of 2004, Republic of South Africa

<sup>821</sup> National Environmental Management: Air Quality Act No. 39 of 2004, Republic of South Africa

<sup>822</sup> National Water Act No. 36 of 1998, Republic of South Africa

<sup>823</sup> Mineral and Petroleum Resources Development Act No. 28 of 2002, Republic of South Africa

<sup>824</sup> National Environmental Management Act, Act No. 107, 1998, vol 401, Republic of South Africa, Government Gazette, 27<sup>th</sup> November 1998, amended by Act 56 of 2002, Act 46 of 2003, Act 8 of 2004, Act 62 of 2008

<sup>825</sup> Jana Honke, Nicole Kranz, Tanja A. Borzel, Adrienne Heritier, ‘Fostering Environmental Regulation? Corporate Social Responsibility in Countries with Weak Regulatory Capacities The Case of South Africa’ (2008) SFB Working Paper Series No9, available at <[http://userpage.fu-berlin.de/ffu/akumwelt/bc2008/papers/bc2008\\_341\\_Kranz.pdf](http://userpage.fu-berlin.de/ffu/akumwelt/bc2008/papers/bc2008_341_Kranz.pdf)> accessed 3<sup>rd</sup> August 2016



laid out in order to implement these legislation that uphold section 24 of the 1996 constitution.

However, while passing legislation and policies that uphold section 24 of the 1996 constitution are positive in demonstrating South Africa's willingness to protect such a right, one might argue that the real test of the effectiveness of the right to an environment that is not harmful to the health of the people is the application of this right and its protection by the courts. Such application and protection is done by the effective adjudication of cases by a country's court system, leaving one to question what exactly is considered effective adjudication.

According to Fuller adjudication is seen as a means of settling disputes or controversies, this of course is its most obvious aspect.<sup>826</sup> Matters become more complex when one begins to look into other aspects such as the office of the Judge and what are considered as the limits of adjudication i.e. what problems are unsuited for adjudicative disposition and should be left with the legislature. Quite simply adjudication according to Fuller is limited to 'an authoritative determination of questions raised by claims of right and accusation of guilt' based on established principles in settling disputes.<sup>827</sup> Such determination is made by judges who are impartial and have a duty to apply established principles usually contained in Statutes or case law.

Therefore the key role of a court when adjudicating is settling disputes by reaching a reasoned decision in a rational and impartial manner based on the correct interpretation of established principles. This chapter will now analyse how effective South African courts have been when adjudicating disputes involving the protection of environmental and social rights where mining is concerned as enshrined by the Constitution. Such an analysis allows one to determine how effective section 24 of the 1996 constitution has been. This is because as noted earlier the real test of section 24's<sup>828</sup> effectiveness which this section seeks to establish, is the application of this right and its protection by the courts, not simply by passing legislation.

In South Africa the constitution provides for a Constitutional Court under section 167, it is the highest court in all constitutional matters and may readily adjudicate and protect any

---

<sup>826</sup> Lon L. Fuller and Kenneth I. Winston, 'The Forms and Limits of Adjudication', (1978) Vol 92 No. 2 Harvard Law Review Association, 353-409, 357

<sup>827</sup> *ibid* 368

<sup>828</sup> The right to an environment that is not harmful to the health of the people

rights within the constitution, it is therefore the ideal court for this section to analyse, especially where the constitution is concerned.<sup>829</sup> The South African Constitutional Court as will be demonstrated below has a reputation for ‘Judicial Activism’ in that it is known to go beyond the traditional roles of adjudicators described above. Therefore one might expect the right to an environment that is not harmful to one’s health or wellbeing to be very well protected.

Judicial Activism may be defined as ‘a philosophy of judicial decision-making whereby judges allow their personal views about public policy among other factors to guide their decisions.’<sup>830</sup> Judicial activism is common within the Constitutional Court in South Africa as decisions have been made by the court even when it is contrary to the desires of the majority. This has caused some controversy as unelected individuals are seen as determining the intention of an elected legislature which is beyond their role as discussed above.<sup>831</sup> The Fourie case<sup>832</sup> is a clear example of the South African Constitutional Court’s ‘judicial activism.’ In this case the court ruled that section 30(1) of the South African Marriage Act was unconstitutional because it did not recognize gay couples’ right to marriage. The court ordered parliament to remedy the Common Law to avoid an automatic inclusion of the words ‘or spouse’ after the words ‘or husband’ in section 30 (1) of the Marriage Act.<sup>833</sup> This case is so far reaching that it led to the enactment of the Civil Union Act by parliament which afforded legal recognition to gay unions. There are further examples of the Constitutional Court making far reaching decisions that particularly protect minority rights.<sup>834</sup>

However, an analysis of ‘judicial activism’ is beyond the scope of this thesis, it is highlighted here to demonstrate that the Constitutional Court is considered rather activist. Therefore one might expect it to be far reaching with regards to the interpretation and protection of environmental rights under section 24 of the 1996 constitution in the course of adjudication,

---

<sup>829</sup> The Constitution of the Republic of South Africa, 1996, available at <http://www.gov.za/sites/www.gov.za/files/images/a108-96.pdf> accessed 1<sup>st</sup> August 2016

<sup>830</sup> Blacks Law Dictionary (10<sup>th</sup> Ed 2014)

<sup>831</sup> Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (first published 1962, Yale University Press 1986) 21

<sup>832</sup> Minister of Home Affairs & Anor v Fourie & Ors; Lesbian and Gay Equality Projects & Ors v Minister of Home Affairs & Ors, (2006) (3) BCLR 355 (CC)

<sup>833</sup> *ibid*

<sup>834</sup> See *State v Makwanyane* (1995) (3) SA 391 (CC), *Minister of Health v Treatment Action Campaign* (2002) (5) SA 721 (CC) Government of the Republic of South Africa and Others v Grootboom and Others (2001) (1) SA 46 (CC) *Masiya v DPP* (2007) CCT Case 54/06

thereby making section 24 very effective. Through the analysis of case law within the mining field this research establishes whether this is indeed the case in South Africa below.

In the case of *Director: Mineral Development, Gauteng Region and SASOL Mining (Pty) Ltd v. Save the Vaal Environment and others*<sup>835</sup> which was concerned with whether a group of persons under an association as affected parties were able to oppose a mining license on environmental grounds and had the right to be heard by the authority tasked with issuing or refusing such applications, section 24 of the 1996 constitution was referred to by the court. In this case the court held that the respondents relied on section 24 of the 1996 Constitution which according to them would be affected prejudicially by an adverse decision of the Director without hearing their concerns.<sup>836</sup> The Court dismissed the appeal, finding in favour of the association holding that:

Our Constitution, by including environmental rights as fundamental, justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative processes in our country. Together with the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns.<sup>837</sup>

Additionally, in the case of *BP Southern Africa (Pty) Ltd v. MEC For Agriculture, Conservation, Environment & Land Affairs*<sup>838</sup> where it was argued by the appellant that the respondent State department acted beyond its powers, in its rejection of the appellants application to build a new filling station, on the grounds of environmental concerns. The appellant argued that the Department's concern was not truly environmental but rather one of regulating the economy to protect the commercial interests of existing filling stations.<sup>839</sup> The Court failed to be convinced by the appellant's arguments after a lengthy analysis of numerous legislation, instead the court argued section 24 of the 1996 Constitution has made environmental concerns in South Africa of paramount importance to all State organs. Indeed, the Court noted that; 'by virtue of Section 24, environmental considerations, often ignored in the past, have now been given rightful prominence by their inclusion in the constitution'<sup>840</sup> The Court further emphasized that State Departments have a duty to protect the constitutional right provided by section 24 of the 1996 Constitution, and in doing so take reasonable

---

<sup>835</sup> Director: Mineral Development, Gauteng Region and SASOL Mining (Pty) Ltd v. Save the Vaal Environment and Others, [1999] 2 SA 709 SCA Case no: 133/98

<sup>836</sup> *ibid*

<sup>837</sup> *ibid*

<sup>838</sup> BP Southern Africa (Pty) Ltd v. MEC For Agriculture, conservation, Environment & Land Affairs [2004] 5 SA 124 WLD Case No. 03/16337

<sup>839</sup> *ibid*

<sup>840</sup> *ibid*

legislative and other measures to protect the environment. As authority the Court cited *Government of the Republic of South Africa and Others v Grootboom and Others*<sup>841</sup> where it was held that:

The State is required to take reasonable legislative and other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The State is obliged to act to achieve the intended result and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programs implemented by the Executive. These policies and programs must be reasonable both in their conception and their implementation. The formulation of a program is only the first stage in meeting the State's obligations. The program must also be reasonably implemented. An otherwise reasonable program that is not implemented reasonably will not constitute compliance with the State's obligations.<sup>842</sup>

The *Grootboom*<sup>843</sup> decision is a key illustration of the South African Constitutional Court's resolve to protect constitutional rights such as section 24 of the 1996 Constitution through effective adjudication, leading to a strong regulatory framework protecting South Africa from the negative impacts of mining. This is because rather than allowing the state to be seen as protecting constitutional rights by simply passing legislation and 'other measures' that protect the environment as stipulated in section 24 of the Bill of Rights,<sup>844</sup> the court went further. It emphasized that the State was under an obligation to also have well directed policies and programs to be implemented by the executive, and such implementation must be reasonable otherwise the state would have failed to uphold its obligations and a decision would be found against it. This is a clear example of the Court's willingness to protect constitutional rights and elaborate on the state's duty in protecting constitutional rights, thus strengthening environmental regulation in South Africa. This decision and the other cases mentioned earlier are in line with the view expressed above that with its reputation for judicial activism section 24 of the Bill of Rights would be well protected by the South African constitutional court. The cases also demonstrate effective adjudication in South Africa as the court reached reasoned decisions after hearing all parties and correctly applying and interpreting section 24 of the 1996 Constitution.

However, authors such as Theunis Roux have argued that despite the fact that the Court in *Grootboom* went further than any other court in the world has gone in giving effect to socio-

---

<sup>841</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* [2001] 1 SA 46 (CC) at 69 B-D, Yacoob J

<sup>842</sup> *ibid*

<sup>843</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* [2001] 1 SA 46 (CC)

<sup>844</sup> The Constitution of the Republic of South Africa, 1996, available at <http://www.gov.za/sites/www.gov.za/files/images/a108-96.pdf> accessed 1<sup>st</sup> August 2016

economic rights it did not embrace the full extent of the constitution's transformative vision.<sup>845</sup> Roux explains this by noting the case simply does not provide the legal ammunition hoped for because the order by the Court in *Grootboom* was merely declaratory. The Court merely repeated the provisions of section 26(2) and confirmed the state's constitutional duty.<sup>846</sup> The closest the Court came to giving its order teeth was its statement that the South African Human Rights Commission was under a constitutional duty to monitor the promotion of socio-economic rights and would therefore where necessary report on the state's efforts to comply with section 26 in accordance with its judgement.<sup>847</sup> In doing so the court seemed to suggest the South African Human Rights Commission was already in place to enforce socio-economic rights and the Court's role was to give guidance on the interpretation of the constitution.<sup>848</sup> This author therefore agrees with Roux when he argues the Court should have gone further in giving teeth to its order, perhaps a more activist approach similar to that taken in the *Fourie* case noted above.<sup>849</sup> This is because although as noted earlier adjudication does involve courts interpreting principles and applying them to settle disputes, these same principles also bestow on courts the powers to remedy situations in such disputes in their roles as adjudicators. The court should therefore have applied stronger remedies offered by the 1996 South African constitution. Indeed, Trengove observed that the 1996 Constitution under section 172(1)(b) gives the courts 'sweeping powers... to develop and build their own arsenal of remedies'.<sup>850</sup> For instance, they have the option when a socio-economic right has been violated to direct the relevant state agency to present the Court 'with a plan of reform which would put an end to the violation' and if content with the plan to order the plan's implementation according to a deadline.<sup>851</sup> They may even go as far as to hold individual state officials in contempt if they fail to perform.<sup>852</sup> Therefore the declaratory approach followed by the Court in *Grootboom* clearly did not go as far as the constitution permitted in socio-economic rights violation cases thereby demonstrating while the Courts do enforce environmental and social provisions in South Africa they can still go further in their roles as adjudicators.

---

<sup>845</sup> Theunis Roux, 'Understanding *Grootboom* – A Response to Cass R. Sunstein' (2002) 12.2 Forum Constitutionne 1

<sup>846</sup> *ibid* 51

<sup>847</sup> *ibid* 1

<sup>848</sup> *ibid*

<sup>849</sup> *Minister of Home Affairs & Anor v Fourie & Ors; Lesbian and Gay Equality Projects & Ors v Minister of Home Affairs & Ors*, (2006) (3) BCLR 355 (CC)

<sup>850</sup> Wim Trengove, 'Judicial Remedies for Violation of Socio-Economic Rights', (1999) 1 E.S.R. Rev 8, 10

<sup>851</sup> *ibid*

<sup>852</sup> *ibid*

However, another example of the application of Section 24 by the Judiciary can be found in the case of *In Re Kranspoort Community*<sup>853</sup> which concerned restrictions on land use and development under the Restitution of Land Rights Act (1994).<sup>854</sup> Attending to issues relating to the environment and the environmental right, the court held:

The effect of such depletion would be to prevent the younger members of the community from having equitable access to restored asset in the future. As I have said, s35(3) empowers and obliges the Court to impose conditions which will ensure equal access to the restored asset by all members of the community, including younger members who will come to access the property in their own right in the future. This allows me to impose conditions aimed at eliminating the risk of such depletion. Such an interpretation of s 35(3) promotes the spirit purports and objects of s 24(b) of the Constitution.<sup>855</sup>

While the above cases clearly illustrate that the protection offered to the environment by the 1996 Constitution is applied by the judiciary, there is still a sense that the Courts could do more to protect social and environmental rights in South Africa especially in cases such as *Grootboom*. Indeed, in the more recent *Tergniet* case<sup>856</sup> the Court missed the opportunity to highlight the strength and breadth of the constitution in protecting socio-economic rights and providing easy access to courts. The case involved the applicants seeking an interdict to restrain the respondent from the manufacture of creosote-treated wooden poles which the applicants argued were in conflict with the relevant provisions of the Atmospheric Pollution Prevention Act<sup>857</sup> and the Land Use and Planning Ordinance.<sup>858</sup> The main legal issue in this case centred on the respondents argument that the first applicant (a voluntary organization) lacked locus standi with respect to the relief sought and that all of the applicants lacked locus standi in respect of the relief sought with regards to the non-compliance with the Atmospheric Pollution Prevention Act. This was despite the respondent's counsel actually acknowledging that section 38 of the 1996 Constitution and Section 32 of the National Environmental Management Act (NEMA)<sup>859</sup> have indeed broadened the notion of locus standi.<sup>860</sup> While in the end the Court rightly found the applicants to have standing, the

---

<sup>853</sup> *In Re Kranspoort Community*, [2000] 2 SA 124 LCC

<sup>854</sup> Restitution of Land Rights Act 22 of 1999, Republic of South Africa

<sup>855</sup> *In Re Kranspoort Community*, [2000] 2 SA 124 LCC, para. 117, at 183

<sup>856</sup> *Tergniet and Toekoms Action group v Outeniqua Kreosootpale (Pty) Ltd* Case 10083/2008 (c) 23 January [2009]

<sup>857</sup> Atmospheric Pollution Prevention Act 45 of 1965

<sup>858</sup> Land Use and Planning Ordinance Act 15 of 1985

<sup>859</sup> National Environmental Management Act, Act No. 107, 1998, vol 401, Republic of South Africa, Government Gazette, 27<sup>th</sup> November 1998, amended by Act 56 of 2002, Act 46 of 2003, Act 8 of 2004, Act 62 of 2008

<sup>860</sup> M Kidd, 'Public Interest Environmental Litigation: Recent Cases Raise Possible Obstacles' (2010) Vol 13 No. 5 Potchefstroom Electronic Law Journal, 28

reasoning of the Court has been questioned as despite both the respondent and applicant's counsels making reference to section 38 of the 1996 Constitution and section 32 of NEMA these provisions were nowhere in its reasoning.<sup>861</sup> This is a fundamental issue as the Court in effect relegated the Constitution and NEMA to the background and emphasized on the pre-constitutional requirements for locus standi. It is this research's contention that such an approach does not bode well for the protection of environmental rights in South Africa as if the Constitution and the chief environmental legislation i.e. NEMA can be relegated to the background it means they can be considered irrelevant where a Court decides so, thus causing uncertainty in the application of such regulation. This also demonstrates that adjudication is not as effective as established in the earlier cases, as here the court's reasoning was not based on the necessary law that applied to the case as is expected when adjudicating as discussed earlier.

Indeed, authors such as Feris have also argued that the content of the right under section 24 of the Constitution and its value in terms of effect in South Africa, a country that deals with highly contested interests such as economic development versus environmental protection, remains undefined.<sup>862</sup> This is evidenced by the above noted cases of *Grootboom* and *Tergniet* and also the fact that environmental issues continue to plague South Africa. In South Durban for instance, the communities have been protesting for decades in response to the social and environmental injustices of being exposed to pollution and industrial risk on a daily basis.<sup>863</sup> However, rather than alleviating their suffering the Durban City Council's Strategic Environmental Assessment report recommended that the area should be industrialised, which would have resulted in the removal of some people out of the area. The report also failed to put measures in place to address air pollution in the short or medium term.<sup>864</sup> Now clearly this is contrary to the spirit of section 24 of the 1996 constitution, leaving one to question just how effective will the constitution be in the protection of environmental rights with respect to mining which as noted earlier contributes significantly to the South African economy, making it more difficult to go against the mining companies.

---

<sup>861</sup> M Kidd, 'Public Interest Environmental Litigation: Recent Cases Raise Possible Obstacles' (2010) Vol 13 No. 5 Potchefstroom Electronic Law Journal, 28

<sup>862</sup> Lorette Feris, 'Constitutional Environmental Rights: An Under-Utilised Resource' (2008) 24 South African Journal on Human Rights, 49

<sup>863</sup> Zarina Patel, 'Environmental Justice in South Africa: tools and trade-offs', (2009) 35:1, Social Dynamics, 94-110, 99

<sup>864</sup> Zarina Patel, 'Environmental Justice in South Africa: tools and trade-offs', (2009) 35:1, Social Dynamics, 94-110, 99

The last five paragraphs have demonstrated that while the South African Constitutional Court is known for its ‘judicial activism’ especially when it comes to the protection of minority rights under the constitution it has not been overly ‘activist’ in the protection of environmental rights under the constitution, thereby leaving this thesis to argue the court is not an activist court especially where mining and the protection of the environment is concerned.<sup>865</sup> This might lead one to argue that constitutional protection under section 24 of the 1996 constitution has not been as effective as it should be due to the South African courts failing to effectively adjudicate by employing all the remedies available to them as demonstrated in the *Grootboom* case.

However, this thesis does not support such an argument. As while the above discussion does highlight that environmental cases have not attracted much activism from the constitutional court, the constitutional protection of the environment has also been effectively enforced in some matters. Cases such as *Director: Mineral Development, Gauteng Region and SASOL Mining (Pty) Ltd v. Save the Vaal Environment and others*<sup>866</sup> have shown that courts are willing to broaden the scope of their application even in administrative matters. The courts can also be very strict when it comes to defending the rights bestowed by section 24 of the 1996 Constitution by requiring State organs to do all that is within their power to uphold this right as demonstrated by the *BP Southern Africa (Pty) Ltd v. MEC For Agriculture, Conservation, Environment & Land Affairs* case.<sup>867</sup> In the *Re Kranspoort Community case*<sup>868</sup> it was also illustrated that the courts will always pass decisions that are within the spirit of section 24 of the 1996 constitution. Therefore the constitutional backing of environmental rights in South Africa has clearly had a positive impact on environmental regulation, and can definitely be considered as an important tool in the regulation of mining activities in South Africa, thus strengthening South African regulation aimed at limiting the impact of mining.

---

<sup>865</sup> The lack of Judicial activism where environmental matters are concerned in South Africa may be due to the fact that the constitution under section 24 is very clear on the protection it provides the environment and remedies available, therefore there is no need for the courts to be activist in changing the law as in the Fourie case, the Court’s duty is only to interpret and enforce the constitution where it is clear, as in the case of the Environment in South Africa. Further discussions as to why the Constitutional court is not consistent in its activism is beyond the scope of this section as this section’s main purpose is to establish whether the constitutional right to a health environment under section 24 of 1996 Constitution is effective in South Africa thereby demonstrating South Africa’s regulatory strength where mining regulations concerned, through the analysis of case law.

<sup>866</sup> *Director: Mineral Development, Gauteng Region and SASOL Mining (Pty) Ltd v. Save the Vaal Environment and Others*, [1999] 2 SA 709 SCA Case no: 133/98

<sup>867</sup> *BP Southern Africa (Pty) Ltd v. MEC For Agriculture, conservation, Environment & Land Affairs* [2004] 5 SA 124 WLD Case No. 03/16337

<sup>868</sup> *In Re Kranspoort Community*, [2000] 2 SA 124 LCC



However it must be stressed that to be truly effective the courts must consistently apply the constitutional protection afforded under section 24 not sparingly, the constitutional court must show more of its activism in environmental matters. The constitutional backing for the environment is therefore a positive development in Africa, which signifies South Africa's intent on protecting the environment, which is in stark contrast to Nigeria which has no constitutional backing in the form of a fundamental right for the environment.

As noted above legislation were passed to give effect to section 24 of the 1996 Constitution, and the chief legislation for this is the NEMA 1998,<sup>869</sup> which will be considered below to further analyse how strong the South African regulations on the environment and socio-economic justice are in the face of the negative impacts of mining activities.

### **5.3.2 National Environmental Management Act (NEMA), 1998**

As a result of section 24 of the 1996 Constitution, the Legislature responded by promulgating NEMA which is the central document in South African environmental law. The act is meant to provide for a co-operative framework of environmental governance in accordance with section 24 of the 1996 constitution by establishing principles for environmental decision making, defining the scope of actions of the institutions in environmental policy and advocating an integrated approach to environmental management.<sup>870</sup> This section seeks to establish the extent to which NEMA and its principles regulate the impacts of mining in South Africa.

The key principles of NEMA are established under sections 2(2) and 2(3) of the Act. Section 2(2) states that 'Environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and

---

<sup>869</sup> National Environmental Management Act, Act No. 107, 1998, vol 401, Republic of South Africa, Government Gazette, 27<sup>th</sup> November 1998, amended by Act 56 of 2002, Act 46 of 2003, Act 8 of 2004, Act 62 of 2008

<sup>870</sup> Jana Honke, Nicole Kranz, Tanja A. Borzel, Adrienne Heritier, 'Fostering Environmental Regulation? Corporate Social Responsibility in Countries with Weak Regulatory Capacities The Case of South Africa' (2008) SFB Working Paper Series No9, available at <[http://userpage.fu-berlin.de/ffu/akumwelt/bc2008/papers/bc2008\\_341\\_Kranz.pdf](http://userpage.fu-berlin.de/ffu/akumwelt/bc2008/papers/bc2008_341_Kranz.pdf)> accessed 3<sup>rd</sup> August 2016

social interests equitably...<sup>871</sup> While section 2(3) states that ‘Development must be socially, environmentally and economically sustainable.’<sup>872</sup>

The first principle under Section 2(2) is rather straight forward and is usually expected in most environmental legislations, it thus required no further elaboration even within the NEMA Act. However, section 2(3) is drawn from the international principle of sustainable development and is further elaborated in section 2(4) which spawns about 18 more principles, thereby ensuring the NEMA Act is essentially based on the principle of sustainable development.

Section 1(1) of NEMA defines sustainable development as, ‘the integration of social, environmental factors into planning, implementation and decision making so as to ensure that development serves present and future generations.’<sup>873</sup> This is especially important where mining is concerned as on the one hand the benefits of mining activities to the economy are significant, while on the other hand as demonstrated above it leaves future generations with serious environmental problems. Based on the principle of sustainable development as subscribed by NEMA mining companies should therefore base their decisions on mining after careful planning, ensuring they do all that is possible to mitigate damage to the environment that jeopardise the livelihoods of future and present generations.

This research is of the view that in order to attain sustainable development where mining is concerned, as in the case of most countries (e.g. Nigeria) there must first be a form of Environmental Impact Assessment before mining proceeds and also a mine closure or rehabilitation plan. One would therefore expect to see such provisions contained in NEMA.

However, NEMA is quite a peculiar legislation in that it is a framework legislation allowing for other government departments such as the Department of Minerals and Energy (DME) and the Department of Water Affairs and Forestry (DWAF) to promulgate separate sets of sectoral specific legislation.<sup>874</sup> Therefore it does not contain specific provisions requiring

---

<sup>871</sup> National Environmental Management Act, Act No. 107, 1998, vol 401, Republic of South Africa, Government Gazette, 27<sup>th</sup> November 1998, amended by Act 56 of 2002, Act 46 of 2003, Act 8 of 2004, Act 62 of 2008, Section 2(2)

<sup>872</sup> National Environmental Management Act, Act No. 107, 1998, vol 401, Republic of South Africa, Government Gazette, 27<sup>th</sup> November 1998, amended by Act 56 of 2002, Act 46 of 2003, Act 8 of 2004, Act 62 of 2008, Section 2(3)

<sup>873</sup> Section 1(1) (xxix) National Environmental Management Act, Act No. 107, 1998, vol 401, Republic of South Africa, Government Gazette, 27<sup>th</sup> November 1998, amended by Act 56 of 2002, Act 46 of 2003, Act 8 of 2004, Act 62 of 2008

<sup>874</sup> L.A. Sandham, A.R. Hoffmann, and F.P. Retief, ‘Reflections on the quality of mining EIA reports in South Africa’ (2008) vol 108 The Journal of the Southern Africa Institute of Mining and Metallurgy, 701-706

environmental impact assessments for all projects with potential impacts to the environment as found in the Nigerian Environmental Impact Assessment Decree (1992) discussed in chapter four, or even the repealed Republic of South Africa Environment Conservation Act (ECA) 1989<sup>875</sup> which contained a list of activities which an EIA was mandatory for. In contrast, section 11 of NEMA states:

- (1) Every national department listed in Schedule 1 as exercising functions which may affect the environment and every province must prepare an environmental implementation plan within one year of the promulgation of this Act and at least every four years thereafter.
- (2) Every national department listed in Schedule 2 as exercising functions involving the management of the environment must prepare an environmental management plan within one year of the promulgation of this Act and at least every four years thereafter.<sup>876</sup>

The above therefore suggests that NEMA in effect seeks to ensure all state departments and institutions that carry out activities that may affect the environment have environmental management and implementation plans, and it is therefore their duty to protect the environment. NEMA therefore clearly places a duty to protect the environment on State departments, who are directly held responsible where they fail to implement their own management plan.

For the purpose of this research, Schedule 2 as noted in section 11(2) above includes the Department of Minerals and Energy, which we are interested in. Therefore where mining is concerned in accordance with section 11 of the NEMA Act 1998 the Department of Mines and Energy are under a duty to produce an Environmental Management plan for mining activities. However, NEMA does not provide departments with complete freedom, for instance where mining and ensuring sustainable development by undertaking environmental impact assessments are concerned, NEMA provides minimum requirements which must be complied with under section 24(7).<sup>877</sup>

---

<sup>875</sup> Republic of South Africa, Environmental Conservation Act, Act No.73 of 1989

<sup>876</sup> Section 11(1) and (2), National Environmental Management Act, Act No. 107, 1998, vol 401, Republic of South Africa, Government Gazette, 27<sup>th</sup> November 1998, amended by Act 56 of 2002, Act 46 of 2003, Act 8 of 2004, Act 62 of 2008

<sup>877</sup> Procedures for the investigation, assessment and communication of the potential impact of activities must, as a minimum, ensure the following:

- (a) Investigation of the environment likely to be significantly affected by the proposed activity and alternatives thereto;
- (b) Investigation of the potential impact, including cumulative affects, of the activity and its alternatives on the environment, socio economic conditions and cultural heritage, and assessment of the significance of that potential impact;

The minimum standard ensures departments are not biased towards their sectors by providing weak environmental plans which is a possibility especially to avoid liability where they fail to fully implement their plans.

Generally, where mining is concerned by requiring the Department of Minerals and Energy to produce and implement an environmental plan and also providing a minimum standard for environmental impact assessments in accordance with the principle of sustainable development NEMA is well placed to regulate the mining sector through the Department of Minerals and Energy. However, NEMA fails to specifically deal with the issue of mine closure and rehabilitation, on the other hand one can argue this is an area best left for the sectoral legislations to be promulgated by the relevant governments departments in accordance with NEMA's position as a general framework legislation. Additionally, it is worth noting that NEMA does provide the following principle under section 2(4)(a)(ii) which can be applied to mine closure:

That pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied.<sup>878</sup>

The above discussions of the NEMA clearly demonstrates that it places stringent duties on state departments in the protection of the environment in accordance with section 24 of the 1996 constitution. NEMA also provides a strong enforcement mechanism for such stringent duties under Section 28(12). This section prescribes that, where any person applies to the Director General of the Environmental Affairs and Tourism Department or a provincial head of department to take action regarding an environmental issues, if there is no action after 30 days they may apply to a competent court requesting an order that the state organs takes the necessary action initially applied for.<sup>879</sup> While providing provisions that place stringent duties on the state and providing strong enforcement mechanism are critical to the success of a legislation, the true strength of a legislation is whether it is followed and where it is not followed if it is enforced by the courts. Frequent and consistent enforcement of legislation by

- 
- (c) Investigation of mitigation measures to keep adverse impacts to a minimum, as well as the option of not implementing;
  - (d) Public information and participation, independent review and conflict resolution in all phases of the investigation and assessment impacts;

<sup>878</sup> Section 2(4)(a)(ii), National Environmental Management Act, Act No. 107, 1998, vol 401, Republic of South Africa, Government Gazette, 27<sup>th</sup> November 1998, amended by Act 56 of 2002, Act 46 of 2003, Act 8 of 2004, Act 62 of 2008

<sup>879</sup> Section 28(12), National Environmental Management Act, Act No. 107, 1998, vol 401, Republic of South Africa, Government Gazette, 27<sup>th</sup> November 1998, amended by Act 56 of 2002, Act 46 of 2003, Act 8 of 2004, Act 62 of 2008

the judiciary are usually hallmarks of strong regulations, it is for this reason that this research will now consider the decisions of South African courts with respect to NEMA in determining how strong it is as a legislation that regulates the negative impacts of mining.

In the case of *MEC for Agricultural Conservation, Environment and Land affairs v. Sasol Oil (Pty) and another*<sup>880</sup> which again involved the construction of a filling station and whether the relevant authority had the power to refuse the authorisation for such a construction.

Referring to NEMA the court held that:

NEMA contains an injunction which prescribes that any and all environmental law(s) should be interpreted by having regard to the NEMA principles, which include, *inter alia*, sustainable development which, in turn, requires the state to evaluate the social, environmental and economic impacts of activities in an integrated manner.<sup>881</sup>

The court found in favour of the government department in its refusal to grant authorisation based on environmental grounds, demonstrating the principles contained in section 2 of NEMA are to be diligently applied in conjunction with other legislation, in this case the Environmental Conservation Act of 1989.<sup>882</sup>

Furthermore, in the case of *Minister of Water affairs and Forestry v. Stilfontein Gold Mining Company Ltd and Others*<sup>883</sup> Hussain J, granted an order holding the Stilfontein Gold Mining Company (Ltd) and its four directors guilty of contempt of court for their failure to comply with a previous court order compelling them to obey directives relating to the pumping of underground water issued by the Regional Director of Water Affairs and Forestry for the Free State. Demonstrating the importance of NEMA and its principles in protecting the environment in its dictum the court emphasized that:

The object of the directives is to prevent pollution of valuable water resources. To permit mining companies and their directors to flout environmental obligations is contrary to the constitution, the Mineral Petroleum Development Act and to the National Environmental Management Act. Unless courts are prepared to assist the state by providing suitable mechanisms for the enforcement of statutory obligations, an impression will be created that mining companies are free to exploit the mineral resources of the country for profit, over the lifetime of the mine; thereafter they may simply walk away from their environmental

---

<sup>880</sup> MEC for Agricultural Conservation, Environment and Land affairs v. Sasol Oil (Pty) and Another, [2006] 5 SA 483 SCA

<sup>881</sup> *ibid*

<sup>882</sup> Environmental Conservation Act 73 of 1989 (ECA)

<sup>883</sup> Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Limited & Others [2006] (5) SA 333 (W)

obligations. This simply cannot be permitted in a constitutional democracy which recognises the right of all its citizens to be protected from the effects of pollution and degradation.<sup>884</sup>

Just as in the *Sasol Oil* case, this case clearly demonstrates that where mining companies disregard the orders of state departments empowered by NEMA, thus ignoring NEMA, the courts are ready to assist the state by enforcing statutory obligations such as NEMA. Such developments makes NEMA a strong legislation in terms of managing the social and environmental impacts of mining.

However, while the above cases demonstrate the courts willingness to enforce the provisions of NEMA thus strengthening it as a regulatory tool, there are instances where South African courts have failed to enforce NEMA provisions thus leaving one to question its strength as a regulatory mechanism. In the case of *Minister of Public Works v Kyalami Ridge Environmental Association (Kyalami case)*<sup>885</sup> the Constitutional Court seemed to misinterpret and arguably ignore NEMA. First, the court found that the environmental management principles in section 2 mentioned earlier are not directed at ‘controlling the manner in which organs of state use their property.’<sup>886</sup> The court argued that ‘the principles are directed to the formulation of environmental policies by the relevant organs of state, and the drafting and adoption of their environmental...plans’<sup>887</sup> In other words the court saw the principles contained in section 2 of NEMA as mere guidelines in the implementation of environmental management plans and not controlling the actions of the State organs. This author disagrees with this finding as clearly section 2(1) of NEMA states that ‘the principles set out in this section apply throughout the Republic to actions of all organs of state that may significantly affect the environment.’<sup>888</sup> Which means they are not mere guidelines to be applied when drafting environmental plans but principles that must be applied in all state actions that may significantly affect the environment. Therefore they do have a controlling effect in how state organs use their property where the environment is concerned. Indeed Kidd supports this view, as he notes;

---

<sup>884</sup> Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Limited & Others [2006] (5) SA 333 (W) at para 16.9

<sup>885</sup> Minister of Public Works v Kyalami Ridge Environmental association [2001] (3) SA 1151 (CC); 2001 (7) BCLR 652

<sup>886</sup> *ibid* para 69

<sup>887</sup> *ibid*

<sup>888</sup> Section 2(1), National Environmental Management Act, Act No. 107, 1998, vol 401, Republic of South Africa, Government Gazette, 27<sup>th</sup> November 1998, amended by Act 56 of 2002, Act 46 of 2003, Act 8 of 2004, Act 62 of 2008

...that the principles are directed at the manner in which organs of state use their property and indeed, do anything that could affect the environment, could not be clearer from the wording of section 2(1).<sup>889</sup>

The author's view was further supported by Kotze who noted the court's interpretation of the environmental principles established in section 2 of NEMA in the *Kyalami* case is a matter for concern.<sup>890</sup>

Secondly, in this case the court seemed to again misinterpret section 2(1) of NEMA when it found the respondents had failed to demonstrate that the proposed government activity will have a significant effect on the environment and therefore in breach of section 2(1) of NEMA.<sup>891</sup> This research finds that the court erred in reaching this conclusion as section 2(1) of NEMA again clearly stated the principles apply to activities that 'may' significantly affect the environment not those that 'will' significantly affect it. The above findings by the Court in the *Kyalami* case are puzzling and goes to show that NEMA provisions are not always enforced by the courts. Kidd suggests that the court may have deliberately misconstrued NEMA in order to ensure that the decision was the socially and politically appropriate one to reach in the circumstances.<sup>892</sup> This is a valid point taking into account the case involved the relocation of desperate flood victims by the government which was challenged by the respondents. Nevertheless the literature is in agreement that the *Kyalami* case is a flawed case which ignored and misinterpreted NEMA, which in effect weakens NEMA as a piece of legislation.<sup>893</sup>

The *Kyalami* case is not the only example of NEMA being ignored by the courts, in *Merebank Environmental Action Committee v Executive Member of KwaZuluNatal Council for Agriculture and Environmental Affairs and Others (Merebank Case)*<sup>894</sup> the court entirely ignored section 32 of NEMA with respect to its application to both the applicant's locus standi and the award of cost.<sup>895</sup> With respect to locus standi, Majid J, in attending to the legal

---

<sup>889</sup> M. Kidd, 'Greening the Judiciary', (2006) Vol 09 No. 3 Potchefstroom Electronic Law Journal, 74

<sup>890</sup> LJ Kotze, 'The Constitutional Court's Contribution to Sustainable Development in South Africa' (2003) vol 6 No. 2 Potchefstroom Electronic Law Journal

<sup>891</sup> *Minister of Public Works v Kyalami Ridge Environmental association* [2001] (3) SA 1151 (CC); 2001 (7) BCLR 652

<sup>892</sup> M. Kidd, 'Greening the Judiciary', (2006) Vol 09 No. 3 Potchefstroom Electronic Law Journal, 74

<sup>893</sup> See Loretta Feris, 'Constitutional Environmental Rights: An Under-Utilised Resource' (2008) 24 South African Journal on Human Rights, 29-49, LJ Kotze, 'The Constitutional Court's Contribution to Sustainable Development in South Africa' (2003) vol 6 No. 2 Potchefstroom Electronic Law Journal, 81-95, M. Kidd, 'Greening the Judiciary', (2006) Vol 09 No. 3 Potchefstroom Electronic Law Journal, 72-86

<sup>894</sup> *Merebank Environmental Action Committee v Executive Member of KwaZuluNatal Council for Agriculture and Environmental Affairs and Others* [2001] Unreported Case no 269/01 D

<sup>895</sup> M. Kidd, 'Greening the Judiciary', (2006) Vol 09 No. 3 Potchefstroom Electronic Law Journal, 75

nature of the applicants stated he was 'inclined to believe that anything that calls itself simply a committee, whatever comes before the word, cannot conceivably be an association with locus standi in judicio.'<sup>896</sup> This is evidently contrary to section 32(1) of NEMA which again clearly states; 'any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act.'<sup>897</sup> By using the words 'any person or group of persons' this research is of the view that a committee would have standing under section 32(1) of NEMA as a committee is formed by a group of persons. Therefore NEMA was yet again ignored in this case, which means it is not as clear and stringent as it should be in regulating activities that may be detrimental to the environment, as the courts seem to ignore its provisions.

The above analysis shows that while the courts have enforced NEMA provisions in some cases, they have also ignored and misinterpreted its provisions in other cases. This shows there are inconsistencies in the enforcement of NEMA by the South African judiciary which weakens its ability to comprehensively regulate environmental infractions of mining companies, as the Judiciary seems to pick and choose when NEMA provisions may be enforced depending on the circumstances of a particular case.

The inconsistencies of the South African courts in the enforcement of NEMA are not alone in highlighting the weakness of NEMA as a regulatory tool. While there have been criticisms relating to weak enforcement of the act and environmental law in general due to the weak administrative capacity in South Africa,<sup>898</sup> a more specific criticism of the NEMA itself is the fragmentation of laws caused by the act. The fact that NEMA allows different state organs and departments to promulgate their own laws leaves one to argue that surely there will be a great deal of confusion regarding responsible bodies for certain environmental violations, overlaps in the jurisdiction of certain departments, and the difficulty in keeping up with laws by companies. Indeed, Honke et al argue that the fragmented nature of environmental legislation as a result of NEMA's allocation of responsibilities in the

---

<sup>896</sup> Michael Kidd, 'Of Gas Pipelines and Sour Judicial Air: Merebank Environmental Action Committee v Executive Member of KwaZulu-Natal council for Agricultural and Environmental Affairs'(2001) Vol 8 Issue 1, South African Journal of environmental Law and Policy, 135-138

<sup>897</sup> Section 32(1), National Environmental Management Act, Act No. 107, 1998, vol 401, Republic of South Africa, Government Gazette, 27<sup>th</sup> November 1998, amended by Act 56 of 2002, Act 46 of 2003, Act 8 of 2004, Act 62 of 2008

<sup>898</sup> See Peter Lund-Thomas, 'Corporate Accountability in South Africa: The Role of Community Mobilizing in Environmental Governance' (2005) 81(3) International Affairs, 619-633, Moshibudi P. Rampedi, 'Experiences in Environmental Compliance and Enforcement in Limpopo Province, South Africa' (2006), Seventh International Conference on Environmental Compliance and Enforcement, Marrakech, 9 – 15 April 2005)



environmental sector to numerous different institutions may render an effective implementation of environmental provisions very difficult.<sup>899</sup> They further note that NEMA's system of co-operative governance spearheaded by the Department of Environmental Affairs and Tourism (DEAT) does not prevent other ministries from pursuing alternative strategies to that of DEAT with regards to environmental matters as they may be contrary to their priorities.<sup>900</sup> Sutton and Weiersbye also note that although the Constitution and NEMA clearly establishes DEAT as the lead agent for environmental protection, the division of the responsibility for environmental protection between departments on a favoured industry basis will result in a lowering of standards.<sup>901</sup> For instance, the Minerals and Petroleum Development Act in Section 39(1)<sup>902</sup> advocates for 'accelerated' EIAs for the mining industry by requiring an EIA, as well as environmental management programme (EMP), to be submitted within 180 days. By accelerating such a process the standard is sure to be lower as the EIA will not be based on a scientifically sound process<sup>903</sup> however, as it is in the interest of the Department of Energy to have them accelerated so as to increase investment into the mining sector they have it in their law. Furthermore, Ashton et al argue that the coordination of different requirements by different departments translates into significant costs for the companies which diminishes their willingness to comply.<sup>904</sup>

While the above are all valid arguments one might still argue that the fragmentation of environmental regulation may still be positive as the more laws protecting the environment, the better it is for the environment. Also, as noted earlier by leaving environmental planning in the hands of state departments it allows them the opportunity to design the most effective plans based on their experience within the sector, thus strengthening their regulations. However, one must note that having too many laws may cause confusion, on the part of the

---

<sup>899</sup> Jana Honke, Nicole Kranz, Tanja A. Borzel, Adrienne Heritier, 'Fostering Environmental Regulation? Corporate Social Responsibility in Countries with Weak Regulatory Capacities: The Case of South Africa' (2007) SFB Working Paper Series 9, available at <[http://userpage.fu-berlin.de/ffu/akumwelt/bc2008/papers/bc2008\\_341\\_Kranz.pdf](http://userpage.fu-berlin.de/ffu/akumwelt/bc2008/papers/bc2008_341_Kranz.pdf)> accessed 4<sup>th</sup> August 2016

<sup>900</sup> *ibid*

<sup>901</sup> M.W. Sutton and I.M. Weiersbye, 'South African Legislation Pertinent to Gold Mine Closure and Residual Risk' (2007), Mine Closure, Santiago, Chile

<sup>902</sup> Section 39(1) Mineral and Petroleum Resources Development Act No. 28 of 2002, Republic of South Africa

<sup>903</sup> M.W. Sutton and I.M. Weiersbye, 'South African Legislation Pertinent to Gold Mine Closure and Residual Risk' (2007), Mine Closure, Santiago, Chile

<sup>904</sup> Peter Ashton, David Love, Harriet Mahachi, Paul Dirks, 'An Overview of the Impact of Mining and Mineral Processing Operations on Water Resources and Water Quality in Zambezi, Limpopo and Olifants Catchments in South Africa' (2001) Mining, Minerals and Sustainable Development (Southern Africa) Project, Pretoria

departments responsible for implementation, the companies affected by the laws, and the general populace, which may hinder effective implementation of NEMA.

Overall while NEMA is a welcome development which has recorded some positive gains in the courts, thus demonstrating its strength as a regulatory tool against the potential environmental abuses of mining companies, the judiciary's inconsistency in the enforcement of its provisions, weakens its ability to act as a stronger regulator of mining activities.

As this thesis is concerned with mining it is now necessary to consider the mining sectoral legislation created for environmental regulation as a result of NEMA, namely The Minerals and Petroleum Development Act, which will be discussed below.

### **5.3.3 The Minerals and Petroleum Development Act (MPRDA), 2002**

In terms of regulations for mining in South Africa the Minerals and Petroleum Development Act (MPRDA) continues where the NEMA stopped, as the sectoral legislation it applies the NEMA principles and provisions to the mining sector. Reaffirming the importance of the sustainable development principle outlined in section 24 of the 1996 Constitution and the NEMA Act, the MPRDA's long title clearly states the act is created:

'To make provision for equitable access to sustainable development of the nation's mineral and petroleum resources; and to provide for matters connected therewith'<sup>905</sup>

As discussed earlier sustainable development where mining is concerned refers to the prudent extraction for mineral resources for the economic benefit of the present population while minimizing any negative social and environmental impact for present and future generations. The 'equitable access' of mineral resources is also one of the key tenets of the MPRDA as it seeks to ensure social-economic justice for all South Africans.

With respect to attaining sustainable development in the mining industry, this relates to the use of environmental management principles, that include the conduct of environmental impact assessments, environmental management plans, mine closure and rehabilitation plans, as mentioned above with regards to NEMA.

---

<sup>905</sup> Long title for the, Mineral and Petroleum Resources Development Act No. 28 of 2002, Republic of South Africa

In applying the principles contained in NEMA, especially that of sustainable development, the MPRDA has a wide range of provisions which are worded strongly, leaving very little room for discretion, and can arguably be considered an impressive set of regulation, aimed at protecting the environment and ensuring social equality, unlike many in SSA. This will be demonstrated by considering some of the key provisions here.

Under section 38(1) the issue of environmental management in line with the sustainable development principle is addressed, where it is stated that the holder of a reconnaissance permission, prospecting right, mining right, mining permit or retention permit;

- (a) must manage all environmental impacts-
  - (i) in accordance with his or her environmental management plan or approved environmental management programme, where appropriate; and
  - (ii) as an integral part of the reconnaissance, prospecting or mining operations, unless the Minister directs otherwise;
- (b) must as far as it is reasonably practicable, rehabilitate the environment affected by the prospecting or mining operations to its natural or predetermined state or to a land use which conforms to the generally acceptable principles of sustainable development...<sup>906</sup>

The above provision highlights that the principle of sustainable development is underpinned by two instruments provided by the Act. The first being an ‘environmental management plan’, which is a plan to manage and rehabilitate environmental impact resulting from; prospecting, reconnaissance, exploration or mining operations.<sup>907</sup> The second instrument is an environmental management programme, as contemplated by section 39 of the Act.<sup>908</sup>

The description under section 39 of the MPRDA of what an environmental management plan or programme consist of is arguably what is usually found in an environmental impact assessment (EIA) around the world. However, the MPRDA differentiates between an

---

<sup>906</sup> Section 38(1) and (2) Mineral and Petroleum Resources Development Act No. 28 of 2002, Republic of South Africa

<sup>907</sup> Jan Glazewski and Emma Witbooi, ‘Environmental Law: International Law Developments’ (2002) Ann. Surv. S. African L. 550 – 572, 554

<sup>908</sup> Section 39(3) envisages that an environmental management programme or environmental management plan must contain the following:

- (i) Determine baseline information concerning the affected environment in order to determine the protection, remedial measures and environmental management targets.
- (ii) Assess the impact of their mining prospecting or operations on the; environment, and the socio-economic conditions of any person directly affected by mining operations.
- (iii) Develop an environmental awareness plan for employees.
- (iv) Describe how they intend to modify, remedy, mitigate, or stop any action or process which may cause pollution or environmental degradation.
- (v) They must also provide how they intend to comply with waste management standards or practices.<sup>908</sup>

environmental management plan or programme and an EIA in section 39 (1) where it states; every applicant of a mining right must conduct an environmental impact assessment and submit an environmental management programme within 180 days of being notified to do so by the Regional manager, thereby clearly differentiating the two.<sup>909</sup> However, what stands out from section 39(1) is that the requirement of an EIA only applies to an application for mining rights and not an application for prospecting rights. An applicant for a prospecting right must submit an environmental management plan as prescribed above. Whereas an applicant for a mining right must submit an EIA as well as an environmental management plan. One could argue that although the extra precaution necessary when obtaining a mining right is welcome, this should be also extended to prospecting rights, as environmental damage is done as early as the prospecting stage. Indeed this is an argument supported by Glazewski and Witbooi, who note:

From an environmental management perspective one can question the wisdom of only requiring that an EIA be carried out after the prospecting permission has been granted. In our view an EIA should be carried out prior to the granting of prospecting permission, as otherwise the implication is that mining will eventually go ahead and environmental factors may be given only token considerations.<sup>910</sup>

However, it is worth noting that section 119 of the Nigerian Minerals and Mining Act also subscribes to a procedure whereby exploration licences, mining leases, and small-scale mining leases are granted before an EIA is conducted. Under this section an EIA is requested when development is about to begin.<sup>911</sup> In agreement with Glazewski and Witbooi, these procedures weaken the desire for environmental protection by mining companies and must be reviewed, in order to strengthen environmental protection. Although it is worth noting that at least in South Africa there is a need for the presentation of an EIA before a mining right can be granted, whereas in Nigeria according to section 119 of the Minerals and Mining Act a mining lease may be granted without an EIA.

A more positive provision in the hopes of attaining sustainable development is found in section 10 of the MPRDA,<sup>912</sup> which requires the regional manager of the Department of Energy to notify interested parties of a land that an application for a prospecting right, mining

---

<sup>909</sup> Section 39(1) Mineral and Petroleum Resources Development Act No. 28 of 2002, Republic of South Africa

<sup>910</sup> Jan Glazewski and Emma Witbooi, 'Environmental Law: International Law Developments' (2002) Ann. Surv. S. African L. 550 – 572, 556

<sup>911</sup> Section 119, Nigerian Minerals and Mining Act [2007]

<sup>912</sup> Section 10(1) and (2) Mineral and Petroleum Resources Development Act No. 28 of 2002, Republic of South Africa

right, or mining permit has been received with respect to the land. He is then required to call for objections, and if one is received must refer the objection to the Regional Mining Development and Environmental Committee to consider the objection and advise the Minister thereon.<sup>913</sup> This is positive as the consultation of host communities is important in having a balanced view of how mining activities may impact upon their living standards. Such a provision is usually found in most mining regulations around the world. However, the difference with this provision to for instance, section 100 of the Nigerian Minerals and Mining Act,<sup>914</sup> which deals with consultation is that the responsibility for consultation is with a State organ. Whereas under the Nigerian Act the mining right applicant is required to obtain the consent of the host community after consultation. The South African provision is arguably stronger as the Regional Development and Environmental Committee are in a better position expertise wise to assess the objection of host committees and protect their interest against mining giants with ample resources. Whereas in the Nigerian case host communities are not skilled negotiators or experts in terms of the impacts of mining and after some convincing by skilled employees of mining companies may hastily give their consent. Therefore this research would thus argue section 10 of the MPRDA offers greater protection for host communities.

Another provision further demonstrating the MPRDA's capacity to protect the environment from the impact of mining is found in section 38(2) of the MPRDA which appears to unusually lift the corporate veil in environmental matters where it states:

The directors of a company or members of a close corporation are jointly and severally liable for any unacceptable negative impact on the environment, including damage, degradation or pollution advertently or inadvertently caused by the company or close corporation which they represent or represented.<sup>915</sup>

The above signifies the extent this law will go in piercing the corporate veil to protect the environment, this is rare in environmental regulations, or indeed company law itself, thereby signifying the strength of the regulation. Additionally, the sanctions for the directors under the MPRDA are stringent. Under section 99(1)(c) where a company fails to manage environmental impacts in accordance with their environmental management plan or approved environmental management programme they may be liable to a fine not exceeding R500,000

---

<sup>913</sup> Section 10(1) and (2) Mineral and Petroleum Resources Development Act No. 28 of 2002, Republic of South Africa

<sup>914</sup> Section 100, Nigerian Minerals and Mining Act [2007]

<sup>915</sup> Section 38(2) Mineral and Petroleum Resources Development Act No. 28 of 2002, Republic of South Africa

or to imprisonment for a period not exceeding 10 years or to both.<sup>916</sup> This demonstrates the seriousness of the offence and serves as a deterrent for companies and their directors. Such provisions are unlike that of the Nigerian Minerals and Mining Act in that there are no provisions holding directors personally liable for environmental violations or failure to comply with their EIA, and thus laying out stringent punishment guidelines.

However, where the MPRDA is similar to the Nigerian Mineral and Mining Act is under section 41(1) which requires an applicant of a prospecting right, mining right or mining permit to make the 'prescribed financial provision for the rehabilitation or management of negative environmental impacts.'<sup>917</sup> Under the MPRDA if an applicant fails to rehabilitate or is unable to do so after notice has been issued the Minister may use all or part of the financial provision provided by the applicant to rehabilitate or manage the negative environmental impact in question.<sup>918</sup> This provision is similar to that found in section 30 of the Nigerian Minerals and Mining Act which ensures there are funds available for the rehabilitation of the environment after mining activities are concluded, which is important to preserve the environment. Section 41(1) of the MPRDA addresses the observation made earlier that NEMA does not provide a provision specifically dealing with the rehabilitation of mines thus weakening its ability to regulate the impacts of mining on the environment.

The above provisions of the MPRDA are some of many significant provisions available for the protection of the environment in accordance with the MPRDA principle of sustainable development. However, it will be noted that the long title of the MPRDA act states that the act was also made for the equitable access of the nation's mineral resources. In seeking to give effect to this statement the act also lays out an impressive set of provisions aimed at social equality, taking into account the past injustices of Apartheid. Indeed, the most important provision in the MPRDA act from a social perspective was to return all mineral rights to the custodianship of the State for redistribution.<sup>919</sup> The old order mineral rights were cancelled thus requiring current and future mine owners to apply for new order rights. The new-order rights are designed to transfer ownership of mining companies to formerly

---

<sup>916</sup> Section 99(1)(c) Mineral and Petroleum Resources Development Act No. 28 of 2002, Republic of South Africa

<sup>917</sup> Section 41(1) Mineral and Petroleum Resources Development Act No. 28 of 2002, Republic of South Africa

<sup>918</sup> Section 41(2) Mineral and Petroleum Resources Development Act No. 28 of 2002, Republic of South Africa

<sup>919</sup> Paul Sorensen, 'Legislative transformation of South African mining since 1994: what progress?'(2011) 68 (2) International Journal of Environmental Studies, 171-190, 174

disadvantaged individuals.<sup>920</sup> The implementation of this would be done in terms of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry, commonly referred to as the Mining Charter with its attached scorecard. This will be considered in more detail below. The above developments were especially impressive due to the fact that the MPRDA was going against the trend of mining regulations in developing countries, particularly in Africa, (e.g. the Nigerian Minerals and Mining Act) which focus on attracting Foreign Direct Investment. Instead it was seen as a socialist initiative, which discouraged Foreign Direct Investment.<sup>921</sup> Rather than attracting Foreign Direct Investment the MPRDA focused on redistribution of South African wealth to especially the ‘historically disadvantaged.’ This is achieved through section 3 of the MPRDA<sup>922</sup> which changes the mineral ownership laws of South Africa as noted above and section 100 of the MPRDA which empowers the Minister of the Department of Minerals and Energy to develop the broad-based socio-economic empowerment charter (Mining Charter).<sup>923</sup> This charter is to set the framework, targets and timetable for effecting the entry of historically disadvantaged South Africans into the mining industry and also allow such South Africans to benefit from the exploitation of mining and mineral resources.<sup>924</sup>

The Charter was ratified on 11 October 2002 and had provisions such as all companies needed to have 26% Black Economic Empowerment (BEE) ownership by April 2014 (in 10 years), it also had provisions financing such ownerships, and mine community and rural development amongst other socio-economic provisions.<sup>925</sup> The Charter was accompanied by a Scorecard which has a checklist to be assessed when issuing titles or assessing a company’s compliance with the MPRDA. Together, the Charter and the Scorecard are implementing instruments that ensure participation in the ownership of South Africa’s mining companies by Highly Disadvantaged South Africans. This is very encouraging as rather than waiting for handouts from mining companies at their discretion the MPRDA aims to empower the disadvantaged by making their involvement mandatory and creating implementation mechanisms. Indeed, under the MPRDA, Sorensen argues in South Africa now nothing is left

---

<sup>920</sup> Paul Sorensen, ‘Legislative transformation of South African mining since 1994: what progress?’(2011) 68 (2) International Journal of Environmental Studies, 171-190, 174

<sup>921</sup> Paul Sorensen, ‘Mining in South Africa: a mature industry?’ (2011) 68(5) International Journal of Environmental Studies, 625-649, 627

<sup>922</sup> Section 3, Mineral and Petroleum Resources Development Act No. 28 of 2002, Republic of South Africa

<sup>923</sup> Section 100, Mineral and Petroleum Resources Development Act No. 28 of 2002, Republic of South Africa

<sup>924</sup> *ibid*

<sup>925</sup> Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry, [2002] available at <<https://www.westerncape.gov.za/Text/2004/5/theminingcharter.pdf>> accessed on the 10<sup>th</sup> August 2016

to choice; apart from paying taxes, the mining companies now have to additionally surrender equity and pay royalties on the resource by law.<sup>926</sup> The above are some of the impressive socio-economic developments under the MPRDA, which are clearly stronger than those found in the Nigerian Minerals and Mining act discussed in chapter 4, such as section 116 which requires a Community Development Plan be agreed between mining companies and host communities.<sup>927</sup> While the Nigerian provision is a positive one it does not go as far as giving equity to disadvantaged communities as found in the South African law, along with many other community development requirements, which is novel.

However, while the socio-economic developments of the MPRDA are welcome it must be noted, that there have been arguments that the principal beneficiaries of the post-apartheid policies were the well-connected members of the black elite, who became overnight billionaires.<sup>928</sup> Indeed it is noted that at the operational level in the mining industry, most Historically Disadvantaged South African's are still under-represented in the industrialised South African society, except as unskilled and semi-skilled labour. Therefore it is argued that the Broad Based Black Economic Empowerment policy (BBBEE) which is enshrined in the MPRDA socio-economic policies has not been successful.<sup>929</sup> However, one might argue that the lack of representation at the operational level may be due to the fact that those that are to benefit from the policy are still growing into such positions, taking into account the law only came into force in 2002 and Apartheid only ended in 1994. The Historically Disadvantaged would therefore require time to acquire the necessary qualifications to benefit from the new policies. Therefore this thesis still argues the socio-economic policies contained under the MPRDA are impressive especially in a world where the bargaining power to dictate policies rests with the supplier of capital; i.e. the investor, who would not favour the socio-economic policies under the MPRDA due to the increase in the cost of doing business in South Africa.

Moreover, before moving on to the next section, it is worth also considering how effective the environmental provisions on the MPRDA have been. Case law such as *Director: Mineral Development, Gauteng Region and SASOL Mining (Pty) Ltd v. Save the Vaal Environment*

---

<sup>926</sup> Paul Sorensen, 'Mining in South Africa: a mature industry?' (2011) 68(5) International Journal of Environmental Studies, 625-649, 642

<sup>927</sup> Section 116, Nigerian Minerals and Mining Act [2007]

<sup>928</sup> Paul Sorensen, 'Mining in South Africa: a mature industry?' (2011) 68(5) International Journal of Environmental Studies, 625-649, 643

<sup>929</sup> *ibid*



and others<sup>930</sup> and the *Minister of Water affairs and Forestry v. Stilfontein Gold Mining Company Ltd and Others*<sup>931</sup> discussed earlier have demonstrated that the Courts usually do not permit mining companies to flout environmental laws contrary to the MPRDA or the Constitution.

While testing the effectiveness of the Nigerian Minerals and Mining Act was difficult as there was no empirical studies to refer to, with South Africa this research has identified some data it will use to illustrate the effect of the MPRDA, particularly with respect to EIAs in the mining sector. In their empirical study to review the quality of EIAs in compliance with the MPRDA Sandham et al reviewed a sample of 20 approved EIAs submitted to the Department of Energy after the MPRDA regulations came into force in 2004. Their results were rather positive in that they rated 85% of the EIAs satisfactory, in terms of quality and compliance with the MPRDA regulations.<sup>932</sup> Additionally, out of the 20 reports they only reported two as unsatisfactory, one as a poor attempt, and none as not attempted.<sup>933</sup> Therefore, the quality and compliance of one of the most important tenets of the MPRDA is rather inspiring. However, it is worth noting that the study also discovered that mining companies found it difficult to predict the impact magnitude of their activities and finding alternative sites or mitigating options in their EIAs. This may simply be explained by the fact that the nature of mining means that it may be unlikely to find an alternative site with the same resources and quite difficult to predict the exact impact on the society as a whole. Indeed, the failure of companies to deal with these issues appears to be international.<sup>934</sup> Therefore the South African case seems to be satisfactory, thus rebutting criticism that the DME is essentially acting as ‘referee and player’ within the mining context.<sup>935</sup> In the sense it needs to attract investments to increase royalties and thus revenue, yet it is allowed to regulate, its environmental management programme, which may not be the required quality, as it seeks to generate more revenue.

---

<sup>930</sup> Director: Mineral Development, Gauteng Region and SASOL Mining (Pty) Ltd v. Save the Vaal Environment and Others, [1999] 2 SA 709 SCA Case no: 133/98

<sup>931</sup> Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Limited & Others [2006] (5) SA 333 (W)

<sup>932</sup> L.A. Sandham, A.R. Hoffmann, and F.P. Retief, ‘Reflections on the quality of mining EIA reports in South Africa’ (2008) vol 108 The Journal of The Southern African Institute of Mining and Metallurgy, 701-706

<sup>933</sup> *ibid*

<sup>934</sup> See A. Barker and C. Wood, ‘An Evaluation of EIA system performance in eight EU countries’ (1999) vol 19, Environmental Impact Assessment Review, 387-404

<sup>935</sup> L.A. Sandham, A.R. Hoffmann, and F.P. Retief, ‘Reflections on the quality of mining EIA reports in South Africa’ (2008) vol 108 The Journal of The Southern African Institute of Mining and Metallurgy, 701-706

The above study revealing a satisfactory compliance record of mining companies with respect to the EIA requirement of the MPRDA is rather encouraging taking into account that the general picture with regards to EIA implementation across all sectors in South Africa is similar to the weak situation in Nigeria, discussed in chapter four. Indeed, Patel argues that in South Africa EIAs have been little more than a compliance exercise, showing that projects will comply with existing environmental regulations.<sup>936</sup> She notes there have been numerous examples of decisions that have already been made, resources allocated, before public participation took place. For instance, the decision to solve South Africa's energy crisis with a Pebble Bed Modular Reactor is a case in point, despite the fact that the regulator had not seen the final designs nor has an EIA been completed contracts were awarded for the manufacture of reactor components.<sup>937</sup> Therefore Sandham et al's study further demonstrates the strength of the MPRDA as a regulatory tool against the impact of mining in South Africa.

Overall, in keeping with the sustainable development theme found in section 24 of the 1996 Constitution and NEMA, the MPRDA continues with the theme and through its provisions is unlike any regulation in SSA. However, as noted earlier after over a century of mining a world class piece of legislation for the mining sector should be expected in South Africa, and the MPRDA is surely a benchmark that should be followed by other SSA countries. While it has setbacks due to institutional weaknesses which harbour corrupt elements as in many developing countries, the MPRDA, is evidently a strong regulatory tool and together with section 24 of the Constitution and NEMA leaves little room for weak governance. The MPRDA is also a strong facet in the creation of an enabling environment for soft law initiatives in South Africa which may have even higher standards and requirements than the benchmarks set by the MPRDA as shall be discussed further below.

#### **5.4 Providing an Enabling Environment for Soft Law Initiatives**

In order to have a balanced comparison that will establish whether South Africa and Nigeria have an enabling environment for soft law initiatives, just as in section 4.4 of Chapter four, this section will use the Equator Principles as our sample soft law initiative. Like in Nigeria, the Equator Principles can be applied to the South African mining sector with great effect given the right enabling environment. As discussed in chapter four the principles are

---

<sup>936</sup> Zarina Patel, 'Environmental Justice in South Africa: Tools and Trade-Offs' (2009) 35(1), *Social Dynamics*, 94-110, 105

<sup>937</sup> *ibid*

examples of soft law that result in stricter rules and policies than are required by hard law, thus filling any gaps left by such laws. The section above has already demonstrated that when it comes to providing an enabling environment for soft law in the form of hard law the South African regulatory system is quite capable. However, as discovered in Chapters two and three, creating an enabling environment for soft law initiatives requires more than just providing hard law regulation. Therefore it is essential, using the Equator Principles to establish if the other features of an enabling environment as prescribed in chapter two are readily provided in South Africa, in order to establish whether South Africa has an enabling environment for soft law initiatives.

#### **5.4.1 The Equator Principles in South Africa**

The Equator Principles (EP) are a widely adopted set of soft law and as such have indeed reached South Africa. However, out of over fourteen locally controlled South African Banks only three banks are members of the Equator Principles, namely First Rand Limited, Nedbank Limited, and Standard Bank of South Africa limited.<sup>938</sup> However, it is worth noting that South Africa's ABSA Group Limited is a subsidiary of Barclays Bank which is a member of the EPs thus making ABSA a de facto member. It must also be noted that as an industrialised nation, there is a large community of International banks present in South Africa, such as the Royal Bank of Scotland, Standard Chartered, BNP Paribas, Societe Generale and Citibank, who are all members of the EPs. This shows that while most of the major international banks in the South African financial sector are EP members the local banks are slowly becoming members, most likely as result of the influence of the larger financial houses.<sup>939</sup> Indeed, the strides made by banks in adopting the EPs in South Africa, was recognised in June 2015 when Standard Bank of South Africa Limited became the first African Bank to become the Chair of the Equator Principles Association.<sup>940</sup> This appointment is likely to increase awareness of the EPs in South Africa, thus encouraging more local banks to adopt the principles, and become Equator Principles Financial Institutions (EPFIs). However, with regards to the current local EPFIs in South Africa it is necessary to establish

---

<sup>938</sup> Equator Principles Association, Members and Reporting, available at <http://www.equator-principles.com/index.php/members-reporting> accessed 12th January 2017

<sup>939</sup> Equator Principles Association, Members and Reporting, available at <http://www.equator-principles.com/index.php/members-reporting> accessed 12th January 2017

<sup>940</sup> Equator Principles, 'Standard Bank Becomes First African Bank to Chair Equator Principles Association' (2015) available at <<http://www.equator-principles.com/index.php/all-ep-association-news/ep-association-news-by-year/98-2015/392-standard-bank-becomes-first-african-bank-to-chair-equator-principles-association>> accessed 19<sup>th</sup> August 2016

whether the EPs have had an impact on their activities and whether they are in compliance with the EPs, thereby demonstrating the effectiveness of the Equator Principles in South Africa. By establishing the success or failure of the EPs in South Africa, we may then seek to establish whether this is as a result of an enabling environment or the lack there of one in South Africa.

Where First Rand Bank of South Africa is concerned, it is reported as compliant with the EPs reporting requirement.<sup>941</sup> Indeed, in its 2015 report First Rand Bank provided the Equator Principles organization with a review of their activities and how they complied with the EPs. A review of this report revealed more on the effects of the EPs in South Africa and on First Rand Bank of South Africa. For instance, the report noted that in the 2015 financial year eleven (11) equator principles standard project finance loans, three (3) equator principles standard project finance advisory transaction, and one (1) equator principles standard project related corporate loan reached a financial close.<sup>942</sup> However, while First Rand Bank notes the number of projects and the types of projects it applied the EPs in its report, it fails to specifically name the projects and give a detailed analysis of how they applied the principles in approving the finances for the projects. A more detailed approach similar to that of Access bank of Nigeria discussed in section 4.4.2 of chapter four would have revealed more on First Rand Bank's compliance with the Equator Principles. Furthermore, while the bank notes the number of EPs financed projects, it fails to note the amount of projects rejected on the basis of failure to meet standards, which again would have further assisted in determining the effects of the EPs. However, a noteworthy point about the report is the fact that there was an independent report on First Rand Bank's compliance with the Equator Principles which states:

KPMG Services (Pty) Ltd has provided reasonable assurance on the Equator Principle transaction performance information... In its opinion, the Equator Principle transaction performance information for the year ended 30 June 2015 is prepared, in all material respects, in accordance with the Equator Principles.<sup>943</sup>

The above statement demonstrates that while the 2015 report provided by First Rand Bank may not be detailed enough for one to authoritatively conclude on its compliance with the

---

<sup>941</sup> See The Equator Principles Members at: <<http://www.equator-principles.com/index.php/members/firstrand>> accessed 19<sup>th</sup> August 2016

<sup>942</sup> First Rand Bank, Rand Merchant Bank, 'Report to Society' (2015) available at <<http://www.firstrand.co.za/Sustainability/ReportsToSocietyRMB/2015%20RMB%20report%20to%20society.pdf>> accessed 20<sup>th</sup> August 2016

<sup>943</sup> *ibid* 28

EPs, the independent review conducted by KPMG and their conclusion shows that First Rand Bank is actually in compliance with the EPs and thus applies them to their projects. While the above demonstrates compliance with the EPs by the First Rand Bank, without field or empirical research on the direct effect of the EPs on the environment it is difficult to ascertain whether the banks and clients are making a difference to the environment. However, what is clear is that the higher EPs standards are sure to improve conditions and compliance with them by First Rand Bank is encouraging for soft law in South Africa.

With regards to Nedbank the Equator Principles association also regard them as compliant with their EPs reporting requirement.<sup>944</sup> In its report Nedbank highlights the fact that Rule 6(f) of the Equator Principles Association Governance Rules, require signatories to submit ‘Data and implementation Reporting ‘and ‘Project Name for Project Finance’ data annually.<sup>945</sup> In compliance with this Nedbank’s report duly stated that a total of nine (9) projects were identified and assessed using Equator Principles one to ten, (as appropriate to the category) and the IFC Performance Standards, however, only seven (7) projects reached financial close.<sup>946</sup> This information is more helpful in ascertaining its compliance, as unlike in the case of the First Rand Bank report it revealed that two projects did not reach financial close, which may be because they did not satisfy the standards set by the Equator Principles. This may demonstrate that Nedbank in particular is applying the standards to their projects. However, without further detail on why the two projects did not reach a financial close it is difficult to authoritatively state it was due to their failure to comply with the standards set by the EPs. However, as the report noted the two projects that did not make it in the section titled compliance with the EPs one might imply their failure to reach a financial close was due to their failure to comply with the standards of the EPs. Furthermore, Nedbank’s report revealed that there were two (2) Category A, four (4) Category B, and one (1) Category C projects, going as far as naming the projects. Naturally the Category A projects were mining projects, which we are concerned with in this thesis. There was the Gancho Kue Diamond Project of Canada, and the GEM Diamonds Botswana-Ghaghoo Project.<sup>947</sup> One might argue that applying the EPs standards and expecting them to be met to the Gancho Kue Diamond

---

<sup>944</sup>see <<http://www.equator-principles.com/index.php/members/nedbank>> accessed 20th August 2016

<sup>945</sup> Nedbank Group, ‘Sustainability Review’, [2015] available at <<https://www.nedbank.co.za/content/dam/nedbank/site-assets/AboutUs/Sustainability/Supporting%20Documents/Sustainability%20Review%20Final%2011%20March%202016.pdf>> accessed 21<sup>st</sup> August 2016

<sup>946</sup> ibid 8

<sup>947</sup> ibid

project is expected, taking into account that the project was in a developed country, i.e. Canada. However, in the case of the GEM Diamond Botswana-Ghaghoo Project, this is a positive development, as it demonstrates that where Nedbank is concerned mining projects in Africa are given finance only when they meet the EPs standards. This is positive because as discussed in earlier chapters mining companies tend to abuse weak laws in African countries. However, what this example from NedBank demonstrates is that where mining projects do not meet the higher equator principles standards, they will not be financed by Nedbank, thereby ensuring mining companies comply with environmental management regulations in order to secure the finance they need.

However, despite providing the names of the projects again it is difficult to ascertain if there have been a change in the activities of the companies involved in the Botswana-Ghaghoo project on the field. This is due to the fact that there have not been much empirical studies on such projects and whether they continue complying with EPs for the duration of their projects. This is not surprising taking into account for instance, the Botswana-Ghaghoo project only obtained finance in 2015, so it would be difficult to expect an empirical study on their environmental management implementation.

Moreover, while Nedbank does provide more details than First Rand Bank did in its report, again another South African bank fails to provide how they applied the principles in approving the financing for the projects. This again hampers a more conclusive assertion on the compliance of Nedbank with the EPs, and unlike First Rand Bank where an independent report on their compliance with EPs was provided, none was provided where Nedbank is concerned.

As noted earlier Standard Bank of South Africa was appointed the new chair of the Equator Principles Association, therefore one would expect them to have been compliant with EPs reporting requirements, which indeed they are.<sup>948</sup> Their recent appointment would also suggest high compliance with the EPs, and their report shares this view by not only listing the amount of projects they have financed in accordance to the EPs, but crucially how they assess these projects.

The Standard Bank Group (SBG) in its report notes that in accordance with the EPs before finance is approved there are a few stages to go through. First, all transactions are vetted by

---

<sup>948</sup> See The Equator Principles Members at: <http://www.equator-principles.com/index.php/members/standard-bank> accessed 21th August 2016

the Pre-credit Committee, whose responsibility is to ensure that environmental and social risks are correctly identified in the application phase.<sup>949</sup> Second, the transaction goes to the Credit stage where the transaction specific environmental and social issues identified are evaluated. At the third stage, where the issues have been evaluated and mechanisms for avoidance and mitigation have been agreed legal documentation are drawn to include environmental and social covenanting. The final stage of the financing process of the SBG involves monitoring of the client and the terms of the finance.<sup>950</sup> The above is quite a robust formula which demonstrates that the SBG is indeed trying to comply with the EPs in South Africa. The process seems to have been helpful as the SBG noted that in 2015, no deals were declined at the final credit assessment stage, as transactions that did not meet the bank and the EPs requirements were either screened out during the pre-credit stage or the client implemented the actions required for funding to be granted. This therefore explains why some banks do not include rejected projects in their final EPs report, as the pre-credit screening process stops EPs non-compliant projects from getting far in the finance process to even be worth a mention. This shows that the bank adheres to a strict process which ensures clients comply with the EPs standards before getting finance, thereby making the bank an EP compliant bank.

More importantly, whereas the earlier South African banks discussed did not mention compliance monitoring after finance had been given by the banks to ensure better environmental and social management, the SBG provides such details. For instance, it notes that all category A and, where relevant, category B projects financed, are monitored to ensure adherence to the social and environmental commitments which were set as part of the finance agreement.<sup>951</sup> To achieve this, where required, independent external professionals monitor the implementation and progress of remedial actions on a semi-annual or annual basis for the complete tenure of the finance. Additionally, their Environmental and Social Advisory team undertakes site visits to ensure there is proper management of environmental and social issues.<sup>952</sup> The above is a welcome development as simply passing standards and not

---

<sup>949</sup> Standard Bank of South Africa Limited, 'Our Environmental and Social Risk Management', [2015] available at <[http://sustainability.standardbank.com/environmental\\_and\\_social\\_risk\\_management.php](http://sustainability.standardbank.com/environmental_and_social_risk_management.php)> accessed 21st August 2016

<sup>950</sup> *ibid*

<sup>951</sup> *ibid*

<sup>952</sup> *ibid*

monitoring compliance will seldom have an effect in curtailing environmental and social issues as envisioned by the EPs.

Furthermore, where borrowers fail to comply with environmental and social covenants, the SBG works with them over a period of time to achieve the required standards.<sup>953</sup> However, the bank was quick to note that where there is no progress in meeting requirements, it would consider terminating the finance.<sup>954</sup> This again is positive in ensuring environmental and social protection as clients will always try their best to ensure they maintain their finance. However, it is worth noting that in 2015 no deals were terminated by the SBG due to non-compliance, thus highlighting the fact that banks may be reluctant to pull finance from a deal once it has already been approved, as they also stand to lose out if the project is halted, as investors.

Overall, the SBG's report on its compliance with the EP's as expected being the Chair of the Equator Principles Association is more robust, with sections explaining how the EPs are applied, monitoring mechanisms, and the amount of EPs projects financed. However, as with the other banks we are yet to gather information on changes to the way projects manage environmental and social issues, as a result of the requirements of the EPFIs. This research argues that this is due to the fact that unlike hard law which may rely on the judicial system to establish how effective they have been in terms of meeting their goal of environmental protection, it is difficult to establish whether soft law have been effective in protecting the environment beyond compliance with them by the sector they seek to regulate without empirical studies. They are therefore heavily reliant on empirical studies which is arguably a weakness of soft law initiatives, especially in SSA where there are less empirical studies on them. Therefore as noted earlier this research mainly focuses on compliance with soft law initiatives such as the EPs as a measure of how successful they have been, as non-compliance is soft law's main criticism as noted in chapters two and three.

In sum, of the three banks that have adopted the EPs, a review of their reports reveal that based on the reports provided of which their levels of detail varied all the banks may be considered to be truly EPs compliant EPFI. This is unlike the case in Nigeria where chapter four found only Access Bank of Nigeria to be truly EPs compliant despite two other banks

---

<sup>953</sup>Standard Bank of South Africa Limited, 'Our Environmental and Social Risk Management', [2015] available at <[http://sustainability.standardbank.com/environmental\\_and\\_social\\_risk\\_management.php](http://sustainability.standardbank.com/environmental_and_social_risk_management.php)> accessed 21st August 2016

<sup>954</sup> *ibid*



being members. This may lead one to argue that South Africa has an enabling environment for soft law initiatives which has encouraged their use, as in the case of the EPs by the three banks considered. It is therefore essential to determine whether South Africa has an enabling environment for the Equator Principles and other soft law initiatives, better than that of Nigeria, which assists it in regulating its mining activities.

#### **5.4.2 South Africa and the provision of an Enabling Environment for the Equator Principles and other Soft Law Initiatives**

As was established in chapter two and also mentioned in chapter four, an enabling environment with respect to soft law initiatives is the sum of the drivers, tools, human capacities and institutions directed towards achieving the effective implementation of soft law codes in States.<sup>955</sup> In the interest of simplicity and clarity, chapter two was able to classify the key players/components when it comes to providing an enabling environment for soft law codes into four groups; the public sector (i.e. national government), local governance, civil society, and the international community. In order to have a balanced comparison between Nigeria and South Africa, the same structure as that of chapter four is adopted. This section shall therefore consider whether the three key players where the State is concerned (i.e. the public sector, local governance, and civil society) are active and have put in place drivers for the provision of an enabling environment for the equator principles and soft law initiatives in South Africa.

##### **5.4.2.1 The South African Public Sector (National/Central Government)**

Governments may create an enabling environment for soft law initiatives such as the Equator Principles in numerous ways. However, Fox et al divided such numerous ways into four main categories; mandating, facilitating, partnering, and endorsing, for ease of understanding and simplicity.<sup>956</sup> As was done in chapter four, using the Equator Principles as our example we shall examine whether the South African government has provided an enabling environment

---

<sup>955</sup> Halina Ward, 'Public Sector Roles In Strengthening Corporate Social Responsibility: Taking Stock' [2004] The World Bank, available at: <<http://pubs.iied.org/pdfs/16014IIED.pdf>> accessed 28th March 2016

<sup>956</sup> Tom Fox, Halina Ward, Bruce Howard, 'Public Sector Roles In Strengthening Corporate Social Responsibility: A Baseline Study' [2002] The World Bank available at: <<http://pubs.iied.org/pdfs/16017IIED.pdf?>> Accessed 20<sup>th</sup> March 2016

for the equator principles and soft law initiatives through; mandating, facilitating, partnering and endorsing.

#### **5.4.2.1.1 Mandating in South Africa**

Where soft law is concerned mandating as an enabling mechanism involves either passing specific regulation for a particular soft law, as in the case of EITI in Nigeria or passing of legislation, regulation, penalties, and associated public sector agencies which may control some aspects of business investment or operations. Whichever approach is taken the passing of regulation enables soft law initiatives to be more effective, this is because a minimum standard will have been set in the country, thereby allowing soft law initiatives to build on them. By building on the minimum standards, soft law initiatives may then encourage those within the sector to subscribe to their higher standards on a voluntary bases, which they are more likely to do, based on the fact they are already required to meet the minimum standards by law. Whereas, where the minimum standards have not been mandated by law, requiring those within the sector to follow standards on a voluntary basis is arguably a more difficult task because such standards are unfamiliar to them.

With regards to the Equator Principles and South Africa, there are no specific legislation mandated for the purpose of the Equator Principles in the same vein as the Nigerian Extractive Industries Transparency Initiative Act 2007 for the Extractive Industries Transparency Initiative soft law. However, as in the case in Nigeria, where mining, environmental, and social issues are concerned, the analysis of South African regulation in section 5.3 has clearly established that the South African State has mandated a strong set of regulations. These may act as minimum legal standards that may enable the Equator Principles soft law provisions on Environmental and social issues which are applicable to the mining sector. In order to demonstrate that the South African regulations do indeed enable the Equator Principles provisions through mandated provisions in its legislation, this section will consider three Equator Principle provisions pertaining to mining and establish the South African provisions mandated to enable them.

Principle 2 of the EPs titled Environmental and Social Assessment requires clients to conduct an environmental and social impact assessment for all Category A and B projects.<sup>957</sup>

---

<sup>957</sup> The Equator Principles, 'A Financial industry benchmark for determining, assessing and managing environmental and social risk in projects' (2013), available at: <<http://www.equator-principles.com/index.php/ep3>> accessed 22nd August 2016

Category A projects are those ‘with potential significant adverse environmental and social risks and/or impacts that are diverse, irreversible, or unprecedented’.<sup>958</sup> Therefore going by the above definition mining is clearly a Category A project and thus requires an Environmental and Social impact assessment. Under the South African Minerals and Petroleum Resources Development Act, section 39 (1) requires every applicant of a mining right to conduct an environmental impact assessment.<sup>959</sup> One might therefore argue that where mining is concerned by mandating section 39(1) the South African government has enabled Principle 2 of the EPs. This is because it gives it legal backing as those in the mining sector seeking finance will already be aware that they need an EIA by law, therefore providing one to an EPFI will not prove difficult, as they are accustomed to its requirement as a minimum standard in their sector. Principle 2 is therefore enabled by section 39(1) of the MPRDA, as mining companies will comply with it as they are required to do so by law.

The South African MPRDA also enables Principle 4 (Environmental and Social Management System and Equator Principles Action Plan) of the Equator Principles. Principle 4 requires all EPFIs to demand their clients develop or maintain an Environmental and Social Management System.<sup>960</sup> Where mining is concerned this is clearly enabled under the almost identical section 5(4) of the MPDRA which mandates that no person may even prospect for minerals without an approved environmental management program or approved environmental management plan.<sup>961</sup> Thereby making it necessary for mining companies to already possess an Environmental management plan before going to an EPFI, therefore satisfying Principle 4 and thus making compliance with the EPs easier and the principles more effective. However, as normally the case with soft law initiatives they usually go further than hard law in their standards. Principle 4 also does this, in that where a client’s management plan does not meet the EPs standards the client and the EPFI will agree to an Equator Principles Action Plan, to

---

<sup>958</sup> The Equator Principles, ‘A Financial industry benchmark for determining, assessing and managing environmental and social risk in projects’ (2013), available at: <<http://www.equator-principles.com/index.php/ep3>> accessed 22nd August 2016

<sup>959</sup> Section 39(1) Mineral and Petroleum Resources Development Act No. 28 of 2002, Republic of South Africa

<sup>960</sup> The Equator Principles, ‘A Financial industry benchmark for determining, assessing and managing environmental and social risk in projects’ (2013), available at: <<http://www.equator-principles.com/index.php/ep3>> accessed 22nd August 2016

<sup>961</sup> Section 5(4) Mineral and Petroleum Resources Development Act No. 28 of 2002, Republic of South Africa

raise the standards.<sup>962</sup> However, at this point the minimum standards of Principle 4 would have been met as a result of section 5(4) of the MPRDA, thereby enabling the EPs.

Furthermore, another example of South Africa mandating law and enabling the equator principles is seen under Principle 5 (Stakeholder engagement). Principle 5 requires Category A and B project clients to show effective stakeholder engagement and also obtain free, prior and informed consent of locals.<sup>963</sup> Under section 10 of the MPRDA there must be consultation and engagement with affected parties as soon as an application for mining activities is lodged, again enabling Principle 5.<sup>964</sup> Therefore just as the case of principles 2 and 4, again we see government mandated laws enabling the EPs.

The above examples of mandating through legislation and section 5.3.3 demonstrate that South Africa is clearly providing an enabling environment for the Equator Principles by mandating a strong set of legislation that cater for environmental and social issues as minimum standards, thus enabling the equator principles by making them more likely to be followed because of legal backing. However, as noted in chapter three mandating laws to enable soft law initiatives on their own may not create the enabling environment necessary to make soft law initiatives and thus the Equator Principles more effective. Therefore it is essential to establish whether the South African government has also adopted the other categories mentioned earlier below.

#### **5.4.2.1.2 Facilitating in South Africa**

Facilitating soft law initiatives such as the Equator Principles by government can take a number of forms such as through legislation, government policy, and government incentives as discussed in chapter two. In their role as facilitators of soft law government agencies enable stakeholders to engage and follow soft law initiatives to drive social and environmental developments.<sup>965</sup> With regards to the Equator Principles, in contrast to Nigeria where the Central Bank of Nigeria is the regulator of the Nigerian banking sector and thus the government agency best placed to act as facilitator, facilitated their adoption as discussed in

---

<sup>962</sup> The Equator Principles, 'A Financial industry benchmark for determining, assessing and managing environmental and social risk in projects' (2013), available at <http://www.equator-principles.com/index.php/ep3> accessed 22nd August 2016

<sup>963</sup> *ibid*

<sup>964</sup> Section 10 Mineral and Petroleum Resources Development Act No. 28 of 2002, Republic of South Africa

<sup>965</sup> Tom Fox, Halina Ward, Bruce Howard, 'Public Sector Roles In Strengthening Corporate Social Responsibility: A Baseline Study' [2002] The World Bank, available at <http://pubs.iied.org/pdfs/16017IIED.pdf?>> Accessed 27<sup>th</sup> August 2016

chapter 4, its South African counter agency, the South African Reserve Bank, has done very little to facilitate their adoption. Indeed, in a 2015 WWF report (World Wide Fund for Nature) on sustainable development in the financial market, South Africa was found to have no specific regulation or policy on environmental and social risks in its financial sector.<sup>966</sup> Furthermore, a review of the responsible government agencies within the financial sector by this author reveals no such policy obliging South African banks to include environmental risk standards in their operations and activities as noted, by the WWF report.<sup>967</sup> Therefore it would appear that the South African public sector does not facilitate the adoption of the Equator Principles through a sustainable banking policy in the same way the Nigerian public sector did with its adoption of the Nigerian Sustainable Banking Principles 2012.<sup>968</sup> This is a surprising development taking into account that South Africa is ranked 8<sup>th</sup> most developed banking sector, ahead of all emerging markets (except Brazil) and even some developed countries like Japan and France.<sup>969</sup> Therefore one would have expected a government policy facilitating the adoption of principles such as the Equator Principles similar to the case in Nigeria. However, one might argue as in some advanced countries with strong regulatory systems and advanced sectors, facilitating soft laws such as the EPs may not be necessary as the principles are already readily adopted by the private sector. Indeed, this may be the case in South Africa, as in interviews with banks in South Africa the above noted WWF report found bankers to note the need for a public sector policy on sustainable banking was not necessary.<sup>970</sup> This is because the South African banking sector is already heavily regulated and there is already an engagement of sustainable banking by four out of seven of the largest banks who prefer a self-regulatory route to sustainable banking.<sup>971</sup> This indeed is the case as established in section 5.4.1.

---

<sup>966</sup> WWF, 'Financial market regulation for sustainable development in the BRICS countries', (2015), available at <[http://www.sustainablefinance.ch/upload/cms/user/201506\\_wwf\\_international\\_report\\_brics.pdf](http://www.sustainablefinance.ch/upload/cms/user/201506_wwf_international_report_brics.pdf)> accessed 25<sup>th</sup> August 2016

<sup>967</sup> Agencies include the South African Reserve Bank, The Financial Services Board, and Department of Finance

<sup>968</sup> Central Bank of Nigeria, Nigerian Sustainable Banking Principles, (July 2012)

<sup>969</sup> UNEP Finance Initiative, 'Sustainability Banking in Africa', (2005) available at <[http://www.unepfi.org/fileadmin/documents/ceo\\_brief\\_sust\\_banking\\_in\\_africa\\_2005.pdf](http://www.unepfi.org/fileadmin/documents/ceo_brief_sust_banking_in_africa_2005.pdf)> accessed 25<sup>th</sup> August 2016

<sup>970</sup> WWF, 'Financial market regulation for sustainable development in the BRICS countries', (2015), available at <[http://www.sustainablefinance.ch/upload/cms/user/201506\\_wwf\\_international\\_report\\_brics.pdf](http://www.sustainablefinance.ch/upload/cms/user/201506_wwf_international_report_brics.pdf)> accessed 25<sup>th</sup> August 2016

<sup>971</sup> WWF, 'Financial market regulation for sustainable development in the BRICS countries', (2015), available at <[http://www.sustainablefinance.ch/upload/cms/user/201506\\_wwf\\_international\\_report\\_brics.pdf](http://www.sustainablefinance.ch/upload/cms/user/201506_wwf_international_report_brics.pdf)> accessed 25<sup>th</sup> August 2016

Furthermore, the private banking sector through the Banking Association of South Africa the mandated representative of the banking sector has facilitated the adoption of the EPs through its Code of Conduct for Managing Environmental and Social Risk.<sup>972</sup> For instance, under Clause 2(ii)(d) of the Code of Conduct, specific reference is made to the EPs where it states:

Banks that have adopted the Equator Principles will require environmental and social impact assessments to be undertaken on transactions that fall within the ambit of the Equator Principles prior to providing facilities to such clients. Members will furthermore develop and implement systems and procedures which identify, measure, and monitor environmental and social risks during the life cycle of project finance agreements and require clients to do the same, subject to legal and regulatory requirements. These systems and procedures will be reviewed regularly to ensure their adequacy and effectiveness.<sup>973</sup>

The above therefore reveals despite the absence of the South African public sector in facilitating the adoption of the EPs and thus enabling them, the private banking sector is very much active in facilitating their adoption, thus creating an enabling environment for them.

Moreover, the lack of evidence demonstrating the South African public sector facilitating the adoption or compliance with the Equator Principles should not be construed as suggesting this applies to all soft law initiatives in South Africa. It would appear to this author that where South Africa is concerned if a private sector is already engaged in addressing issues, such as that of sustainable banking the public sector may not interfere, and will allow the sector to continue facilitating the adoption of higher standards. However, in areas where a sector is behind and is of paramount importance the public sector will facilitate adoption of soft law initiatives. In South Africa this is especially the case where the Broad Based Black Economic Empowerment Policy is concerned. This policy seeks to redress past injustices in South Africa, for instance, where the finance sector is concerned by granting access to finance to black people, granting them equity in finance houses, and equality of employment.<sup>974</sup> Therefore any soft law initiative with the aims of ensuring social equality within the finance sector would be facilitated by this policy. Indeed, it has been noted that due to this policy

---

<sup>972</sup> The Banking Association of South Africa, Code of Conduct for Managing Environmental and Social Risk (2011) available at <<http://www.banking.org.za/docs/default-source/market-conduct-division/the-banking-association-south-africa-code-of-conduct-for-management-environmental-and-social-risk.pdf?sfvrsn=2>> accessed 25<sup>th</sup> August 2016

<sup>973</sup> Clause 2(ii)(d) Code of Conduct for Managing Environmental and Social Risk, Banking Association of South Africa (2011)

<sup>974</sup> Department of Trade and Industry, Codes of Good Practice on Broad-Based Black Economic Empowerment, Notice 997 of 2012

South African banks largely focus on Black Economic Empowerment social transformation issues, the policy thereby facilitates any soft law within this field.<sup>975</sup>

In sum, while the South African public sector does not specifically facilitate the adoption of the EPs in the same way the Nigerian sector does, it may yet facilitate the adoption of other soft law initiatives that require more pressing attention through its policies such as the Black Economic Empowerment programme.

#### **5.4.2.1.3 Partnering in South Africa**

Partnering where the public sector is concerned as discussed in chapter two involves public sector agencies collaborating with stakeholders (e.g. local communities and the private actors) within a specific industry to tackle social and environmental concerns, thereby enabling soft law commitments. Due to the voluntary nature of soft law, partnering by the public sector with local communities, the private sector, and other stakeholders may be seen as necessary to ensure compliance. Indeed, a World Bank survey has found the public sector a very important partner for the extractive industries in meeting soft law commitments.<sup>976</sup> This is further supported by Hamann who noted that establishing tri-sector partnerships between the company, the government and civil society is said to represent a more intelligent way of fulfilling corporate social responsibility.<sup>977</sup> With regards to the EPs as discussed above, it would seem the public sector has left it wholly in the hands of the South African private banking sector, apart from endorsing the initiative which shall be considered below, it has remained rather passive with respect to the initiative. Therefore in contrast to the situation in Nigeria there are currently no partnerships between the South African public sector and the private banking sector for the implementation of the Equator Principles soft law initiative.

However, it must be noted that this does not mean that the South African public sector does not engage in partnerships in order to enable soft law initiatives. In fact the South African public sector is an avid promoter of partnerships and consultation in line with the ANC government's 'co-operative government' approach.<sup>978</sup> For instance, the South African

---

<sup>975</sup> UNEP Finance Initiative, 'Banking on Value: A New Approach to Credit Risk in Africa', (2007) available at <[http://www.unepfi.org/fileadmin/documents/banking\\_on\\_value.pdf](http://www.unepfi.org/fileadmin/documents/banking_on_value.pdf)> accessed 25th August 2016

<sup>976</sup> The World Bank Group, Corporate Social Responsibility Practice, 'Race to The Top: Attracting and Enabling Global Sustainable Business' [2003] Business Survey Report 1-28, 22

<sup>977</sup> Ralph Hamann, 'Mining companies' role in sustainable development: The 'why' and 'how' of corporate social responsibility from a business perspective' (2003) 20(2) Development Southern Africa, 237-254, 245

<sup>978</sup> Jana Honke, Nicole Kranz, Tanja A. Borzel, Adrienne Heritier, 'Fostering Environmental Regulation? Corporate Social Responsibility in Countries with Weak Regulatory Capacities: The Case of South

government in the form of the Department of Mines and Energy (DME) partnered with mining companies to transform the South African National Business Initiative voluntary energy efficiency targets into a sector-specific energy efficiency accord adopted by all parties.<sup>979</sup> This partnership to enable such voluntary targets has indeed yielded results as so far it is reported that over 31 companies and industry associations have signed the voluntary Energy Efficiency Accord with the DME to reduce their energy consumption.<sup>980</sup>

Furthermore, another initiative where the South African government partnered with stakeholders in the absence of legislation in order to promote the initiative is the International Union of Conservation (IUCN) and International Council on Mining and Metals (ICMM) joint initiative on the improvement of biodiversity management in mining.<sup>981</sup> In order to promote this initiative the IUCN South African branch in collaboration with the South African Chamber of mines helped establish the South African Mining and Biodiversity Forum (SAMBF) multi-stakeholder platform in 2005.<sup>982</sup> Along with other stakeholders the South African government is also a partner and participant in this forum. The forum has developed a guideline for mining companies and other stakeholders on how to address biodiversity conservation and management. Government remains a key partner in enabling this soft law initiative by remaining a participant in the forum and assisting in funding and training on the guideline.<sup>983</sup>

The above examples demonstrate that although the South African public sector has not engaged in any partnerships for the adoption and compliance of the EPs, it nevertheless does so with respect to other initiatives, particularly in the mining industry which is of specific interest here. Indeed the South African public sector is a major promoter of partnerships when it comes to promoting different forms of soft law in South Africa. Nowhere is this more evidenced than in its aggressive promotion of the Black Economic Empowerment policy.

---

Africa' (2007) SFB Working Paper Series 9, available at <[http://userpage.fu-berlin.de/ffu/akumwelt/bc2008/papers/bc2008\\_341\\_Kranz.pdf](http://userpage.fu-berlin.de/ffu/akumwelt/bc2008/papers/bc2008_341_Kranz.pdf)> accessed 26<sup>th</sup> August 2016

<sup>979</sup> Jana Honke, Nicole Kranz, Tanja A. Borzel, Adrienne Heritier, 'Fostering Environmental Regulation? Corporate Social Responsibility in Countries with Weak Regulatory Capacities: The Case of South Africa' (2007) SFB Working Paper Series 9, available at <[http://userpage.fu-berlin.de/ffu/akumwelt/bc2008/papers/bc2008\\_341\\_Kranz.pdf](http://userpage.fu-berlin.de/ffu/akumwelt/bc2008/papers/bc2008_341_Kranz.pdf)> accessed 26<sup>th</sup> August 2016

<sup>980</sup> *ibid*

<sup>981</sup> See report at <<https://www.iucn.org/theme/business-and-biodiversity/our-work/global-business-partnerships/international-council-mining>> accessed 26<sup>th</sup> August 2016

<sup>982</sup> South African National Biodiversity Institute, South African Mining and Biodiversity Forum (SAMBF), available at <<http://biodiversityadvisor.sanbi.org/industry-and-conservation/conservation-and-mining/connect-2/south-african-mining-and-biodiversity-forum-sambf/>> accessed 26<sup>th</sup> August 2016

<sup>983</sup> *ibid*



Here the government has partnered with different industry stakeholders, and has created a Broad Based Black Economic Empowerment charter for almost all the major sectors in the south African economy as mentioned above with regards the banking and mining sectors. Therefore where partnering to enable soft law initiatives are concerned it is clear the South African public sector is more than capable of partnering and is indeed its preferred approach in line with its ‘co-operative government approach’.

#### **5.4.2.1.4 Endorsing in South Africa**

Endorsing involves public sector recognition and support of soft law initiatives, either through public announcements, policy documents, public sector management practices, or the direct recognition of companies through award initiatives.<sup>984</sup> With regards to the EPs one might argue that the South African public sector endorses them. This is because it has been noted that in its white paper on the National Climate Change Response of 2011, the South African government recognized the financial sector’s responsibility in environmental and social governance. It explicitly ‘acknowledges and supports initiatives by the South African banks to integrate environmental considerations in the decision-making frameworks.’<sup>985</sup> This is a clear endorsement of soft law initiatives such as the equator principles. This is key to enabling soft law initiatives such as the EPs because they encourage adoption and compliance with such initiative as a result of government support. This is especially the case where the public sector has not been very direct in its approach, with respect to facilitating or partnering to enable initiatives as in the case of the equator principles. The above example is one of the few endorsements of sustainable banking by the South African public sector.

However, with regards to other sectors such as mining the South African public sector has endorsed voluntary initiatives through public policy. One such example is with regards to the International Cyanide Management Code, a voluntary initiative for the gold mining industry and the producers and transporters of cyanide which is used in gold mining.<sup>986</sup> Drawing on this voluntary code and the South African Chamber of Mines voluntary guideline based on

---

<sup>984</sup> Tom Fox, Halina Ward, Bruce Howard, ‘Public Sector Roles In Strengthening Corporate Social Responsibility: A Baseline Study’ [2002] The World Bank, available at <<http://pubs.iied.org/pdfs/16017IIED.pdf?>> Accessed 20<sup>th</sup> March 2016

<sup>985</sup> WWF, ‘Financial market regulation for sustainable development in the BRICS countries’, (2015), available at <[http://www.sustainablefinance.ch/upload/cms/user/201506\\_wwf\\_international\\_report\\_brics.pdf](http://www.sustainablefinance.ch/upload/cms/user/201506_wwf_international_report_brics.pdf)> accessed 25<sup>th</sup> August 2016

<sup>986</sup> International Cyanide Management Institute, ‘International Cyanide Management Code’ (2014) available at: < <https://www.cyanidecode.org/about-cyanide-code/cyanide-code> > accessed 18<sup>th</sup> September 2018

the International Cyanide Management Code, South Africa's Mines, Safety and Health Inspectorate approved a mandatory guideline of good practice.<sup>987</sup> The passing of a mandatory guideline as a result of the voluntary code is clearly an endorsement of the soft law initiative by the South African government.

Furthermore, another example of the South African government's efforts to endorse soft law is found in its participation in the Intergovernmental Forum on Mining and Sustainable Development initiated by UNCTAD and other agencies to encourage member states to implement the relevant mining clauses of the Johannesburg Plan of Implementation.<sup>988</sup> The Johannesburg Plan of Implementation was a soft law product of the World Summit on Sustainable Development 2002 (WSSD). Demonstrating its endorsement of the plan the South African DME developed a strategy for implementation of the mining relevant clauses of the plan and established a national Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development. The forum included government departments, the mining industry, labour and NGOs.<sup>989</sup> Therefore again through policy the South African public sector endorsed another soft law initiative.

In sum, the above suggests with regards the EPs the South African public sector has recognised and endorsed them, and more generally where soft law is concerned the public sector is more than capable of endorsing them, particularly through policy, thus enabling them.

This section has demonstrated that going by the public sector requirements for providing an enabling environments for soft law initiatives i.e. mandating, facilitating, partnering, and endorsing, where the EPs are concerned the Public Sector has indeed mandated laws which may enable the EPs and have indeed endorsed the EPs through their recognition in the statement noted above. However, unlike the situation in Nigeria this research has not found evidence of the South African public sector facilitating or partnering with stakeholders to enable the EPs.

---

<sup>987</sup> Jana Honke, Nicole Kranz, Tanja A. Borzel, Adrienne Heritier, 'Fostering Environmental Regulation? Corporate Social Responsibility in Countries with Weak Regulatory Capacities: The Case of South Africa' (2007) SFB Working Paper Series 9, available at <[http://userpage.fu-berlin.de/ffu/akumwelt/bc2008/papers/bc2008\\_341\\_Kranz.pdf](http://userpage.fu-berlin.de/ffu/akumwelt/bc2008/papers/bc2008_341_Kranz.pdf)

<sup>988</sup> Plan of Implementation of the World Summit on Sustainable Development, available at <[http://www.un.org/esa/sustdev/documents/WSSD\\_POI\\_PD/English/WSSD\\_PlanImpl.pdf](http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf)> accessed 27<sup>th</sup> August 2016

<sup>989</sup> Delien Burger, *South Africa Yearbook 2005/06*, ( 13<sup>th</sup> Edn, GCIS 2006) 456

On the other hand, where other soft law initiatives are thrown into the mix the South African public sector has been found capable of mandating, facilitating, partnering, and endorsing in order to enable soft law initiatives. This leads one to therefore argue that the South African government is more likely to play a more direct role in enabling soft law initiatives where there are serious concerns within the sector. For instance, most of the soft law initiatives cited as examples where the government has engaged in partnerships, facilitated, endorsed, and also mandated a very strong legislation are within the mining industry, where there are still serious environmental and social concern. Whereas the banking sector is already well advanced in terms of regulation, taking into account South Africa's banking sector is ranked number 8 in the world. Therefore the need to facilitate or partner may not be as pressing in the banking sector. This has therefore demonstrated that while the South African public sector is capable of mandating, facilitating, endorsing, and partnering to enable soft law initiatives, its willingness to do all four will depend on the sector within its economy. This is contrary to Nigeria where the Nigerian public sector with regards to the EPs was found capable of mandating, facilitating, partnering, and endorsing to enable them, as well as a few other soft law initiatives. This may leave one to argue where public sector enabling is concerned Nigeria has a better enabling environment. On the other hand, one may argue the only reason the above would be suggested was due to the South African public sector not having a very direct approach in enabling the EPs. However, as noted this is may be due to South Africa already having an advanced banking sector, so leaving such enabling in the hands of the South African private sector agents such as the Banking Association of South Africa was more than enough. Requiring the public sector to promote the initiative would be like requiring the UK public sector to do the same, it was not necessary, where South Africa was concerned as the banking sector was advanced enough to self-regulate environmental issues. However, as in Nigeria with respect to other soft law initiatives the South African public sector is more than capable of enabling soft law initiatives through mandating, facilitating, partnering, and endorsing. It is now essential to establish if the other facets of an enabling environment for soft law are available and strong in South Africa below.

#### 5.4.2.2 Local Governance in South Africa

As noted in chapter four, in most cases mining projects take place in rural areas, away from the majority of a country's populace. Therefore negative activities of mining companies in such areas where only a minority of people reside usually go unnoticed unless there is a strong presence of civil society or an enabled local government system to remedy the situation either through soft law subscribed by the companies or indeed hard law. Without an enabled local government and civil society (discussed in the next section) it would be difficult for those residing in rural areas to report the grievances suffered at the hands of mining companies thus highlighting the fact they are not complying with soft law initiatives or even hard law. This is because an enabled local government is the part of the State that is closest to the people and as such has the potential to engage more effectively with them and to address their issues.<sup>990</sup> Such issues may include environmental and social issues as a result of mining activities. Local government bodies if enabled may then speedily liaise between local communities and mining companies to ensure soft law initiatives and state policies are followed, thus enabling them. Therefore local government empowerment by the State is critical in enabling soft law initiatives, which seek to protect the weakest in society.

With respect to the EPs if there is an enabled local government system in South Africa, being at the grassroots of society it may be able to monitor environmental and social issues caused by those engaged in mining activities financed by EPFIs in their local communities. Where the local government structure is enabled they would be able to report instances of non-compliance to the financing EPFIs as the governance system closest to the community. This therefore helps enforce soft law initiatives such as the EPs thereby making them more effective, and thus enabling them.

In South Africa, just as in Nigeria local government is constitutionally recognised along with provincial and national government as a sphere of government, and as will be seen below has a strong, although limited level of autonomy.<sup>991</sup> Section 40(1) of the 1996 Constitution of the Republic of South Africa States: 'In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and

---

<sup>990</sup> Jo Beall, 'Decentralizing Government and Decentering Gender: Lessons from Local Government Reform in South Africa' (2005) 33(2) *Politics and Society*, 253-276, 253

<sup>991</sup> Nico Steytler, 'Local government in South Africa: Entrenching decentralised government' in Nico Steytler (ed), *The Place and Role of Local Governments in Federal Systems* (Konrad-Adenauer-Stiftung 2005)

interrelated.<sup>992</sup> To ensure its ‘distinctness’ and limited autonomy the constitution provided that local spheres consists of municipalities covering the entire country and importantly a municipality ‘has the right to govern, on its own initiative, the local government affairs of its community, as provided for in the Constitution’.<sup>993</sup> In further highlighting its autonomy to carry out its functions the Constitution added that ‘the national and provincial government may not compromise or impede a municipality’s ability or right to exercise its powers or perform its duties’.<sup>994</sup> The above therefore clearly shows the South African constitution envisaging a strong autonomous local government in the execution of its functions and duties, (which shall be considered below) which is positive.

However, in giving such a standing to local government in the South African State the constitution highlighted that it must pursue the following objectives under section 152(1) in carrying out its functions:

- (a) to provide democratic and accountable government for local communities;
- (b) to ensure the provision of services to communities in a sustainable manner;
- (c) to promote social and economic development;
- (d) to promote a safe and healthy environment; and
- (e) to encourage the involvement of communities and community organisations in the matters of local government.<sup>995</sup>

The above objectives are rather clear, and with respect to mining activities that harm communities the constitution ensures that the local government focuses on socio-economic development and a healthy environment for communities, which was not the case with the Nigerian constitution. Therefore one would expect local governments in South Africa to be ready to deal with issues regarding environmental degradation as a result of mining and also work with soft law initiatives to ensure there is a healthy environment within its locality, thus enabling such initiatives.

Furthermore, unlike in Nigeria, in South Africa local governments are empowered with executive and legislative powers by the constitution. Under Schedules 4B and 5B the functional areas under the competencies of local governments are listed by the constitution. These include planning and building regulation, household services, (electricity, gas, water and sanitation) social services (child-care facilities, health care), protective services, (firefighting) economic activities, (tourism, trading regulations) transport, (airports, public

---

<sup>992</sup> Constitution of the Republic of South Africa [1996], section 40 (1)

<sup>993</sup> Constitution of the Republic of South Africa [1996], section 151 (3)

<sup>994</sup> Constitution of the Republic of South Africa [1996], section 151 (4)

<sup>995</sup> Constitution of the Republic of South Africa [1996], section 152 (1)

transport, ferries, traffic) infrastructure, (storm water management, public works) and environment (air/noise pollution).<sup>996</sup> This therefore means that unlike under the Nigerian constitution where their local government may not regulate or advice on matters relating to the exploitation of mineral resources within their locality, in South Africa they may be able to do so. This is because first, there is no such explicit limitation within its powers and functions as contained in the Nigerian constitution, therefore the national or provincial governments may pass a statute to enable them to regulate on such matters. Secondly, the constitution empowers them to regulate on environmental matters within their vicinity particularly air or noise pollution which are some of the negative effects of mining, as discussed in the section on the impacts of mining earlier. Therefore here, the South African local government system as the closest to the people affected by mining activities is again empowered to regulate on environmental matters and may enable soft law initiatives that do the same. They may enable them by using their regulatory powers to set minimum environmental standards for mining companies to subscribe to and then promoting the adoption of higher standard soft law initiatives by mining companies, thereby enabling soft law initiatives. Also, being close to mining communities they would also be able to monitor compliance more easily as they have the authority to regulate environmental matters, therefore they may arrange spot visits at mining sites, or they may get feedback from their community members more readily. Such monitoring is especially important where soft law initiatives are concerned, and where there is no effective local governance system where monitoring compliance to soft law initiatives can be assessed it is difficult to assess their effects, and then try to make them more effective. Therefore a local government system that has the power to regulate on environmental matters and monitor compliance in rural communities where mining takes place is critical to ensuring mining companies are complying with laws, especially soft law initiatives which are voluntary.

The provisions above clearly demonstrate the South African local government system to be a strong one.

It must be noted that the powers and functions given to the local government sphere are protected by the constitution and cannot be reduced by an ordinary statute, however, both national and provincial government may add further areas by assigning some of their powers

---

<sup>996</sup> Nico Steytler, 'Local government in South Africa: Entrenching decentralised government' in Nico Steytler (ed), *The Place and Role of Local Governments in Federal Systems* (Konrad-Adenauer-Stiftung 2005)

to local government.<sup>997</sup> Indeed, just as in the case of environmental regulation discussed earlier, the South African state followed up the provisions of the constitution by further passing statutes to strengthen the developmental role of local governments in South Africa. The laws include the Local Government Transition Act,<sup>998</sup> the Development Facilitation Act,<sup>999</sup> and the Municipal Systems Act.<sup>1000</sup> Such laws ensured the strengthening and embedding of the local government system in South Africa, thereby demonstrating the importance of local government in South Africa, which is in stark contrast to the situation in Nigeria. Indeed, when discussing the Municipal Systems Act before it was passed Pycroft noted that the local governance system's innovations introduced by the bill will provide a more service-focused, client-driven and competitive local government environment.<sup>1001</sup> He further noted that these developments would align South Africa's local government systems with other strong systems such as that of the UK, New Zealand, and Singapore, which are very strong systems.<sup>1002</sup> With the passing of the Act this would therefore suggest that South Africa's local government system by law appears to be rather empowered and comparable to other developed countries as noted by Pycroft.

However, in practice there have been criticisms of the South African local government system, particularly with regards to their capacity to carry out functions and powers prescribed by the constitution and statutes as noted above. Binns and Nel argue that whilst the objectives of the South African local government system as promulgated by the constitution and subsequent laws are admirable, they fear local governments have been overburdened taking into account the very real capacity and financial constraints experienced by most of the smaller local authorities.<sup>1003</sup> They further add that the new post-apartheid system local government authorities are still 'finding their feet' and usually grossly lacking both human and financial resources.<sup>1004</sup> This is a view supported by Pycroft who notes that although the legislative framework of South Africa is admirable in that in theory it gives local

---

<sup>997</sup> Nico Steytler, 'Local government in South Africa: Entrenching decentralised government' in Nico Steytler (ed), *The Place and Role of Local Governments in Federal Systems* (Konrad-Adenauer-Stiftung 2005)

<sup>998</sup> Republic of South Africa, Local Government Transition Act (LGTA) [1993] (no. 209 of 1993)

<sup>999</sup> Republic of South Africa, Development Facilitation Act, [1995] (no 67 of 1995)

<sup>1000</sup> Republic of South Africa, Municipal Systems Act, [2000] (no.32 of 2000)

<sup>1001</sup> Christopher Pycroft, 'Democracy and delivery: the rationalization of local government in South Africa' (2000) Vol 66 *International Review of Administrative Sciences*, 143-159,156

<sup>1002</sup> *ibid*

<sup>1003</sup> Tony Binns and Etienne Nel, 'Devolving Development: Integrated Development Planning and Developmental Local Government in Post-apartheid South Africa' (2002) vol 36(8) *Regional Studies*, 921-932, 922

<sup>1004</sup> *ibid*

governments the legal power to bind provincial and national governments to their planning requirements. In practice local government authorities lack the capacity to compile and enforce their planning requirements.<sup>1005</sup> He adds that, although local government is recognised as a distinct sphere of government they remain the ‘poor relation’ of South Africa’s intergovernmental system.<sup>1006</sup> Furthermore, Beall reported that in the publication ‘Towards a Ten Year Review’, the South African Government stated that ‘the needs of local government are most critical, with the majority of municipalities not having the capacity...to perform their delivery functions.’<sup>1007</sup> This therefore demonstrates that even the South African government acknowledges that there have been some capacity issues with respect to local governance in South Africa, despite its efforts to empower them as noted above.

However, other evidence suggest that the local government authorities in South Africa despite some capacity issues are still effective. In Cato Manor for example, through participation at the ward committees, the integrated planning process, and negotiations with the Cato Manor Development Association, local women at the community level were said to have made an impact on the issues that affected their lives.<sup>1008</sup> This is at all possible due to the constitutional and legislative framework that empowers the local government system in South Africa, thereby demonstrating that the local government system can empower communities to liaise with TNCs and ensure they comply with soft law initiatives they are subscribed to.

Furthermore, another form of demonstrating the empowerment of local governments in South Africa, is through their finances. Steytler reported that while provinces are dependent on national transfers for 96% of their activities, local governments only receives 17% of its revenue from the national and provincial governments. In his review of the finances of local governments he concluded that local governments in South Africa are self-sustainable, giving them a wide discretion to pursue the preferences of local voters.<sup>1009</sup> Self-sustainability suggests strength, decentralization and autonomy, thereby supporting the argument that local governments are empowered in South Africa. However, it must be noted that there is a

---

<sup>1005</sup> Christopher Pycroft, ‘ Democracy and delivery: the rationalization of local government in South Africa’ (2000) Vol 66 International Review of Administrative Sciences, 143-159,149

<sup>1006</sup> *ibid*

<sup>1007</sup> Jo Beall, ‘Decentralizing Government and Decentering Gender: Lessons from Local Government Reform in South Africa’ (2005) 33(2) Politics and Society, 253-276, 267

<sup>1008</sup> *ibid*

<sup>1009</sup> Nico Steytler, ‘Local government in South Africa: Entrenching decentralised government’ in Nico Steytler (ed), *The Place and Role of Local Governments in Federal Systems* (Konrad-Adenauer-Stiftung 2005) 201



significant variation between, at the one end of the spectrum , the large metropolitan local government authorities such as Cape Town that achieve a level of financial autonomy and at the other, small rural councils with scant fiscal capacity and a heavy dependence on national government.<sup>1010</sup> This is however not a new phenomenon as in most countries around the world some local governments or areas always outperform others, the important point is to at least have some performing areas to demonstrate a system has been empowered. Indeed, in South Africa especially from an economic perspective they are empowered, for example the Durban and Cape Town localities in partnership with the provincial governments, entered the ambitious enterprises such as financing international convention centres.<sup>1011</sup> Even rural and less developed local government authorities with limited capacity have been reported to have forayed abroad to attract foreign investment.<sup>1012</sup>

Overall, while it is clear that the South African local governance system has its setbacks especially with respect to capacity issues, it is a major step up from the Nigerian local governance system. The constitutional powers bestowed on local government authorities are more far reaching and powerful than that in Nigeria. The legislative backing that followed in order to further strengthen this sphere of government also re-emphasised its importance, in contrast to Nigeria. The financial autonomy and economic activities of the South African local governments further shows empowerment. Therefore clearly demonstrating that South Africa has an enabled local governance system ideal for enforcing soft law initiatives together with the national public sector in South Africa's 'co-operative inter-governmental' system, as well as civil society which shall be discussed below.

#### **5.4.2.3 Civil Society in South Africa**

South Africa has been argued to have one of Africa's most dynamic civil society to date, in terms of holding state bodies accountable and providing solutions to societal issues.<sup>1013</sup> This section seeks to analyse this argument on the basis that as discussed in chapter four the presence of an enabled 'dynamic' civil society is critical to implementing and thus enabling soft law initiatives such as the EPs. This is because civil society especially where soft law

---

<sup>1010</sup> Jo Beall, 'Decentralizing Government and Decentering Gender: Lessons from Local Government Reform in South Africa' (2005) 33(2) *Politics and Society*, 253-276, 260

<sup>1011</sup> Nico Steytler, 'Local government in South Africa: Entrenching decentralised government' in Nico Steytler (ed), *The Place and Role of Local Governments in Federal Systems* (Konrad-Adenauer-Stiftung 2005) 197

<sup>1012</sup> *ibid*

<sup>1013</sup> John Mw Makumbe, 'Is There a Civil Society in Africa?' (1998) Vol. 74 No 2, *International Affairs*, pp 305-317, 309

initiatives such as the global compact are considered are seen as co-regulators of such initiatives.<sup>1014</sup> Along with local government bodies, civil society are those closest to communities and can regulate soft law initiatives such as CSR by ensuring company commitments go beyond glossy company reports and public relations.<sup>1015</sup> They monitor compliance by companies, raise awareness regarding the availability of soft law initiatives signed up by TNCs which protect locals in areas affected by mining projects, especially where the State is reluctant to act on its own accord as demonstrated in the cases *SERAC v Nigeria*<sup>1016</sup> and *SERAP v Nigeria*<sup>1017</sup> discussed in chapter four. Indeed, Honke et al have noted the effectiveness of NGOs in South Africa who they argue are very active and effectively employ numerous strategies such as lobbying, campaigning, capacity-building and increasingly litigation to point to corporate malpractice.<sup>1018</sup> Therefore where there is an absence of an enabled civil society within a country soft law initiatives suffer due to the absence of its key regulatory partner.

With respect to the EPs in South Africa, an enabled civil society would play a key role in ensuring the South African banks that have subscribed to them are in compliance by monitoring the activities of such banks, thereby enabling the principles. Indeed, non-governmental organisations (NGOs) such as BankTrack continually pressure banks over non-compliance with EPs standards by monitoring their activities.<sup>1019</sup> Unlike the situation in Nigeria, where although there is civil society presence they are not very active throughout the country and in all sectors, leaving international organizations such as BankTrack with no data to monitor compliance with initiatives such as the EPs. In South Africa, the banking sector and civil society seem to be monitoring the activities of banks as BankTrack indeed has data in which it further monitors EPs compliance of the four South African banks noted in section 5.4.1 to be EPs compliant. With respect to First Rand Bank, Nedbank, and Standard Bank, from its monitoring activities, BankTrack noted they were involved in projects and activities

---

<sup>1014</sup> Ralph Hamann and Nicola Acutt, 'How should civil society (and the government) respond to 'corporate social responsibility? A critique of business motivations and the potential for partnerships' (2003) Vol 20, No 2, Development Southern Africa, 255-270,256

<sup>1015</sup> Ibid 259

<sup>1016</sup> *SERAC v. Nigeria* [2002], Case No. ACHPR/COMM/A044/1, Afr. Comm'n Human & People's Rights

<sup>1017</sup> *Socio-Econ. Rights & Accountability Project (SERAP) v. Nigeria* [2012] Judgement No. ECW/CCJ/JUD/18/12, ECOWAS

<sup>1018</sup> Jana Honke, Nicole Kranz, Tanja A. Borzel, Adrienne Heritier, 'Fostering Environmental Regulation? Corporate Social Responsibility in Countries with Weak Regulatory Capacities: The Case of South Africa' (2007) SFB Working Paper Series 9, available at <[http://userpage.fu-berlin.de/ffu/akumwelt/bc2008/papers/bc2008\\_341\\_Kranz.pdf](http://userpage.fu-berlin.de/ffu/akumwelt/bc2008/papers/bc2008_341_Kranz.pdf)

<sup>1019</sup> Richard Macve and Xiaoli Chen, 'The "equator principles": a success for voluntary codes?' (2010), Vol. 23 (7) Accounting, Auditing & Accountability Journal, 890-919, 908

they consider problematic in light of the sustainability commitments of the banks.<sup>1020</sup> Specifically, they cited the Kusile Coal Power Plant project in South Africa.<sup>1021</sup> This is a critical discovery as based on the analysis of the three banks above, their reports suggested compliance with the EPs. However, as a result of civil society independent monitoring, it is established here, they are not as compliant as they claim to be. This clearly illustrates the importance of civil society in enabling soft law initiatives, by monitoring compliance of those subscribed to them. The above further demonstrates that where the EPs are concerned, civil society in South Africa are monitoring activities of banks and pressuring them to comply with their commitments, thus enabling the EPs in South Africa, unlike in Nigeria.

While the above suggests a presence of civil society in South Africa within the banking sector, where other soft law initiatives are concerned, it is essential to determine just how far civil society is enabled in South Africa and why they are considered Africa's 'most dynamic civil society.'<sup>1022</sup> The importance of civil society in South Africa is highlighted by the fact that there are over 98,920 voluntary sector organisations in the country.<sup>1023</sup> These voluntary civil organizations are divided into two in South Africa. The first are the most professionalised NGOs, who primarily engage in service delivery and are referred to as 'blue-chip' NGOs.<sup>1024</sup> The second group involves informal, survivalist community based organisations (CBOs) that enable poor and marginalised communities.<sup>1025</sup> In a study of the John Hopkins survey on the shape and size of civil society in South Africa, CBOs were found to comprise 53% of the 98,920 civil society organizations in South Africa.<sup>1026</sup> The proliferation of such CBOs in South Africa is very important as it ensures the concerns of local marginalised communities are well heard and represented in South Africa, this also demonstrates the vibrancy of South African civil society, with numerous types of organizations available to protect those considered weak. Furthermore, another enabling factor that seems to make civil society thrive in South Africa is the fact they receive government funding. The John Hopkins survey on the shape and size of civil society in South

---

<sup>1020</sup> See <<http://www.banktrack.org/>> accessed 1<sup>st</sup> September 2016

<sup>1021</sup> *ibid*

<sup>1022</sup> John Mw Makumbe, 'Is There a Civil Society in Africa?' (1998) Vol. 74 No 2, *International Affairs*, pp 305-317, 309

<sup>1023</sup> Hermien Kotze, 'Responding to the growing socio-economic crisis? A review of civil society in South Africa' (2003), in Centre for Civil Society (ed) *Development Update: The Deepening divide – civil Society and Development in South Africa in 2001/2002*, 4:4, pp 1-32

<sup>1024</sup> *ibid*

<sup>1025</sup> Adam, Habib, 'State-Civil society Relations in Post-Apartheid South Africa', (2005) Vol 72, No 3, *Social Research*, 671-692

<sup>1026</sup> *ibid*

Africa noted above found that government funding that went into civil society benefited organizations involved in social services.<sup>1027</sup> However, while the above suggests civil society is active in South Africa, within the two identified groups, research has not further broken down civil society activities into sector specific categories, such as health and environment, to establish which area civil society is thriving the most. Therefore more research is required in identifying the specific kinds of activities contemporary civil society is engaged in and the examination of their motivation in South Africa.<sup>1028</sup>

While sector specific activities of contemporary civil society in South Africa is not readily available, South Africa's civil society is still considered one of the most enabled civil society in Africa as noted earlier, due to its notable achievements. Just like Nigerian civil society played a major part in Nigeria's return to democracy, the South African civil society was critical in the protracted struggle for the liberation of the country from the 'clutches of a racist settler regime.'<sup>1029</sup> This eventually led to the democratization of the country's political system in 1994 and the undoing of apartheid. Since then civil society has remained active in South Africa especially through the enabling practices of the post-apartheid government. Such practice included the passing of the Non-Profit Organization Act<sup>1030</sup> that officially recognised civil society, created a system of voluntary registration for its constituents and provided them with allowances and benefits.<sup>1031</sup> Furthermore, a directorate for Non-Profit Organisations was established to coordinate the above Act, thus further enabling civil society. Enabling civil society in South Africa continued with the South African government providing an enabling fiscal environment to enable the financial sustainability of civil society. The National Development Agency (NDA) and the Lottery Commission were established with a mandate to fund legitimate non-profit civil society activities.<sup>1032</sup> The above demonstrates that while civil society was very active during the anti-apartheid struggle, they have been further strengthened post-apartheid in contrast to Nigeria where after the struggle for democracy civil society lost some of its drive.

---

<sup>1027</sup> Hermien Kotze, 'Responding to the growing socio-economic crisis? A review of civil society in South Africa' (2003), in Centre for Civil Society (ed) Development Update: The Deepening divide – civil Society and Development in South Africa in 2001/2002, 4:4, pp 1-32, 22

<sup>1028</sup> *ibid*

<sup>1029</sup> John Mw Makumbe, 'Is There a Civil Society in Africa?' (1998) Vol. 74 No 2, International Affairs, pp 305-317, 309

<sup>1030</sup> Non-Profit Organization Act [1997] (Act No. 71 of 1997)

<sup>1031</sup> Adam Habib, 'State-Civil society Relations in Post-Apartheid South Africa', (2005) Vol 72, No 3, Social Research, 671-692

<sup>1032</sup> *ibid*

Indeed, the efforts of the South African State to enable an active civil society can be argued to have been realised in the environmental field where this thesis is concerned. Honke et al note that in South Africa NGOs continue to make a significant contribution to the shaping and implementation of environmental policies, at the national, but more importantly, especially where soft law initiatives are concerned, at the local level.<sup>1033</sup> With the lack of capacity at times by government to enforce legislation effectively, civil society in South Africa plays an important role in monitoring the adherence of companies to environmental regulation, thereby putting pressure on companies and the government.<sup>1034</sup>

Evidence of NGOs' continued contribution to shaping and implementing environmental policies may be found in South Africa's mining industry. After years of tension between mining companies and local communities, efforts were made by NGOs and the mining industry represented by the Chamber of mines to improve communication. This gave rise to the Chamber of Mines-NGO Dialogue Forum which aims to provide a platform for the development of public participation guidelines, conflict resolution mechanisms, and a common vision for sustainable development amongst mining industry stakeholders.<sup>1035</sup> One of the achievements of the forum is the development of a cyanide code for the gold industry. The success of this forum has resulted in the development of similar efforts in the Gauteng province to deal with dust pollution from mine dumps, and on a national level between labour, industry, and the government with respect to the sector response to HIV/Aids.<sup>1036</sup>

The above clearly demonstrates that as noted above South Africa indeed does have a dynamic civil society, in the form of NGOs and CBOs who were involved in the anti-apartheid struggle and have carried on to participate in other areas especially the mining and environmental sectors, where this research is concerned. The state has played a major role in enabling civil society in South Africa, especially with regards to financing, which is helpful as civil society just like local government bodies are the closest to the people and need finance to enable their activities.

---

<sup>1033</sup> Jana Honke, Nicole Kranz, Tanja A. Borzel, Adrienne Heritier, 'Fostering Environmental Regulation? Corporate Social Responsibility in Countries with Weak Regulatory Capacities: The Case of South Africa' (2007) SFB Working Paper Series 9, available at <[http://userpage.fu-berlin.de/ffu/akumwelt/bc2008/papers/bc2008\\_341\\_Kranz.pdf](http://userpage.fu-berlin.de/ffu/akumwelt/bc2008/papers/bc2008_341_Kranz.pdf)

<sup>1034</sup> *ibid*

<sup>1035</sup> Ralph Hamann and Nicola Acutt, 'How should civil society (and the government) respond to 'corporate social responsibility? A critique of business motivations and the potential for partnerships' (2003) Vol 20, No 2, *Development Southern Africa*, 255-270,265

<sup>1036</sup> *ibid*

However, it has been argued that with NGOs becoming more commercialized and dependant of government and donor resources, one cannot assert that they are really community driven or answerable to marginalised sectors of South African society.<sup>1037</sup> Such an argument suggests they lose autonomy and impartiality where their cause is concerned because they receive finance from the same government they sometime seek to protect communities from. This is indeed a strong argument which is supported by Makumbe, who notes that the majority of civic groups in Africa are not capable of sustainability without support from foreign donors or the state. Therefore, their autonomy is seriously compromised from the beginning.<sup>1038</sup> Such assertions are fair as civic organizations that receive funding may have to toe to their donor's will or risk losing such funding. Where it is not in the interest of their donor to name and shame mining companies for example, they may refuse to do that, thus compromising their autonomy. Indeed, it has been noted in South Africa that government tends to fund the bigger, more established organizations, more likely to toe their line and the interest of urban working and middle class constituencies to the detriment of the smaller NGOs and CBOs who may not do so.<sup>1039</sup> However, while these autonomy concerns are acknowledged one could argue it is better to have a financed active civic society that may be compromised, than to have no civil society due to lack of finance.

Overall, while there are some concerns regarding the autonomy of civil society in South Africa, what remains clear is that there is an active, vibrant and effective civil society in South Africa. With regards to the EPs it was demonstrated that through BankTrack they are being enabled in South Africa. Where other soft law initiatives are concerned it was demonstrated that there is an active government enabled civil society through legislation, finance, and policy to help enable soft law initiatives. Many civil society organizations in South Africa have developed sophisticated links and networks with the international anti-globalization movement, allowing them to connect local struggles with the broader dictates of globalization.<sup>1040</sup> Which is why International NGOs such as BankTrack are able to access data on projects in numerous countries in order to monitor adherence to initiatives such as the equator principles. The above section has also shown that South Africa clearly has a stronger

---

<sup>1037</sup> Adam Habib and Rupert Taylor, 'South Africa: Anti-Apartheid NGOs in Transition' (1999) Vol. 10 (1) *International Journal of Voluntary and Non-Profit Organizations*, 73-82

<sup>1038</sup> John Mw Makumbe, 'Is There a Civil Society in Africa?' (1998) Vol. 74 No 2, *International Affairs*, pp 305-317, 311

<sup>1039</sup> Hermien Kotze, 'Responding to the growing socio-economic crisis? A review of civil society in South Africa' (2003), in Centre for Civil Society (ed) *Development Update: The Deepening divide – civil Society and Development in South Africa in 2001/2002*, 4:4, pp 1-32, 21

<sup>1040</sup> *ibid* 29

civil society than Nigeria, and Nigeria must seek to emulate South Africa, especially in the way it enabled civil society through legislation and financing to consolidate it after Apartheid. This supports this researcher's argument in section 4.4.3.3 that by providing legislation and funding to NGOs the Nigerian State is more likely to enable civil society and make them more effective in carrying out their key roles of monitoring and regulating the activities of TNCs. This approach has as noted earlier indeed made South Africa, Africa's most dynamic civil society to date.<sup>1041</sup>

## 5.5 Conclusion

This section concludes the chapter by discussing the key findings from the key questions sought at the introduction of this chapter which have been applied to South Africa.<sup>1042</sup> First, whether there is a governance gap in terms of a strong set of laws that effectively regulate the impact of mining on the environment and society in South Africa. Second, the extent to which current policy and legal regimes in South Africa provide an enabling environment for soft law initiatives and what implications does it have on the application of soft law initiatives within SSA. This thesis will also use this section to compare the findings from this chapter to that of chapter four.

With respect to the first issue, this chapter has revealed that regulations such as section 24 of the 1996 Constitution, NEMA 1998, and the MPRDA 2002 leaves South Africa in a strong position to deal with the environmental and social impacts of mining, therefore there was little evidence of a governance gap.

Section 24 of the 1996 Constitution provides a strong platform for South Africa to regulate the social and environmental impacts of mining. The fact that a right to a healthy environment is included in a constitution propels the environment to the strongest form of protection as the number, nature and array of legal remedies available to enforce it are greatly enhanced. However, providing constitutional backing for the environment is not enough to

---

<sup>1041</sup> John Mw Makumbe, 'Is There a Civil Society in Africa?' (1998) Vol. 74 No 2, *International Affairs*, pp 305-317, 309

<sup>1042</sup> Research Questions 1.3 and 1.4: is there a governance gap within the mining sector in SSA as a result of weak mining regulations or the enforcement of such regulation?' and 'do the existing legal and policy regimes in SSA provide an enabling environment for soft law initiatives to effectively fill any governance gap within African mining?

demonstrate effective regulation of the impact of mining in South Africa. It must be demonstrated that such a right is consistently enforced. While the chapter found that the constitutional right to a healthy environment has been enforced in cases such as *Save the Vaal*<sup>1043</sup> and *BP Southern Africa (Pty) Ltd v. MEC For Agriculture, Conservation, Environment & Land Affairs*,<sup>1044</sup> cases such as *Grootboom*<sup>1045</sup> and *Tergniet*<sup>1046</sup> demonstrate that there is a need for more consistency in the enforcement and interpretation of section 24 of the 1996 constitution, if it is to effectively regulate the negative impacts of mining. The chapter found that despite the Constitutional Court's reputation for judicial activism it has not been very activist in the protection of the environment as demonstrated by the *Grootboom* and *Tergniet* cases where the Court could have gone further to protect the environment. This leaves one to conclude that while the constitutional backing afforded to the environment in South Africa has provided a strong platform for the protection of the environment, there is still a need for the Courts to do more to enforce this constitutional right and to be consistent in such enforcement. However, it must be noted that the fact that there has been some inconsistency in the enforcement of Section 24 does not mean it is not a strong regulation as where the law is concerned inconsistencies are bound to occur especially when interpreting the law. Therefore this research finds section 24 to be a strong regulatory measure in managing the impacts of mining in South Africa, and as demonstrated above has recorded some success in ensuring environmental protection. This research therefore advocates for the inclusion of a constitutional right to a healthy environment in State constitutions as stated in the African Charter, but ignored by most African countries including Nigeria.

One might argue that the only reason South Africa included the right to a healthy environment into its constitution was due to the past injustices the majority of South Africans suffered at the hands of white owned mining companies, who deprived them of their natural resources and destroyed their surroundings while mining. However, communities in Nigeria have also suffered from the environmental impacts of oil exploration for decades yet their 1999 constitution failed to include the right to a healthy environment, which is arguably why

---

<sup>1043</sup> Director: Mineral Development, Gauteng Region and SASOL Mining (Pty) Ltd v. Save the Vaal Environment and Others, [1999] 2 SA 709 SCA Case no: 133/98

<sup>1044</sup> BP Southern Africa (Pty) Ltd v. MEC For Agriculture, conservation, Environment & Land Affairs [2004] 5 SA 124 WLD Case No. 03/16337

<sup>1045</sup> Government of the Republic of South Africa and Others v Grootboom and Others [2001] 1 SA 46 (CC)

<sup>1046</sup> Tergniet and Toekoms Action group v Outeniqua Kreosootpale (Pty) Ltd Case 10083/2008 (c) 23 January [2009]



Nigeria continues to suffer from environmental issues while South Africa's record continues to improve thus demonstrating the strength of section 24 of the 1996 constitution.

As the framework legislation for environmental protection in South Africa this chapter found NEMA to be a unique type of legislation. This is because rather than provide provisions that directly address the culprits of environmental degradation such as mining companies as adopted by the Nigerian Environmental Impact Assessment Decree 1992 (EIA Decree)<sup>1047</sup>, it focuses on providing principles and provisions that must be followed by most State departments. This therefore places a duty on State departments to protect the environment by providing environmental plans which must be implemented. This is a positive approach which this research welcomes as first, it allows departments to design sector specific plans tailored to their industry based on experience, thereby making them clear and easy to implement within their sector. Secondly, it allows most of the State departments to share the burden of protecting the environment, again making environmental protection easier. This research finds this to be a better approach as chapter four found that the Nigerian Ministry of Environment struggled to enforce the EIA Decree as the sole agency responsible for its implementation and enforcement due to capacity issues. While there are arguments as noted above that the fragmented nature of the NEMA may result in too much confusion and weaken its effect, this research maintains the position that its fragmented nature is actually its strength. This is because with more State departments monitoring the protection of the environment, its protection is enhanced, and Nigeria has shown us that having few departments monitor the environmental protection of a whole nation leaves scope for the abuse of laws.

Furthermore, in contrast to the EIA Decree which is Nigeria's main environmental regulation, NEMA and its principles were able to record some success in terms of adjudicatory enforcement thus demonstrating its effect as a regulatory measure. While the *Kyalami case*<sup>1048</sup> and the *Merebank Case*<sup>1049</sup> just as with respect to Section 24 above demonstrated the inconsistencies that persist within the South African Judicial system, cases such as *Sasol*

---

<sup>1047</sup> Environmental Impact Assessment Decree, Supplement to Official Gazette Extraordinary, No 73, Vol 79, December 1992

<sup>1048</sup> Minister of Public Works v Kyalami Ridge Environmental association [2001] (3) SA 1151 (CC); 2001 (7) BCLR 652

<sup>1049</sup> Merebank Environmental Action Committee v Executive Member of KwaZuluNatal Council for Agriculture and Environmental Affairs and Others [2001] Unreported Case no 269/01 D

*Oil*<sup>1050</sup> and the *Stilfontein Gold Mining* case<sup>1051</sup> show that NEMA and its principles are indeed enforced in South Africa, thus demonstrating its strength. The same cannot be said of the EIA Decree where chapter four found enforcement was almost non-existent.<sup>1052</sup> While it is fair to state there are still occurrences where NEMA is ignored in South Africa as noted in this chapter, this research finds that in comparison to most legislation within Sub-Saharan Africa it has recorded some success and must be considered a strong regulatory measure against the negative impacts of mining in South Africa.

The fact that NEMA is enforced more than the EIA Decree also demonstrates that the approach taken by NEMA to share the environmental protection burdens between departments despite its fragmented nature is a good approach, which this research supports.

This MPRDA is another South African regulation this chapter found to be quite impressive. The MPRDA is a world class legislation which is so far reaching in terms of protecting the environment and ensuring socio-economic justice in South Africa. While some provisions such as Section 39(1) which only require an EIA where an application for a mining right is being sought could be reviewed to include all classes of mining permits the section is still positive in comparison to its Nigerian counterpart.<sup>1053</sup> This is because under section 119 of the Nigerian Minerals and Mines Act an EIA is not required even for a mining lease grant.<sup>1054</sup> In general the MPRDA contained strong provisions such as Section 10 which seek to protect the interest of mining communities by having the department of energy's regional manager discuss concerns they have with regards to any mining project before a project goes ahead.<sup>1055</sup> This research finds this to be a more appropriate approach than Section 100 of the Nigerian Minerals and Mining Act which allows uneducated local communities to negotiate consent directly with mining companies who are more experienced and skilled in the art of

---

<sup>1050</sup> MEC for Agricultural Conservation, Environment and Land affairs v. Sasol Oil (Pty) and Another, [2006] 5 SA 483 SCA

<sup>1051</sup> Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Limited & Others [2006] (5) SA 333 (W)

<sup>1052</sup> See Abdullahi Husseini, 'The current status of environmental impact assessment in Nigeria (EIA): challenges and prospects', (2015) 1(1) HSE, 28-37, 33, Akeem Morounkeji Lawal, Stefan Bouzarovski, and Julian Clark, 'Public participation in EIA: the case of West African Gas Pipeline and Tank Farm projects in Nigeria' (2013), 31(3) Impact Assessment and Project Appraisal, 226-231 Anago Ifeanyi, 'Environmental Impact Assessment as a tool for sustainable development: The Nigerian experience' (2002) Proceedings of the FIG XXII International Congress, April 19-26, Washington, D.C. USA, pp1-13

<sup>1053</sup> Section 39(1) Mineral and Petroleum Resources Development Act No. 28 of 2002, Republic of South Africa

<sup>1054</sup> Section 119, Nigerian Minerals and Mining Act, 2007

<sup>1055</sup> Section 10 Mineral and Petroleum Resources Development Act No. 28 of 2002, Republic of South Africa

negotiations.<sup>1056</sup> Section 10 of the MPRDA is also a better approach as by having the regional manager and the Regional Mining Development and Environmental Committee discuss objections with local communities they are in a better position to understand and remedy grievances because they are locals who are aware of the history within the area. Moreover, this chapter found provisions such as that found under section 38(2), lifting the corporate veil in environmental matters novel and encouraging, again demonstrating the strength of the MPRDA as a regulatory measure.

In addition, the MPRDA's socio-economic provisions which sought to provide equitable access of the nation's mineral resources were so far reaching that they cancelled all the countries' mineral titles and made it mandatory for mine owners to share their mines with the historically underprivileged and marginalised. The socio-economic provisions under the Nigerian Minerals and Mines Act are simply not up to standard when compared to those found in the MPRDA.

With regards to how effective the MPRDA has been, Sandham et al<sup>1057</sup> in their empirical study and case law show that it is in fact enforced by the judiciary and followed by mining companies especially with respect to undertaking EIAs. This is contrary to the situation in Nigeria where there is little evidence suggesting the Minerals and Mining Act is being followed. While it is fair to note that the mining industry is still developing in Nigeria therefore information regarding enforcement of the Minerals and Mining Act is scarce, evidence of non-compliance in the more established oil and gas sector suggest environmental enforcement and compliance is hard to come by in Nigeria.

This research finds the MPRDA to be a much stronger and effective legislation than the Nigerian Minerals and Mining Act. This writer is of the view that this is due to the fact that the purpose of the MPRDA as oppose to the Nigerian Minerals and Mining Act 2007 was to ensure socio-economic equality and sustainable development in South Africa, which are reflected in strong far reaching provisions as discussed above. Whereas, the Nigerian Minerals and Mining Act was passed to foster foreign direct investment into the Nigerian mining sector, therefore, one was never going to find far reaching requirements such as the Broad Based Black Economic Empowerment requirements within the Nigerian legislation.

---

<sup>1056</sup> Section 100, Nigerian Minerals and Mining Act, 2007

<sup>1057</sup> L.A. Sandham, A.R. Hoffmann, and F.P. Retief, 'Reflections on the quality of mining EIA reports in South Africa' (2008) vol 108 The Journal of The Southern African Institute of Mining and Metallurgy, 701-706

Overall, this chapter finds South Africa to have a robust set of regulations for the protection of the environment and ensuring socio-economic justice, arguably the best set of regulations in SSA, thereby contradicting the claim that there is a governance gap in SSA mining and addressing research question 1.3. However, this should be expected of South Africa after over a century of mining.

With regards to the second issue, using the Equator Principles as our sample soft law initiative and the features required to be enabled, for there to be an enabling environment for soft law initiatives established in chapter two, the chapter found that South Africa clearly has an enabling environment for soft law initiatives especially in comparison to Nigeria because it has all the features required of an enabling environment for soft law initiatives considered in this chapter namely;

1. An Enabled Public Sector - The chapter was able to demonstrate that the South African national government has mandated a stringent set of regulation to stand as a minimum standard for any soft law initiative within the mining sector seeking to ensure environmental protection and socio-economic justice. Further, while we were not able to demonstrate the national government facilitating and partnering to enable the equator principles, more importantly the chapter was able to demonstrate the government facilitating and partnering where soft law initiatives in the mining sector protecting the environment are concerned. Finally, it was clearly established that the government endorsed the EPs and other soft law initiatives. The presence of all four of the public sector enabling facets as outlined by Fox et al<sup>1058</sup> in chapter two thus demonstrates an enabled public sector in South Africa willing to enable soft law initiatives. The South African experience also gave us a great example of what an enabled public sector for soft law mining initiatives looks like in practice. Hence this research found an enabled public sector has a strong set of regulations that are enforced by the judiciary, State departments are empowered and given the capacity to enforce regulations, where necessary the public sector is willing to partner with the private sector to introduce soft law initiatives, and always ready to endorse good initiatives that further regulate troubled sectors. While Nigeria's efforts to enable soft law through the public sector were encouraging they lacked real teeth. In particular its

---

<sup>1058</sup> Tom Fox, Halina Ward, Bruce Howard, 'Public Sector Roles In Strengthening Corporate Social Responsibility: A Baseline Study' [2002] The World Bank, available at: <<http://pubs.iied.org/pdfs/16017IIED.pdf?>> Accessed 20<sup>th</sup> March 2016

regulations lacked any significant evidence of enforcement, its Ministry of Environment which was empowered to enforce the 1992 EIA decree lacks the capacity for such enforcement leading to the constant abuse of the 1992 EIA decree. Additionally, as noted in chapter four the Ministry of Mines and Steel is also poorly funded and lacks the capacity to fully enforce the Nigerian Minerals and Mines Act, thereby leaving Nigeria with a major enforcement problem.

2. An Enabled Local Governance System – This chapter showed South Africa to clearly have a strong local government system constitutionally backed, with functions and powers beyond that found in Nigeria’s case and further empowered by legislative acts. It showed that an enabled local government where soft law mining initiatives are concerned should have the following features; be empowered and supported by all tiers of government particularly financially, local governments should have some environmental regulatory capacity as the closest institution to the people, and finally they should be self-sustainable thus gaining more autonomy in their decision making. This would allow them to effectively monitor the activities of mining companies in their locality and together with civil society and the central government regulate their activities either with soft laws they signed up to or through hard law.
3. An Enabled Civil Society – This chapter demonstrated that South Africa has a most dynamic civil society which again has been empowered with legislative backing and finance in contrast to the situation in Nigeria. While chapter four showed that civil society is indeed present in Nigeria and has played a prominent role in the struggles faced by Nigeria, particularly the struggle for democracy and the Niger Delta resource control and environmental damage struggle, civil society seem to disappear once the struggle has passed. This may be due to the fact that unlike in South Africa where NGOs and CSOs are financed there is no financial provision from the state to civil society, nor is their legislative backing for civil society, therefore it is hard for civil society to remain active within the Nigerian society. Therefore if Nigeria is to have an enabled effective civil society which will help regulate mining activities together with soft law initiatives, the South African approach to civil society must be adopted.

In Conclusion, this chapter has established that South Africa is prepared to enable the use of soft law initiatives to further regulate the mining industry, thereby further addressing research

question 1.4.<sup>1059</sup> Indeed, due to South Africa's enabling environment it is reported that soft law in the form of CSR are stringently applied all over South Africa, especially with the coming into force of the Broad Based Black Economic Empowerment policy of government.<sup>1060</sup>

The studies on Nigeria and South Africa have clearly demonstrated that not all SSA countries provide an enabling environment for soft law initiatives that make such initiatives more likely to be complied with. Therefore it would be too early to suggest soft law initiatives can be considered the fourth generation of mining codes in SSA. This is because if a country as advanced in terms of intellectual know how and economy as Nigeria is struggling to provide an enabling environment for soft law it is hard to make a case that many poorer countries in SSA have the capacity to provide an enabling environment for soft law initiatives. It is this author's contention that promoting the use of soft law initiatives as a form of regulating the negative consequences of mining in SSA may not be ideal taking into account they may struggle to provide an enabling environment that is necessary for them to be complied with in the regulation of mining activities in SSA. This discussion will be further addressed in the next chapter.

---

<sup>1059</sup> To what extent do current policy and legal regimes in Nigeria and South Africa provide an enabling environment for soft law initiatives and what implications does it have on the application of soft law initiatives within SSA mining?

<sup>1060</sup> Jana Honke, Nicole Kranz, Tanja A. Borzel, Adrienne Heritier, 'Fostering Environmental Regulation? Corporate Social Responsibility in Countries with Weak Regulatory Capacities: The Case of South Africa' (2007) SFB Working Paper Series 9, available at <[http://userpage.fu-berlin.de/ffu/akumwelt/bc2008/papers/bc2008\\_341\\_Kranz.pdf](http://userpage.fu-berlin.de/ffu/akumwelt/bc2008/papers/bc2008_341_Kranz.pdf)

## **Chapter 6: Conclusion**

### **6.1 Introduction**

This thesis has researched the rise of transnational soft law initiatives in the governance and management of the negative impacts of mining in Sub-Saharan Africa. Such a development arose in part due to the governance gap left by many African countries as a result of their mining codes prioritizing economic liberalization as opposed to social and environmental development in SSA. This has led to claims that transnational soft law initiatives seeking to govern the negative impacts of the extractive industries can be considered the fourth and latest generation of mining codes in Africa.<sup>1061</sup> While the thesis agrees that the governance gap left within the mining sector in Africa has led to the rise of transnational soft law initiatives which can be considered as the fourth generation of mining codes in Africa, this thesis argued their voluntary nature makes it difficult for them to be effective in filling the governance gap without an enabling environment for them in Africa. In taking such a position the research's main aim was therefore to establish whether given the right enabling environment the so called 'fourth generation' of mining codes are more likely to fill the governance gap in the African extractive industries thereby solving the regulatory issues pertaining to mining in SSA.

This chapter presents the overall conclusion of this thesis, it is structured as follows: first it will present the research's questions, it will then address each question by presenting the research's conclusion based on the findings from the questions, and lastly it concludes the chapter by presenting its suggestions and recommendations.

### **6.2 Research Questions and Findings**

The primary question this thesis has sought to address is whether transnational soft law initiatives are more likely to be an effective form of regulating the negative consequences of mining in SSA given the right enabling environment. While the rise in soft law initiatives and

---

<sup>1061</sup> Hany Besada and Philip Martin, "Mining Codes in Africa: Emergence of a "Fourth" Generation? (2013), The North-South Institute, available at: <<http://www.nsi-ins.ca/wp-content/uploads/2013/03/Mining-Codes-in-Africa-Report-Hany.pdf>> accessed 18<sup>th</sup> September 2018

their effect as regulatory tools have been researched by authors within the literature there has been limited research on how such initiatives require an enabling environment to be effective, as they do not exist in a vacuum. This is a gap within the literature this research has filled by demonstrating that on their own, as voluntary initiatives, soft law initiatives will struggle to fill the governance gap within the mining sector in SSA where hard law has failed. However, where they have been subscribed to by numerous TNCs and are provided with an enabling environment through strong public sector support, a strong local governance system, and an organized civil society they are more likely to be complied with. Soft law initiatives such as the Equator Principles and the IFC performance standards can be very effective in regulating the negative consequences of mining where they are enabled because they have stronger provisions than most mining codes in SSA. Therefore it is essential to establish how these initiative can be made more effective through the provision of an enabling environment so that mining can be effectively regulated in SSA. This research does this by dividing the thesis into six chapters that address the following interlinked secondary research questions:

1. What is soft law and what consists an enabling environment for them?
2. Does the existence of an enabling environment for soft law initiatives make it more likely that such initiatives will be complied with by subscribed companies?
3. Is there a governance gap within the mining sector in SSA as a result of weak mining regulations or the enforcement of such regulation?
4. To what extent do current policy and legal regimes in Nigeria and South Africa provide an enabling environment for soft law initiatives and what implications does it have on the application of soft law initiatives within SSA mining?

The finding of the research will contribute to the relevant literature, given the growing rise of soft law initiatives as an alternative form of regulating the negative activities of mining companies in SSA, and their promotion as the fourth generation of mining codes in SSA.



### **6.2.1 Research Question 1: Are soft law initiatives more likely to be an effective form of regulating the negative consequences of mining in SSA given the right enabling environment?**

**Conclusion One:** This thesis concludes that transnational soft law initiatives are more likely to be an effective form of regulating mining in Sub-Saharan Africa where these countries provide them with an enabling environment.

The thesis concluded they can be effective regulatory mechanisms based on the fact that soft law transnational initiatives usually have provisions with higher standards than those found in some mining codes, and are rapidly subscribed by numerous TNCs. Where they are complied with they can be very effective tools that regulate the activities of TNCs and mining corporations. This thesis found that such compliance can be enhanced where countries provide an enabling environment. To prove that transnational soft law initiatives are more likely to regulate mining activities where they are provided with an enabling environment the research first analysed the United Nations Global Compact and examined how mining giants Rio Tinto and Barrick Gold complied with their commitments to the Compact. The research found that both companies demonstrated significant progress in complying with Compact principles regulating their activities in developed countries where an enabling environment for the Compact was provided in the form of strong public sector support through regulations and enforcement institutions and an active civil society. However, where the companies were mining in developing countries with a weak enabling environment they ignored Compact principles and were involved in environmental and human rights violations.<sup>1062</sup> Furthermore, through the analysis of EITI it was further established that although providing an enabling environment in the form of mandated hard regulations alone will not significantly enhance compliance to soft law and thus their likelihood to effectively regulate mining, it does enhance the legitimacy and longevity of soft law. The section on the Equator Principles also demonstrated an enabling environment especially in the form of civil society are critical in enabling soft law initiatives, by ensuring those subscribed to them are in compliance, thereby promoting a higher standard of regulation.<sup>1063</sup>

While the thesis concludes soft law initiatives are more likely to be an effective form of regulating mining activities should they be provided with an enabling environment, this may

---

<sup>1062</sup> See Chapter three

<sup>1063</sup> See Chapter three

not be the appropriate approach to adopt in present day SSA as very few countries in SSA provide an enabling environment for soft law initiatives as elaborated upon further below. However, it is worth noting that the case of *Lungowe v Vedanta Resources Plc*<sup>1064</sup> discussed in the introduction of this thesis strengthens the likelihood of mining TNCs and their subsidiaries complying with transnational initiatives they are subscribed to which are imbibed in their sustainability policies, as parent companies headquartered in the developed world can be held liable for breaches of such policies by subsidiaries in the developing world. If the law continues to develop in this directions an enabling environment by SSA States may not be the only way of ensuring soft law initiatives subscribed to by TNCs are complied with. Nevertheless it is not sustainable for SSA countries to rely on foreign courts to ensure TNCs are complying with the soft law initiatives they have subscribed to, rather they should create an enabling environment for them that makes compliance to those initiatives more likely in their countries.

### **6.2.2 Research Question 1.1: What is Soft Law in International Law and what consists an Enabling Environment for them.**

**Conclusion Two:** There is no single widely accepted definition of soft law within international law, there are numerous definitions that authors adopt according to the purpose of their research. For the purpose of this research it is concluded that soft laws are ‘rules of conduct which, in principle have no legally binding force but which nevertheless may have practical effects.’<sup>1065</sup> They are referred to as ‘soft’ because they are not law, but are referred to as law because they seek to achieve similar results to law.

The concept of soft law within international law was an important element this thesis considered in order to establish whether transnational soft law initiatives can be considered effective in regulating mining in SSA. Chapter Two considered this question by first examining the development of soft law within international law and it was highlighted that one of the key reasons for its development was the need to regulate international actors not regulated by international law which was dominated by States.<sup>1066</sup>

The Chapter then analysed the definition of soft law within international law, it found numerous definitions of soft law, however, the common feature found in most definitions

---

<sup>1064</sup> *Lungowe v Vedanta Resources Plc* [2017] EWCA Civ 1528 [2017] B.C.C 787; [2017] B.L.R 585

<sup>1065</sup> Francis Snyder, ‘The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques’, (1993b) 56 (1) *The Modern Law Review*, 19-54, 32

<sup>1066</sup> See Chapter Two, section 2.2

despite how influential they saw soft law, is that it is non-binding. This therefore made it simple to distinguish hard law from soft law, however with numerous soft law instruments developing it became difficult to distinguish soft law from itself.<sup>1067</sup> For example, for some authors such as Cerone, corporate social responsibility and best practices standards are not considered as soft law in international law<sup>1068</sup>, whereas to some authors such as Ward corporate social responsibility initiatives can be seen as soft law. This is because for authors in the former bracket soft law within international law are instruments that are derived from sources of international law that may be non-binding. Based on the research theme of this thesis chapter two adopted a wide approach to defining soft law, the approach does not regard soft law as law in the traditional positivist sense at all, and includes only rules that do not have the status of existing international law according to the established sources.<sup>1069</sup> By adopting such an approach transnational soft law initiatives such as the Equator Principles or the Extractive Industries Transparency Initiative (EITI) and other similar initiatives that seek to regulate the negative impact of mining in SSA were found to be soft law for the purpose of this research.

While chapter two focused on establishing a definition for soft law within international law, chapter three examined how effective soft law initiatives had been in terms of ensuring compliance by their subscribers.<sup>1070</sup> Once chapter two had established the Global Compact, the EITI and the Equator Principles are international soft law initiatives, chapter three examined how effective they were as regulatory tools. The chapter found that the main weakness of soft law is its voluntary nature, and such weakness is compounded where there are poor monitoring mechanisms as with the Global Compact and its COP process. However, its weakness is also its strength as its voluntariness is what has attracted numerous multinational corporations to subscribe and follow them, these initiatives are expressions of cooperation rather than penal therefore they can generate goodwill and compliance. On the other hand, their voluntary nature means they are easily ignored, therefore for their strengths to be promoted they require support in the form of an enabling environment.

---

<sup>1067</sup> See Chapter Two, section 2.2.1

<sup>1068</sup> John Cerone, 'A Taxonomy of Soft Law: Stipulating a Definition', in Stephanie Lagoutte, Thomas Gammeltoft-Hansen, and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights*, (Oxford University Press 2016) 15-24, 23

<sup>1069</sup> See Chapter Two, section 2.2.1

<sup>1070</sup> See Chapter Three, Sections 3.3.2, 3.4.1, and 3.5.2

**Conclusion Three:** An enabling environment where soft law is concerned is the sum of drivers, tools, human capacities and institutions directed towards achieving the effective implementation of soft law codes by states and the international community. More specifically, an enabling environment is provided by a State where central government or public sector institutions mandate and enforce minimum standard hard regulations, facilitate the adoption and compliance of soft law initiatives through policy, partnering, and endorsing soft law initiatives. An enabling environment is also provided through a strong local governance system within a state and a strong civil society with international linkages within a state, these monitor and ensure compliance with soft law initiatives by their subscribers, thus enabling them. In order to be an enabling state for soft law initiatives that may regulate the negative impact of mining the above features must be present.

Research within the literature about how soft law initiatives can be made more effective in terms of compliance which is their main weakness has been limited. Chapter two was able to develop the concept of an enabling environment, apply it to soft law and identify the features one should expect within a State that seeks to enable soft law through the analysis of literature within the social sciences and humanities field.<sup>1071</sup> The chapter was able to find that the key actors in providing an enabling environment for soft law within a state are the public sector (central government institutions), local government, and civil society. The public sector provide such an environment through mandating regulations that support soft law, facilitating, partnering, and endorsing soft law initiatives. Local government and civil society as those closest to communities monitor and ensure compliance with soft law initiatives, together with soft law they are regulators. Therefore an enabling environment for soft law initiatives is an environment where all of the key actors above are strong enough to engage in the aforementioned activities. The case study on South Africa in Chapter 5 reveals how such an enabling environment for soft law initiatives can be achieved in practice. First, with respect to the South African public sector enabling soft law initiatives through mandating, facilitating, partnering, and endorsing. The public sector created an enabling environment for mining soft law by mandating the Mineral and Petroleum Resources Development Act<sup>1072</sup> which is a strong enabling act that sets the minimum standards required for soft law initiatives to establish legitimacy and regulate mining. The South African public sector has also illustrated how an enabling environment for mining soft law can be achieved in practice

---

<sup>1071</sup> See Chapter Two, section 2.3

<sup>1072</sup> Mineral and Petroleum Resources Development Act No. 28 of 2002, Republic of South Africa

by endorsing and partnering with stakeholders to promote soft law initiatives and guidelines such as those of the South African Mining and Biodiversity Forum.<sup>1073</sup> Secondly, with regards to providing an enabled local governance and civil society system which are critical to enabling soft law initiatives as discussed in Chapters 4 and 5 South Africa has showed this can be achieved in practice by passing legislation where local governments are concerned such as the Local Government Transition Act,<sup>1074</sup> and the Non-Profit Organization Act<sup>1075</sup> with regards to civil society. Such acts enabled these institutions by strengthening them through legal backing and finance thereby allowing them to effectively regulate and monitor the activities of TNCs in order to ensure they are complying with soft law initiatives, thereby enabling soft law initiatives as demonstrated in Chapter 5. The above are some examples of how an enabling environment can be achieved in practice as further revealed in Chapter 5, thus adding to the discussion on what an enabling environment for soft law initiatives entail.

### **6.2.3 Research Question 1.2: Does the existence of an enabling environment for soft law initiatives make it more likely that such initiatives will be complied with by subscribed companies?**

**Conclusion Four:** An enabling environment in the form described above makes soft law initiatives more likely to be complied with by their subscribers.

The analysis of transnational soft law initiatives; the Global Compact, the EITI, and the Equator Principles in chapter three demonstrated that an enabling environment does in fact affect soft law initiatives. With respect to the Global Compact the research found the Global compact will not be able to fill the governance gap in the regulatory system of developing countries in its current form, as there is little monitoring mechanisms and it is easily ignored. However, where there is an enabling environment for it within a State, chapter three found there is adherence to the compact by its subscribers thus addressing the governance gap.<sup>1076</sup> Indeed, George Kell the executive director of the Global Compact Office and global labour unions were of the view that the initiative required an enabling environment and it was the responsibility of State governments to enable the initiative in order to find a solution to

---

<sup>1073</sup> See Chapter 5, Section 5.4.2.1.3

<sup>1074</sup> Republic of South Africa, Local Government Transition Act (LGTA) [1993] (no. 209 of 1993)

<sup>1075</sup> Non-Profit Organization Act [1997] (Act No. 71 of 1997)

<sup>1076</sup> See chapter Three, section 3.3.3

the global governance gap caused by globalization.<sup>1077</sup> The case studies of Rio Tinto and Barrick Gold with regards to their compliance with the Compact further supported the contention that an enabling environment does influence compliance with soft law initiatives as both companies were in compliance with their compact commitments in developed countries with strong enabling environments, whereas in developing countries they were non-compliant as there were weak enabling environments for the Compact.

Chapter three used the EITI to further demonstrate the effect of an enabling environment on soft law initiatives, particularly where nation states enable soft law initiatives through mandating legislation that will enable the initiative. Despite EITI being a stronger initiative than the Global Compact, with stricter rules on monitoring and compliance chapter three found that an enabling environment in the form of mandated legislation specifically for EITI did not enhance compliance with the initiative. For instance, the NEITI which came about as a result of Nigeria passing an act to enable the EITI initiative gave more teeth to the EITI initiative, it defined the rules governing implementation as well as punishments for non-compliance by stakeholders.<sup>1078</sup> However, despite such an enabling Act the NEITI lost its drive after the government of President Olusegun Obasanjo in Nigeria, thereby demonstrating simply providing an enabling environment in the form of legislation is not enough to enable soft law initiatives. There is a need for other components such as an active civil society, and continued public sector support for soft law initiatives to be truly enabled. Furthermore, the Ghanaian EITI initiative suggested that an enabling environment in the form of legislation may not always be key to ensuring compliance with the initiative. This is because despite not having an enabling act the EITI in Ghana was relatively successful and went beyond EITI best practices in some instances. However, the research demonstrated the absence of an enabling environment affected the momentum of the implementation of the EITI work plan in Ghana.<sup>1079</sup> Therefore the chapter found that while an enabling Act on its own will not be able to ensure compliance with soft law initiatives it does ensure the longevity of an initiative on its own, as demonstrated by the fact that Ghana is actually in the process of passing an EITI enabling Act to boost the initiative. An enabling act for soft law also ensures the initiative has more teeth thus making it more likely to be successful, but in order for an initiative to be truly successful there is a need for other enabling facets such as public sector support, as this

---

<sup>1077</sup> Georg Kell, 'The Global Compact Selected Experiences and Reflections' (2005) *Journal of Business Ethics* 59: 69-79

<sup>1078</sup> See chapter Three, section 3.4.1

<sup>1079</sup> See chapter Three, section 3.4.3

chapter found that government support and sheer political will played a key role in the success of EITI in both countries.

Chapter three also found that despite the very stringent provisions found in some soft law initiatives such as the Equator Principles an enabling environment particularly in the form of civil society is necessary in enabling soft law initiatives. The chapter found that civil society organizations such as BankTrak with respect to the Equator Principles have played key roles in ensuring those subscribed to the principles comply with them and maintain their commitments, thus enabling the initiative to be effective.<sup>1080</sup> The chapter further demonstrated that civil society undertake an important role of enabling compliance with soft law initiatives through their monitoring activities that has led many corporations to conduct business in a way that complies with their commitments to soft law initiatives. This therefore led this research to conclude that along with public sector support an enabled civil society is perhaps the most important feature necessary in order to enable soft law initiatives.

#### **6.2.4 Research Question 1.3: Is there a governance gap within the mining sector in SSA as a result of weak mining regulations or the enforcement of such regulation?**

**Conclusion Five:** There is a governance gap within the mining sector in SSA as a result of the weak enforcement of mining regulations by SSA countries. However, where countries prioritize sustainable development and environmental protection as opposed to attracting foreign direct investment the governance gap is limited.

Using the Nigerian mining sector as its case study, chapter four analysed Nigeria's mining regulatory system by examining the Nigerian Environmental Impact Assessment (EIA) Decree, 1992, the Nigerian Minerals and Mining Decree 1999, and the Nigerian Minerals and Mining Act 2007.<sup>1081</sup> An analysis of the EIA Decree revealed despite having provisions that promote environmental protection there is a lack of implementing mandatory requirements of the Act in Nigeria, projects are routinely approved without fulfilling the necessary mandatory requirements.<sup>1082</sup> The chapter argued the failure of implementing Nigeria's main environmental legislation may be attributed to the fact that the Act was too ambitious for a developing country such as Nigeria which simply does not have the capacity to implement it,

---

<sup>1080</sup> See Chapter Three, section 3.5.3

<sup>1081</sup> See Chapter Four, sections 4.3.1, 4.3.2, 4.3.3

<sup>1082</sup> See Chapter Four, section 4.3.1

having been copied from the developed world. In order to avoid capacity issues that lead to a governance gap the thesis suggests developing countries avoid copying laws from the developed world and instead tailor laws according to their capacity. With respect to the 1999 Mining Decree the chapter found it to be a weak approach to environmental regulation as it simply conferred discretionary powers to the minister of mines and other government officials to regulate environmental issues.<sup>1083</sup>

Chapter four further established that while the 2007 Minerals and Mining Act, Nigeria's current mining law is a very strong mining regulation with numerous provisions regulating the impact of mining to the environment and society just like the EIA Decree 1999, there are serious enforcement challenges and clarity issues.<sup>1084</sup> Indeed, the current Minister of Mines and Steel is quoted as saying:

we are still not doing well with effective monitoring and enforcement of the law. Mining and Minerals Act is one of the best laws. But, having a good law is one thing. Ensuring that it is strictly adhered to is another.<sup>1085</sup>

Therefore in analysing the aforementioned regulations and establishing the above findings, in accordance with authors such as Schwartz and Usman the chapter concluded there was indeed a governance gap within the African extractive industries, as Africa's largest economy was finding it difficult to enforce and monitor its own regulations, which may be due to capacity issues but this will be discussed further below.<sup>1086</sup>

On the other hand, chapter five which uses South Africa as a case study of mining in SSA discovered that the governance gap within the extractive sector in SSA is limited in some countries such as South Africa.<sup>1087</sup> A review of the South African mining regulatory framework through the analysis of the 1996 Constitution of the Republic of South Africa, The National Environmental Management Act (NEMA) 1998 and the Minerals and Petroleum Development Act (MPRDA), 2002 demonstrated strong governance in South

---

<sup>1083</sup> See Chapter Four, section 4.3.2

<sup>1084</sup> See Chapter four, section 4.3.3

<sup>1085</sup> Bassey Udo, 'How Corrupt Government Officials Helped Ruin Nigeria's Mining Sector – Minister' *Premium Times* (Abuja, 15<sup>th</sup> October 2016) available online at <http://www.premiumtimesng.com/news/headlines/212822-interview-corrupt-govt-officials-helped-destroy-nigerias-mining-sector-minister.html> accessed 15<sup>th</sup> October 2016

<sup>1086</sup> See Priscilla Schwartz, 'Corporate activities and environmental justice: perspectives on Sierra Leone's mining', in Jonas Ebbesson and Phoebe Okowa (eds), *Environmental Law and Justice in Context* (Cambridge University Press 2009), N.L Usman, 'Environmental Regulation in the Nigerian Mining Industry: Past, Present, and Future', (2001), 19:3, *Journal of Energy & Natural Resources Law*, 230-243, 241, John M. Conley, and Cynthia A. Williams, 'Global Banks as Global Sustainability Regulators?: The Equator Principles' (2011) Vol. 33, No. 4 *Law & Policy*, 543-574, 565

<sup>1087</sup> See Chapter Five, section 5.3



Africa.<sup>1088</sup> While there was evidence of non-enforcement of laws, incorrect applications of the law, and lenient enforcement of the law by South African Courts and public sector, this was not widely the case, thereby demonstrating the governance gap in South Africa is limited.

This led the research to question why this was the case in South Africa and not in other countries such as Nigeria. While some may argue the failure to enforce laws protecting the environment may be down to the weak capacity of SSA, as demonstrated by the fact Nigeria found it difficult to implement both the 1992 EIA Decree and the 2007 Mining Act. This research concludes that this cannot be the primary reason as despite being a developing country in SSA South Africa has been capable of implementing and enforcing most of its laws. Therefore as Africa's largest economy Nigeria should be capable of implementing and enforcing laws, as if South Africa which is a similar size to Nigeria in terms of economy has the capacity to implement and enforce laws, so can Nigeria where there is a will to do so. This can be applied to other more advanced countries in SSA such as Ghana, where if there is government will to implement and enforce laws capacity will not be an issue as their economies are strong enough to withstand any capacity issues.

Furthermore, another argument that may likely be put forward to explain South Africa's success in regulating its mining sector is that South Africa is the most advanced mining nation in SSA and should therefore be expected to be experienced in mitigating the negative impact of mining within South Africa. While this is indeed a strong argument it must be noted that while Nigeria does not have much experience in the solid minerals mining sector it is very experienced in the extractives industry having been heavily involved in oil and gas exploitation. Nonetheless, there are continued environmental degradation cases littered all over the Niger Delta Region, as the Ogoni land case illustrates, leaving one to conclude that experience is not the primary reason why South Africa regulates its extractive industries better than Nigeria and other SSA countries.

This research concludes that the primary reason South Africa has been more successful in protecting the environment and society from the negative consequences of mining is because it prioritizes environmental protection and sustainable development in the development of its mining sector. The Mineral and Petroleum Development Act (MPRDA), 2002 was passed to

---

<sup>1088</sup> See Chapter Five, section 5.3.1,5.3.2,5.3.3

ensure sustainable development and equality within its mining sector.<sup>1089</sup> This is also reflected in its constitution that provides the right of a healthy environment.<sup>1090</sup> Therefore in all matters concerning the exploitation of mineral resources South Africa always seeks to ensure this primary right is protected, thereby ensuring better regulation of the environment and society in general. Whereas chapter four found that both the 1999 Mining Decree and the 2007 Mining Act were mainly passed to develop the Nigerian mining sector by attracting foreign direct investment.<sup>1091</sup> Therefore Nigeria was more concerned with attracting investments rather than protecting the environment and ensuring sustainable development as is the case in South Africa. Indeed, Nigeria has no constitutional provision protecting the environment despite years of environmental devastation as a result of the exploitation of oil and gas. In such an environment sustainable development and environmental protection becomes secondary and will be trumped by matters that favour attracting foreign investment such as a relaxed regulatory system, which then opens a governance gap within a sector, in this case Nigeria's mining sector. This leaves this research to conclude that there is a governance gap in SSA countries such as Nigeria which especially prioritize foreign direct investment as opposed to environmental protection and sustainable development. However, where SSA countries prioritize environmental protection and sustainable development just as in South Africa, the governance gap is limited in SSA.

#### **6.2.5 Research Question 1.4: To what extent do current policy and legal regimes in Nigeria and South Africa provide an enabling environment for soft law initiatives and what implications does it have on the application of soft law initiatives within SSA mining?**

**Conclusion 6:** Current policy and legal regimes in South Africa are set up to enable soft law initiatives through public sector support (mandating, facilitating, partnering, and endorsing), an effective local governance system and a legislative and financially enabled civil society. In contrast the current policy and legal regime in Nigeria does not fully provide an enabling environment for soft law initiatives as described in chapter two.

---

<sup>1089</sup> See Chapter Five, section 5.3.3

<sup>1090</sup> See Chapter Five, section 5.3.1

<sup>1091</sup> See Chapter Four, section 4.3.2,4.3.3

Where a country such as Nigeria which is advanced in terms of economy, political stability, and capacity, currently does not fully provide an enabling environment for soft law initiatives, it is hard to argue that poorer SSA countries are capable of providing an enabling environment for soft law initiatives. This research therefore concludes that soft law is less likely to be an effective regulatory tool in SSA mining, as countries are unlikely to have an enabling environment that will enhance compliance with mining soft law initiatives.

Chapter four found that although Nigeria provided an enabling environment in the form of public sector support through mandating, facilitating, partnering, and endorsing soft law initiatives, they had a weak civil society and local governance system.<sup>1092</sup> As noted earlier civil society in particular are very important in ensuring compliance with soft law initiatives as they monitor those subscribed to initiatives and ensure they are compliant. In the mining sector together with soft law they are indeed considered regulators, therefore where they are absent or weak an enabling environment for soft law cannot be said to be present, and this was the case in Nigeria as a whole. Additionally, the case study also revealed Nigeria's local governance system was too weak to monitor compliance with soft law or even hard law by companies operating in remote rural areas with uneducated masses under their purview. In contrast Chapter five's case study on South Africa, provided a model illustration of what an enabling environment for soft law initiatives should look like.<sup>1093</sup> South Africa's public sector supported soft law initiatives, particularly through strong mandated regulations that are enforced, the Local Government system in South Africa is fully enabled through legislation and has the financial and human capacity to ensure regulatory compliance with either soft law or hard law. Lastly, South Africa's civil society is possibly the most vibrant in Africa and will continue in such direction as civil society is enabled through legislation and financing in South Africa, which is unlike most African countries such as Nigeria. Therefore despite having a limited governance gap South Africa has an enabling environment for soft law to fill any gap within its mining regulatory system should the need arise.

While South Africa indeed does provide an enabling environment for soft law initiatives it is difficult to envisage a repetition of such an environment in SSA because very few countries possess the resources and capacity to provide effective legislation, a financially enabled civil society and local governance system as those found in South Africa, as demonstrated by the Nigerian case study. While a case could be put forward that Nigeria should have the potential

---

<sup>1092</sup> See Chapter Four, section 4.4.2

<sup>1093</sup> See Chapter Five, section 5.4.2

and resources to provide an enabling environment similar to that of South Africa, the political backgrounds of the two countries seemed to have shaped their approach to regulation. South Africa's bitter experience with apartheid undoubtedly affected its clamour for ensuring equity, justice, and co-operation as a form of governance, which led the State to collaborate with civil society and enable them so that initiatives such as the Broad Based Black Economic Empowerment Policy which seeks to redress past injustices in South Africa can be developed.<sup>1094</sup> Furthermore, South Africa's history of inequality led to the development of a constitution which promotes equality and provides a liberal environment for the empowerment of all organizations and institutions, which then provides an environment where institutions such as civil society who were key in the apartheid struggle can continue to be enabled. With such experience and resources South Africa therefore became an enabling State. In contrast Nigeria's current political dispensation is a product of the military, even the current Nigerian Constitution<sup>1095</sup> was drafted by the military which was shrouded in secrecy and corruption, therefore the Nigerian state is not accustomed to cooperating with the wider society, particularly civil society, and does very little to enable them through financing initiatives. Furthermore, the lack of experience and education with respect to the workings of soft law initiatives in most SSA including Nigeria makes it difficult for them to provide an enabling environment for such initiatives. Therefore with the exception of South Africa it will be difficult to find an enabling environment for soft law initiatives in SSA countries, as the case study on Nigeria demonstrated.

### **6.3 Suggestions and Recommendations**

This research expanded the discussion on the rise of transnational soft law initiatives and the possibility that they may become the fourth generation of mining codes that solve the governance gap in Africa. In expanding this discussion this research's key argument is in order for soft law initiatives to become the fourth generation of mining codes that solve the governance gap in the mining industry in SSA an enabling environment for the implementation of such soft law codes may be required in SSA countries.

---

<sup>1094</sup> Department of Trade and Industry, Codes of Good Practice on Broad-Based Black Economic Empowerment, Notice 997 of 2012

<sup>1095</sup> Constitution of the Federal Republic of Nigeria, 1999

Based on the research findings it is established that an enabling environment is indeed necessary for soft law initiatives to be complied with and thus become more likely to regulate the mining industry in SSA. However, it is this research's conclusion that having analysed the two most advanced nations in SSA and found Nigeria lacking in the provision of an enabling environment it is unlikely many poorer countries within SSA would have an enabling environment for soft law mining initiatives. Therefore soft law mining initiatives cannot be touted as the fourth generation of mining codes in SSA that will effectively fill the governance gap, taking into account they may be lacking an enabling environment in many more SSA countries.

This research recommends that SSA should focus on building an enabling environment for soft law initiatives, this is because soft law initiatives seem to be a growing trend with corporations not usually regulated by international law continually subscribing to them. Soft law initiatives such as the Equator Principles and EITI also have very high standards, and are in some cases more stringent than mining codes found in SSA, therefore they can be very effective where SSA provides them with an enabling environment. Furthermore, where SSA countries are reluctant to stringently regulate their extractive industries sector due to the fear of losing investment, as they might be perceived as hostile to FDI, enabling soft law initiatives through support and minimum standards can help them maintain the perception of investment friendly destinations, and at the same time effectively regulating their industry through soft law. This is because as noted in this thesis soft law is a cooperative form of regulation which can be effective where it is enabled by the State.

This thesis further recommends that SSA should work towards better enforcement of their mining regulations. This is because while many countries such as Nigeria have strong regulations on paper they fail to enforce them. Such better enforcement can be done by prioritizing sustainable development and environmental protection within a state as the South African case study demonstrated. SSA countries such as Nigeria should be encouraged to incorporate the right to a healthy environment and sustainable development principles within their constitution and key legislation governing their extractive industries. They must be advised against prioritizing the need to attract FDI to the detriment of the environment and communities. South Africa demonstrates that stringent regulations do not necessarily discourage investment.

Indeed, while soft law where they are enabled can be effective in filling the governance gap within the mining sector in SSA, they must not be seen as alternatives to hard law within the mining industry. In fact soft law initiatives are more effective where there is a strong system of governance as South Africa has demonstrated. In other words they are more effective where they are complimented by effective hard law, then together they can fill any governance gap within a sector.

In order to make the soft law initiatives continually developing within the extractive industry in SSA more effective, SSA countries must also make a conscious effort of educating government sectors and society about soft law and how they work. This can be enhanced by enabling civil society within Africa, taking the same approach as South Africa, by passing legislation that empowers them and financing them.

This research found civil society to be extremely important in the effective enforcement of regulations, particularly soft law initiatives, and therefore recommends SSA countries strongly enable them as a watchdog that monitors the activities of government and corporations within the extractive industries. This thesis also recommends further research on the impact of civil society in monitoring and ensuring compliance with regulations, as they seem to be growing in influence with international NGOs becoming major players on the International plane. An analysis on how they can be even more effective is necessary.

This thesis also recommends that more empirical research regarding the environmental impact of transnational soft law initiatives should be conducted as this is currently a gap within the literature also noted by other authors.

# Bibliography

## Books

Bickel A, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (first published 1962, Yale University Press 1986) 21

Brummer C, *Soft Law and the Global Financial System*, (Cambridge University Press 2012)

Burger D, *South Africa Yearbook 2005/06*, ( 13<sup>th</sup> Edn, GCIS 2006)

Campbell B, *Regulating Mining in Africa for Who's Benefit*, (Nordic Africa Institute 2004)

Campbell B, *Mining in Africa: Regulation and Development*, (First Published 2009 Pluto Press 2009)

Cutler CA, Haufler V, Porter T, *Private Authority and International Affairs* (State University of New York Press, Albany, NY 1999)

Ebbesson J and Okowa P, *Environmental Law and Justice in Context* (Cambridge University Press 2009)

Follesdale A and Pogge T, *Real World Justice: Grounds, principles, human rights, and social institutions*,(Springer 2005)

Garner B, *Black's Law Dictionary 10<sup>th</sup> Edition* (Thomson West 2014)

Haufler V, *A Public Role for the Private Sector: Industry Self-Regulation in a Global Economy* (Carnegie Endowment for International Peace, Washington, DC 2001)

Keohane R and Nye J, *Power and Interdependence*, (Boston: Little Brown 1977)

Lagoutte S, Gammeltoft-Hansen T, and Cerone J, *Tracing the Roles of Soft Law in Human Rights*, (Oxford University Press 2016)

Mawhood P, *Local Government in the Third World*, (John Wiley and Sons 1983)

McConville M and Chui W H, *Research Methods for Law* (Edinburgh University Press 2007)

Morth U, *Soft Law in Governance and Regulation*, (Edward Elgar Publishing Limited 2004)

Nasser S H, *Sources and Norms of International Law*, (Berlin: Galda and Wilch Verlag, 2008)

Rasche A & Kell G, *The United Nations Global Compact: Achievements, trends, and challenges* (Cambridge University Press 2010)

Shelton D, *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal system*, (First Published 2000 OUP, 2003)

Stopford J M, Strange S and Henley J S, *Rival States, Rival Firms: Competition for World Market Shares*, (Cambridge: Cambridge University Press, 2001)

Steytler N, *The Place and Role of Local Governments in Federal Systems* (Konrad-Adenauer-Stiftung 2005)

Szablowski D, *Transnational law and Local Struggles: Mining Communities and the World Bank* (Hart Publishing 2007)

Van Hoecke M, *Methodologies of Legal Research* (Hart Publishing 2011)

Vaughan O, *Indigenous Political structures and Governance in Nigeria* (Book Craft Ltd 2004)

Vogel D, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Brookings Institution Press, Washington, DC 2005)

### **Journals/Articles**

Aaronson S A, 'Limited Partnership: Business, Government, Civil Society, and the Public in the Extractive Industries Transparency Initiative (EITI)' (2011) 31 Public Admin Dev 50.

Abbott K and Snidal D, 'Hard and Soft Law in International Governance', (2000) 54(3) International Organization, 421-456.



Adabanija M A and Oladunjoye M A, 'Geoenvironmental assessment of abandoned mines and quarries in South-Western Nigeria', (2014) 145 *Journal of Geochemical Exploration*, 148-168.

Adejumobi S, 'The civil society in conflict management and peace building in Africa', (2001) 7 (1) *Development Policy Management Bulletin*, 19-21.

Adimazoya T N, 'Staying Ahead of the Curve: Meeting Ghana's Commitment to Good Governance in the Mining Sector' (2013) 31 *J. Energy & Nat. Resources L.*

Ahrne G and Brunsson N, 'Soft Regulation from an Organizational Perspective', in Ulrika Morth (ed), *Soft Law in Governance and Regulation*, (Edward Elgar Publishing Limited 2004) 171.

Aigbedion I and Iyayi S E, 'Environmental effect of Mineral Exploitation in Nigeria', (2007) Vol. 2 (2) *International Journal of Physical Sciences*, 033-038.

Akabzaa T, 'Mining Legislation and Net Returns from Mining in Ghana', in Bonnie Campbell (ed), *Regulating Mining in Africa for Who's Benefit*, (Nordic Africa Institute 2004)

Albareda L, Lozano J M, Ysa T, in 'Public Policies on Corporate Social Responsibility: The Role of Governments in Europe' (2007) 74 *Journal of Business Ethics* 391-407.

Alstine J V, 'Transparency in resource governance: the pitfalls and potentials of "new oil" in Sub-Saharan Africa' (2014) 14 (1) *Global Environmental Politics*, 20-39.

Andersen K , 'Mining, Privatization and the Environment' (1995) vol. 11 (3) *Journal of Mineral Policy, Business and Environment*, Raw Materials Report, published by Raw Materials Group, Stockholm.

Andrew J, 'The equator principles, project finance and the challenge of social and environmental responsibility', (2007) vol 1(1) *Social and Environmental Accounting*, available at <http://ro.uow.edu.au/commpapers/365/> accessed 12<sup>th</sup> March 2016

Arevalo J A and Fallon F T, 'Assessing corporate responsibility as a contribution to global governance: the case of the UN Global Compact', (2008) Vol. 8(4) *Corporate Governance: The international journal of business in society*, 456 -470.

Arogunjo A M, Hollriegl V, Giussani A, Leopold K, Gerstmann U, Veronese I, Oeh U, 'Uranium and thorium in soils, mineral sands, water and food samples in a tin mining area in Nigeria with elevated activity' (2009) 100 *Journal of Environmental Radioactivity*, 232-240.

Asaju K, Arome S, and Anyio S F, 'The rising rate of unemployment in Nigeria: The socio-economic and political implications' (2014) vol. 3(2) *Global Business and Economics Research Journal* 12-31.

Baller M and Pantilat L J, 'Defenders of Appalachia, 'The Campaign to Eliminate Mountaintop Removal Coal Mining and the Role of Public Justice' (2007) vol 37 *Envtl. L.*, 629-646.

Barker A and Wood C, 'An Evaluation of EIA system performance in eight EU countries' (1999) vol 19, *Environmental Impact Assessment Review*, 387-404.

Beall J, 'Decentralizing Government and Decentering Gender: Lessons from Local Government Reform in South Africa' (2005) 33(2) *Politics and Society*, 253-276.

Berliner D and Prakash A, 'From norms to programs: The United Nations Global Compact and Global Governance [2012], *Regulation and Governance*, 1-18.

Bernstein S and Cashore B, 'Can non-state global governance be legitimate? An analytical framework' (2007) 1(4) *Regulation & Governance*, 347-371.

Binns T and Nel E, 'Devolving Development: Integrated Development Planning and Developmental Local Government in Post-apartheid South Africa' (2002) vol 36(8) *Regional Studies*, 921-932.

Bouzarovski S, and Clark J, 'Public participation in EIA: the case of West African Gas Pipeline and Tank Farm projects in Nigeria' (2013), 31(3) *Impact Assessment and Project Appraisal*, 226-231.

Bryane M, 'Corporate Social Responsibility in International Development: An Overview and Critique', (2003), 10 *Corporate Social Responsibility and Environmental Management*, 115-128.

Campbell B, "Environmental Policies, Mining and Structural Adjustment in Guinea", (1998) Vol 13(1)1 *Journal of Mineral Policy, Business and Environment. Raw Materials Report*, Published by Raw Materials Group, Stockholm, 34-44.

Campbell B, 'Guinea: Deregulation and Its Consequences for Environmental Protection', in Bonnie Campbell (ed), *Regulating Mining in Africa for Who's Benefit*, (Nordic Africa Institute 2004)

Campbell B, 'Revisiting the Reform Process of African Mining Regimes' (2010) Vol 30 *Canadian Journal of Development Studies*, 197-217.

Canel E, Idemudia U, Liisa L. North, 'Rethinking Extractive Industry: Regulation, Dispossession, and Emerging Claims' (2010) 30:1-2, *Canadian Journal of Development Studies*, 5-25.

Carter L.E and Burge M, 'Agriculture and Artisanal Gold Mining in Sierra Leone: Alternatives or Complements?' (2011) 23 *Journal of International Development*, 1080-1099.

Cernic J L, 'Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises' (2008), Vol. 4 (1) *Hanse Law Review*, 71

Cerone J, 'A Taxonomy of Soft Law: Stipulating a Definition', in Stephanie Lagoutte, Thomas Gammeltoft-Hansen, and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights*, (Oxford University Press 2016) 15-24.

Cetindamar D and Husoy K, 'Corporate Social Responsibility Practices and Environmental Responsible Behavior: The Case of The United Nations Global Compact' (2007) 76 Journal of Business Ethics 163-176.

Chaanda M.S, Obaje N.G, Moumouni A, Goki N.G, and Lar U.A, ' Environmental Impact of Artisanal Mining of Barytes in Azara Area, Middle Benue trough, Nigeria' (2010) 4(1) Journal of Earth Sciences, 38-42.

Charney J L, 'Compliance with International Soft Law', in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms In The International Legal system*, (First Published 2000 OUP, 2003) 94.

Chuckwuma Sr C, 'Environmental impact assessment, land degradation and remediation in Nigeria: current problems and implications for future global change in agricultural and mining areas', (2011) International Journal of Sustainable Development and World Ecology.

Churchyard G J, Ehrlich R, TewaterNaude J M, Pemba L, Dekker K, Vermeijs M, White N, and Myers J, ' Silicosis prevalence and exposure-response in South African goldminers' (2004) 61 Occup Environ Med, 811-816.

Conley J M, and Williams C A, 'Global Banks as Global Sustainability Regulators?: The Equator Principles' (2011) Vol. 33, No. 4 Law & Policy, 543-574.

Coumans C, 'Alternative Accountability Mechanisms and Mining: The Problems of Effective Impunity, Human Rights, and Agency' (2011) 30:1-2, Canadian Journal of Development Studies, 27-48.

Cronje F and Chenga C, 'Sustainable Social development in the South African Mining Sector' (2009) 26(3) Dev. South. Afr, 413-427.

Deva S, 'Global Compact: A Critique of the UN's "Public-Private" Partnership for Promoting Corporate Citizenship' (2006-2007) 34 Syracuse J. Int'L. & Com 107.

Dlamini S.G, Mathuthu M.M, Tshivhase V.M, 'Radionuclides and toxic elements transfer from the princess dump to water in Roodepoort, South Africa' (2016) 153 *Journal of environmental radioactivity*, 201-205.

Dupuy K E, 'Community Development requirements in mining laws' [2014] *The Extractive Industries and Society* 1, 200-215.

Edwards D P, Sloan S, Weng L, Dirks P, Sayer J, Laurance W F, 'Mining and the African Environment' (2013) Vol 7 (3), *Conservation Letters*, 302-311.

Ellis J, 'Shades of Grey: Soft Law and the Validity of Public International Law', (2012) Vol 25 *Leiden Journal of International Law*, 313-334.

Eneh O C, 'Managing Nigeria's Environment: The Unresolved Issues' (2011) 4(3) *Journal of Environmental Science and Technology*, 250-263.

Ezeaku P I, 'Evaluating the influence of open cast mining of solid minerals on soil, land use and livelihood systems in selected areas of Nasarawa State, North-Central Nigeria' (2012) vol.4(3) *Journal of Ecology and Natural Environment*, 62-70.

Fell G, 'The Tin Mining Industry in Nigeria', (1939) Vol. 38, No. 151, *Journal of the Royal African Society*, 246 – 258.

Feris L, 'Constitutional Environmental Rights: An Under-Utilised Resource' (2008) 24 *South African Journal on Human Rights*, 49.

Fig D, 'Manufacturing amnesia: Corporate Social Responsibility in South Africa', (2005), Vol 81(3), *International Affairs*, 599-617.

Fuller L L, and Winston K I, 'The Forms and Limits of Adjudication', (1978) Vol 92 No. 2 *Harvard Law Review Association*, 353-409.

Gboyega A, "Local Government reform in Nigeria", in Phillip Mawhood (ed) *Local Government in the Third World*, (John Wiley and Sons 1983)

Gilbert D U, 'The United Nations Global Compact as a network of networks, In A, Rasche & G. Kell (Eds.), *The United Nations Global Compact: Achievements, trends, and challenges*' (340-352) (Cambridge University Press 2010)

Glazewski J and Witbooi E, 'Environmental Law: International Law Developments' (2002) *Ann. Surv. S. African L.* 550 – 572.

Grant J A and Taylor I, 'Global governance and Conflict diamonds the Kimberley Process and the quest for clean gems', (2004) Vol 93, No.375, *The Commonwealth Journal of International Affairs*, 385-401.

Habib A, 'State-Civil society Relations in Post-Apartheid South Africa', (2005) Vol 72, No 3, *Social Research*, 671-692.

Habib A, and Taylor R, 'South Africa: Anti-Apartheid NGOs in Transition' (1999) Vol. 10 (1) *International Journal of Voluntary and Non-Profit Organizations*, 73-82.

Hamann R, Acutt N, 'How should Civil Society (and the Government) Respond to “Corporate Social Responsibility?” A Critique of Business Motivations and the Potential for Partnerships' (2003) 20 *Development Southern Africa*, 255–270.

Hamann R, 'Mining companies' role in sustainable development: The 'why' and 'how' of corporate social responsibility from a business perspective' (2003) 20(2) *Development Southern Africa*, 237-254.

Hamann R, Kapelus P, Sonnenberg D, Mackenzie A, and Hollesen P, “Local Governance as a Complex System” (2005) No. 18, *Journal of Corporate Citizenship*, 61-73.

Hansen R C, 'The impact of the equator principles on lender liability: risks of responsible lending' (2006) available at

<[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=948228](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=948228)> accessed 10<sup>th</sup> March 2016

Hardenbrook A, 'The Equator Principles: The Private Financial Sector's Attempt at Environmental Responsibility' (2007) 40 *Vanderbilt Journal of Transnational Law*, 197-232.

Hatcher P, 'Mali: Rewriting the Mining Code or Redefining the Role of the State?', in Bonnie Campbell (ed), *Regulating Mining in Africa for Who's Benefit*, (Nordic Africa Institute 2004)

Haufler V, 'Disclosure as Governance: The Extractive Industries Transparency Initiative and Resource Management in the Developing World' (2010) 10(3) *Global Environmental Politics*, 53.

Husseini A, 'The current status of environmental impact assessment in Nigeria (EIA): challenges and prospects', (2015) 1(1) HSE, 28-37.

Ibeanu I.G.E, 'Tin Mining and processing in Nigeria: cause for concern?' (2003) 64, *Journal of Environmental Radioactivity*, 59-66.

Idemudia U and Ite U E, 'Corporate-Community Relations in Nigeria's Oil Industry: Challenges and Imperatives' (2006), 13 *Corporate Social Responsibility and Environmental Management*, 194-206.

Idemudia U, 'Oil Extraction and Poverty Reduction in the Niger Delta: A critical examination of Partnership Initiatives' (2009) Vol 90 (1) *Journal of Business Ethics*, 91-116,

Ikelegbe A, 'Civil Society, oil and conflict in the Niger Delta region of Nigeria: Ramifications of Civil Society for a Regional Resource Struggle' (2001) 39(3) *Journal of Modern African Studies*, 437-469.

Ikelegbe A.O, 'The perverse manifestation of civil society: evidence from Nigeria' (2001) 39 (1) *Journal of Modern African Studies*, 1-24.

Ikelegbe A, 'Engendering civil society: oil, women groups and resource conflicts in the Niger Delta region of Nigeria', (2005) 43 (2) *Journal of Modern African Studies*, 241-270.

Isa MK , 'Nigerian Local Government System and Governance: Lessons, Prospects and Challenges for Post 2015 Development Goals', in Eris Schoburgh, John Martin, and Sonia

Gatchair (eds) *Developmental Local Governance: A Critical Discourse in Alternative Development* (Palgrave Macmillan 2016)

Ite U E, 'Multinationals and Corporate Social Responsibility in Developing Countries A Case Study of Nigeria'(2004) 11(1) Corporate Social Responsibility and Environmental Management, 1-11.

Kell G and Levin D, 'The Global Compact network: An historic experiment in learning and action. (2003) 108(2), Business and Society Review, 151-181.

Kell G, 'The Global Compact: Selected experiences and reflections' (2005) 59(1) Journal of Business Ethics, 69-79.

Kell G, '12 Years Later: Reflections on the Growth of the UN Global Compact' (2012) 52(1) Business & Society 31-52.

Kidd M, 'Of Gas Pipelines and Sour Judicial Air: Merebank Environmental Action Committee v Executive Member of KwaZulu-Natal council for Agricultural and Environmental Affairs'(2001) Vol 8 Issue 1, South African Journal of environmental Law and Policy, 135-138.

Kidd M, 'Greening the Judiciary', (2006) Vol 09 No. 3 Potchefstroom Electronic Law Journal, 74.

Kidd M, 'Public Interest Environmental Litigation: Recent Cases Raise Possible Obstacles' (2010) Vol 13 No. 5 Potchefstroom Electronic Law Journal, 28.

Knudsen J S, 'Company Delisting from the UN Global Compact: Limited Business Demand or Domestic Governance Failure?' (2011) 103 Journal of Business Ethics, 331-349.

Konne B R, 'Inadequate Monitoring and Enforcement in the Nigerian Oil Industry: The Case of Shell and Ogoniland' (2014) Vol 47 Cornell International Law Journal



Kotze LJ, 'The Constitutional Court's Contribution to Sustainable Development in South Africa' (2003) Vol 6 No. 2 Potchefstroom Electronic Law Journal.

Kotze LJ, 'The Judiciary, the Environmental Right and the Quest for Sustainability in South Africa: A Critical reflection', (2007) Vol 16 (3) Review of European, Comparative and International Environmental Law (RECIEL) 298-311.

Kuper A, 'Redistributing responsibilities – The UN Global Compact with corporations' in Andreas Follesdale and Thomas Pogge (eds), *Real World Justice: Grounds, principles, human rights, and social institutions*, 358-80 (Springer 2005), 366.

Lawal A M, Bouzarovski S, and Clark J, 'Public participation in EIA: the case of West African Gas Pipeline and Tank Farm projects in Nigeria' (2013), 31 (3) Impact Assessment and Project Appraisal, 226-231.

Lazarus S, 'The Equator Principles at Ten Years' (2014) Vol 5 (3) Transnational Legal Theory, 417-441.

Lipsztein J.L, Dias da Cunha, Azeredo K.M, Juliao A.M.G, Santos L, Melo D.R. M, Simoes Filho F.F.L, 'Exposure of workers in mineral processing industries in Brazil' (2001) 54 Journal of Environmental Radioactivity, 189-199.

Lund-Thomas P, 'Corporate Accountability in South Africa: The Role of Community Mobilizing in Environmental Governance' (2005) 81(3) International Affairs, 619-633.

Maconachie R and Binns T, 'Farmer miners' or 'mining farmers'? Diamond mining and rural development in post-conflict Sierra Leone' (2007) 23 Journal of Rural Studies, 367-380.

Macve R and Chen X, 'The "equator principles": a success for voluntary codes?' (2010), Vol. 23 (7) Accounting, Auditing & Accountability Journal, 890-919.

Makumbe J M, 'Is There a Civil Society in Africa?' (1998) Vol. 74 No 2, International Affairs, 305-317.

Manteaw S, 'Ghana's EITI: Lessons From Mining and Policy Implications for Oil' (2010), *The Ghana Policy Journal*, 96 – 109.

Marais L and Nel E, 'The dangers of growing on gold: Lessons for mine downscaling from the Free State Goldfields, South Africa', (2016) Vol. 31 (1-2) *Local Economy*, 282-298.

Mate K, 'Communities, Civil Society Organizations and the Management of Mineral Wealth'(2002)No. 16 *Mining, Minerals and Sustainable Development*, available at <<http://pubs.iied.org/pdfs/G00872.pdf>> accessed on 19<sup>th</sup> June 2016

Matten D, Moon J, 'Implicit and Explicit CSR: A Conceptual Framework for A Comparative Understanding of Corporate Social Responsibility' (2008) Vol.33, No.2, *Academy of Management Review*, 404-424.

Mattli W, Büthe T 'Setting International Standards: Technological Rationality or Primacy of Power?'(2003) 56 *World Politics*, 1–42.

McConville M and Chui W H, 'Introduction and Overview' in Mike McConville and Wing Hong Chui (eds) *Research Methods for Law* (Edinburgh University Press 2007)

Mhlongo S E and Amponsah-Dacosta F, 'A review of problems and solutions of abandoned mines in South Africa' (2015) *International Journal of Mining, Reclamation and Environment*.

Mnwana S, 'Mining and "Community" struggles on the platinum belt: A case of Sefikile village in the North West Province, South Africa' (2015), Vol 2 *The Extractive Industries and Society*, 500-508.

Nason R W, 'Structuring the Global Marketplace: The Impact of the United Nations Global Compact' (2008) Vol 28, No.4 *Journal of Macromarketing*, 418-425.

Nelson G, Girdler-Brown B, Ndlovu N, and Murray J, 'Three Decades of Silicosis: disease trends at autopsy in South African gold miners' (2010) 118 (3) *Environ Health Perspect*, 421-426.

Nweke K, 'The Role of Traditional Institutions of Governance in Managing Social Conflicts in Nigeria's Oil-Rich Niger Delta Communities: Imperatives of Peace-Building Process in the Post-Amnesty Era' (2012) Vol. 5 No. 2 British Journal of Arts and Social Sciences, 206

Nwete B, 'Corporate Social Responsibility and Transparency in the Development of Energy and Mining Projects in Emerging Markets; is Soft Law the Answer?' (2007)8 German L.J 311.

O'Connell M E, 'The Role of Soft Law in a Global Order', in Dinah Shelton, *Commitment and Compliance: The Role of Non-Binding Norms In The International Legal system*, (First Published 2000 OUP, 2003) 102.

Odiase-Alegimenlen O A, 'New Regime for Solid Mineral Development in Nigeria' (2001), 19:4, Journal of Energy and Natural Resources Law, 344-363.

O'Faicheallaigh Ciaran, 'Community development agreements in the mining industry: an emerging global phenomenon' (2013) 44:2 Community Development, 222-238.

Okoli A C, Uhembe C A, 'Crisis of Natural Resource Governance in Nigeria's Extractive Industry: Examining the Phenomenon of Artisanal Mining/Quarrying' (2015) Vol 15(7) Global Journal of Human Social Science & Political Science, 39-48.

Olubenga F P, Olumide A, Adeola A, 'Environmental Impact Assessment Law and Practice in Nigeria: How Far? How Well?' (2015) Vol 1 No. 1, American Journal of Environmental Policy and Management, 11-15.

Olusegun O, Adeniyi A, and Adeola G T, 'Impact of Granite Quarryinh on the Health of Workers and Nearby Residents in Abeokuta Ogun State, Nigeria' (2009), Vol 2 No.1 Ethiopian Journal of Environmental Studies and Management.

O'Neill E, 'Chile Finally Gets Tough on Mining Industry' (2014), Earth Island Journal, <[http://www.earthisland.org/journal/index.php/articles/entry/chile\\_finally\\_gets\\_tough\\_on\\_mining\\_industry](http://www.earthisland.org/journal/index.php/articles/entry/chile_finally_gets_tough_on_mining_industry)> accessed 18<sup>th</sup> September 2018

Orji K E and Olali S T, 'Traditional Institutions and Their Dwindling Roles in Contemporary Nigeria: The Rivers State Example' in T Babawale, A Aloa and B Adesoji (eds), *Chieftaincy Institution in Nigeria* (Concept Publication Ltd 2010)

Ovadia J S, "Local content and natural resource governance: The cases of Angola and Nigeria" (2014) 1, *The Extractive Industries and Society*, 137-146.

Oviasuyi P.O. and Uwadiae J, 'The Dilemma of Niger-Delta Region as Oil Producing States of Nigeria'[2010] Issue 16 *Journal of Peace, Conflict and Development*

Patel Z, 'Environmental Justice in South Africa: tools and trade-offs', (2009) 35:1, *Social Dynamics*, 94-110.

Pycroft C, 'Democracy and delivery: the rationalization of local government in South Africa' (2000) Vol 66 *International Review of Administrative Sciences*, 143-159.

Rasche A, Waddock S, and McIntosh M, 'The United Nations Global Compact: Retrospect and Prospect' (2012) 52(1) *Business and Society*, 6-30.

Reinicke W H and Witte J M, 'Interdependence, Globalization, and Sovereignty: The Role of Non-binding International Legal Accords', in Dinah Shelton, *Commitment and Compliance: The Role of Non-Binding Norms In The International Legal system*, (First Published 2000 OUP, 2003) 95

Roux T, 'Understanding Grootboom – A Response to Cass R. Sunstein' (2002) 12.2 *Forum Constitutionne l*

Ruggie J, 'global\_governance.net: The Global Compact as Learning Network', (2001), 7:4 *Global Governance*, 373.

Runhaar H and Lafferty H, 'Governing Corporate Social Responsibility: An Assessment of the Contribution of the UN Global Compact to CSR strategies in the Telecommunication Industry' (2009) 84 *Journal of Business Ethics* 479-495.

Sagebien J, Lindsay N, Campbell P, Cameron R and Smith N, 'The Corporate Social responsibility of Canadian mining companies in Latin America: A systems perspective', (2008) 14:3, *Canadian Foreign Policy Journal*, 103-128.

Salami A, Jimoh M A, and Muoghalu J I, 'Impact of Gold Mining on Vegetation And Soil in Southwestern Nigeria' (2003) 60:4 *International Journal of Environmental Studies*, 343-352.

Sahlin-Andersson K, 'Emergent Cross-sectional Soft Regulations: Dynamics at Play in the Global Compact Initiative', in Ulrika Morth (ed), *Soft Law in Governance and Regulation*, (Edward Elgar Publishing Limited 2004) 143

Sandham L A, Hoffmann A R, and Retief F P, 'Reflections on the quality of mining EIA reports in South Africa' (2008) Vol 108 *The Journal of the Southern Africa Institute of Mining and Metallurgy*, 701-706.

Shah A and Shah S, 'The new vision of Local governance and the evolving roles of local governments' in Anwar Shah (ed), *Local Governance in Developing Countries* (The World Bank 2006) 25

Snyder F, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques', (1993b) 56 (1) *The Modern Law Review*, 19-54.

Schuller M, "Seeing Like a 'Failed' NGO: Globalization's Impact on State and Civil Society in Haiti," (2007), Vol32 *Political and Legal Anthropology Review*, 84-104.

Schwartz P, 'Corporate activities and environmental justice: perspectives on Sierra Leone's mining', in Jonas Ebbesson and Phoebe Okowa (eds), *Environmental Law and Justice in Context* (Cambridge University Press 2009)

Sethi S P and Schepers D H, “United Nations Global Compact: The Promise-Performance Gap’ (2014) 122 *Journal of Business Ethics*, 193 – 208

Shaxson N, ‘Nigeria’s Extractive Industries Transparency Initiative: Just a Glorious Audit?’ (2009) Chatham House, Available at:

<[https://eiti.org/sites/default/files/documents/NEITI%20Chatham%20house\\_0.pdf](https://eiti.org/sites/default/files/documents/NEITI%20Chatham%20house_0.pdf)> accessed 18<sup>th</sup> September 2018

Shelton D, ‘Introduction: Law, Non-Law and the Problem of “Soft Law” in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms In The International Legal system*, (First Published 2000 OUP, 2003) 1-42.

Shever E, ‘Engendering the Company: Corporate Personhood and the ‘Face’ of an Oil Company in Metropolitan Buenos Aires’(2010) 33 (1) *Political and Legal Anthropology Review*, 26-46.

Sorensen P, ‘Legislative transformation of South African mining since 1994: what progress?’(2011) 68 (2) *International Journal of Environmental Studies*, 171-190.

Sorensen P, ‘Mining in South Africa: a mature industry’ (2011) 68(5) *International Journal of Environmental Studies*, 625-649.

Steytler N, ‘Local government in South Africa: Entrenching decentralised government’ in Nico Steytler (ed), *The Place and Role of Local Governments in Federal Systems* (Konrad-Adenauer-Stiftung 2005)

Stigler G, ‘The Tenable Range of Functions of Local Government’ in Joint Economic Committee, Sub-Committee on Fiscal Policy, US Congress, 213-19 (ed) *Federal Expenditure Policy for Economic Growth and Stability* (Washington DC: US Government Printing Office 1957)

Swart E, 'The South African Legislative Framework for Mine Closure' (2003) *The Journal of the South African Institute of Mining and Metallurgy*, 489-492.

Therien J P and Pouliot V, 'the Global Compact: Shifting the Politics of International Development?' (2006) *12 Global Governance*, 55-75.

Trengove W, 'Judicial Remedies for Violation of Socio-Economic Rights', (1999) *1 E.S.R. Rev 8*

Turton A, 'Untying the Gordian Knot: Unintended consequences of water policy for the gold mining industry in south Africa' (2016), Vol. 41, No.3, *Water International*, 330-350

Ugochukwu C N and Ertel J, 'Negative impacts of oil exploration on biodiversity management in the Niger Delta area of Nigeria' (2008) *26(2) Impact Assessment and Project Appraisal*, 139-147

Ukiwo U, 'From "Pirates" to "Militants": A Historical Perspective on Anti-State and Anti-Oil Company Mobilization Among the Ijaw of Warri, Western Niger Delta', (2007), *106/425 African Affairs*, 587-610

Usman N L, 'Environmental Regulation in the Nigerian Mining Industry: Past, Present, and Future', (2001), *19:3, Journal of Energy & Natural Resources Law*, 230-243.

Utembe W, Faustman EM, Matatiele P and Gulumian M, 'Hazards identified and the need for health risk assessment in the South African mining industry' (2015), Vol 34(12), *Human and Experimental Toxicology*, 1212-1221

Utting P, 'Corporate Responsibility and the Movement of Business' (2005) Vol. 15, No. 3/4, Development in Practice, 375-388.

Van Gyampo R E, 'Making Ghana's Oil Money Count: Lessons From Gold Mining' (2014), Vol 2, No.1 International Journal of Development and Economic Sustainability, 25-38.

Vogel D, 'Private Global Business Regulation', (2008) 11 Annu. Rev. Polit. Sci, 261-82.

Vranken JB, ' Methodology of Legal Doctrinal Research: A Comment on Westerman', in Mark Van Hoecke (ed) Methodologies of Legal Research (Hart Publishing 2011)

Waddock S, 'Learning from Experience: The United Nations Global Compact Learning Forum 2002' (2003) 11 The Journal of Corporate Citizenship, 51-67.

Wagner H, 'The Challenge of Deep-Level Mining in South Africa' (1986) Vol 86(9) Journal of Southern African Institute of Mining and Metallurgy.

Wapwera S D, Egbu C.O, Parsa A.G, and Ayanbinpe G.M, 'Abandoned mines, homes for the people: case study of Jos Tin-mining region', (2015), Vol.8 No.2, International Journal of Housing Markets and Analysis, 239-264.

Weil P, 'Towards Relative Normality in International Law', (1983) vol. 77 American Journal of International Law, 413-42.

Wellens K C and Borchardt G M, 'Soft Law in European Community Law', (1989) 14 European Law Review, 267-321.



Wilson F, 'How the Mining Industry has shaped South Africa' (2001) Vol. 130, No. 1, MIT Press, American Academy of Arts & Sciences, 99-121.

### **Working Papers**

Akabzaa T and Darimani A, 'Impact of Mining Sector Investment in Ghana: A study of the Tarkwa mining region' (2001) Structural Adjustment Participatory Review International Network (Saprin) 23 <[http://www.saprin.org/ghana/research/gha\\_mining.pdf](http://www.saprin.org/ghana/research/gha_mining.pdf)> accessed 18th September 2018

Arowolo D, 'Local Government Administration and the Challenges of Rural Development in Nigeria' (2008) available at <<http://www.articlesbase.com/authors/dare-arowolo/49807>> accessed 1<sup>st</sup> April 2016

Bendell J, 'Flags of Inconvenience? The Global Compact and the Future of the United Nations', (2004) ICCSR Research Paper Series, No.22, ISSN 1479-5124 available at: <<https://www.peacepalacelibrary.nl/ebooks/files/338104755.pdf>> accessed 18<sup>th</sup> September 2018

Besada H and Martin P, "Mining Codes in Africa: Emergence of a "Fourth" Generation?" (2013), The North-South Institute, available at: <<http://www.nsi-ins.ca/wp-content/uploads/2013/03/Mining-Codes-in-Africa-Report-Hany.pdf>> accessed 18<sup>th</sup> September 2018

Bracking S, 'Hiding Conflict over Industry Returns: A Stakeholder Analysis of the Extractive Industries Transparency Initiative' (2009) BWPI Working Paper 91 <<http://hummedia.manchester.ac.uk/institutes/gdi/publications/workingpapers/bwpi/bwpi-wp-9109.pdf>> accessed 18<sup>th</sup> September 2018

David-Barrett L, Okamura K, 'The Transparency Paradox: Why do Corrupt Countries Join EITI? [2013] Working Paper No.38 European Research Centre for Anti-Corruption & State Building available at: <<http://eiti.org/files/The-Transparency-Paradox.-Why-do-Corrupt-Countries-Join-EITI.pdf>> accessed 2<sup>nd</sup> September 2014

Honke J, Kranz N, Borzel T A, Heritier A, 'Fostering Environmental Regulation? Corporate Social Responsibility in Countries with Weak Regulatory Capacities The Case of South Africa' (2008) SFB Working Paper Series No9, available at <[http://userpage.fu-berlin.de/ffu/akumwelt/bc2008/papers/bc2008\\_341\\_Kranz.pdf](http://userpage.fu-berlin.de/ffu/akumwelt/bc2008/papers/bc2008_341_Kranz.pdf)> accessed 3<sup>rd</sup> August 2016

Jega A, 'Organising for Popular Democratic Change in Nigeria: Options and Strategies' (1997) London Centre for Democracy and Development

Kukah H M, 'State of Current Actors: An Overview of Human Rights and Democratic Development in Nigeria' (1997), London Centre for Democracy and Development

Ocheje P D, 'The Extractive Industries Transparency Initiative (EITI): Voluntary Codes of Conduct, Poverty and Accountability in Africa' [2006], available at:  
<[https://www.researchgate.net/publication/266333694\\_The\\_Extractive\\_Industries\\_Transparency\\_Initiative\\_EITI\\_Voluntary\\_Codes\\_of\\_Conduct\\_Poverty\\_and\\_Accountability\\_in\\_Africa](https://www.researchgate.net/publication/266333694_The_Extractive_Industries_Transparency_Initiative_EITI_Voluntary_Codes_of_Conduct_Poverty_and_Accountability_in_Africa)> accessed 18<sup>th</sup> September 2018

Schoemaker D, 'Raising the Bar on Human Rights: what the Ruggie Principles Mean for Responsible Investors' [2011] Sustainalytics available at:  
<[http://www.sustainalytics.com/sites/default/files/ruggie\\_principles\\_and\\_human\\_rights\\_0.pdf](http://www.sustainalytics.com/sites/default/files/ruggie_principles_and_human_rights_0.pdf)> accessed 18<sup>th</sup> September 2018

Terminski B, 'Mining-Induced Displacement And Resettlement: Social Problem and Human Rights Issue (A Global Perspective)' (2012) Social Science Research Network,  
<<http://ssrn.com/abstract=2028490>> accessed 18<sup>th</sup> September 2018

Utting P, 'Business Responsibility for Sustainable Development' [2000] United Nations Research Institute for Social Development available at  
<[http://www.unrisd.org/80256B3C005BCCF9/httpNetITFramePDF?ReadForm&parentunid=1CA8A49E3513DE1C80256B610059BA0D&parentdoctype=paper&netitpath=80256B3C005BCCF9/\(httpAuxPages\)/1CA8A49E3513DE1C80256B610059BA0D/\\$file/utting.pdf](http://www.unrisd.org/80256B3C005BCCF9/httpNetITFramePDF?ReadForm&parentunid=1CA8A49E3513DE1C80256B610059BA0D&parentdoctype=paper&netitpath=80256B3C005BCCF9/(httpAuxPages)/1CA8A49E3513DE1C80256B610059BA0D/$file/utting.pdf)>  
accessed 16<sup>th</sup> May 2017

### **Table of Cases**

*AAA and others v Unilever plc and another* [2017] EWHC 371 (QB)

*Bragg v. Robertson*, 83 F. Supp. 2d 713 (S.D. W. Va. 1998) (No. 98-0636), 1999 WL 33933888

*BP Southern Africa (Pty) Ltd v. MEC For Agriculture, conservation, Environment & Land Affairs* [2004] 5 SA 124 WLD Case No. 03/16337

*Caparo Industries Plc v Dickman* [1990] 2 AC 605

*Chandler v Cape Plc* [2012] EWCA (Civ) 525

*Director: Mineral Development, Gauteng Region and SASOL Mining (Pty) Ltd v. Save the Vaal Environment and Others*, [1999] 2 SA 709 SCA Case no: 133/98

*Government of the Republic of South Africa and Others v Grootboom and Others* [2001] 1 SA 46 (CC)

*Lungowe v Vedanta Resources Plc* [2017] EWCA Civ 1528 [2017] B.C.C 787; [2017] B.L.R 585

*Masiya v DPP* (2007) CCT Case 54/06

*MEC for Agricultural Conservation, Environment and Land affairs v. Sasol Oil (Pty) and Another*, [2006] 5 SA 483 SCA

*Merebank Environmental Action Committee v Executive Member of KwaZuluNatal Council for Agriculture and Environmental Affairs and Others* [2001] Unreported Case no 269/01 D

*Minister of Health v Treatment Action Campaign* (2002) (5) SA 721 (CC)

*Minister of Home Affairs & Anor v Fourie & Ors; Lesbian and Gay Equality Projects & Ors v Minister of Home Affairs & Ors*, (2006) (3) BCLR 355 (CC)

*Minister of Public Works v Kyalami Ridge Environmental association* [2001] (3) SA 1151 (CC); 2001 (7) BCLR 652

*Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Limited & Others* [2006] (5) SA 333 (W)

*Okpabi and others v Royal Dutch Shell plc and Shell Petroleum Development Company of Nigeria Ltd* [2017] EWHC 89 (TCC)

*Re Kranspoort Community*, [2000] 2 SA 124 LCC

*Sarei v Rio Tinto PLC*, (2009) United States Court of Appeal, 9<sup>th</sup> Circuit

*SERAC v. Nigeria* [2002], Case No. ACHPR/COMM/A044/1, Afr. Comm'n Human & People's Rights

*Socio-Econ. Rights & Accountability Project (SERAP) v. Nigeria* [2012] Judgement No. ECW/CCJ/JUD/18/12, ECOWAS

*Spiliada Maritime Corp v. Cansulex Ltd* [1987] 1 AC 460, at 475-6

*State v Makwanyane* (1995) (3) SA 391 (CC)

*Tergniet and Toekoms Action group v Outeniqua Kreosootpale (Pty) Ltd* Case 10083/2008 (c) 23 January [2009]

*Thompson v Renwick Group PLC* [2014] ECWA

### **International Instruments**

African Charter on Human and People's Rights, (Adopted 27<sup>th</sup> June 1981), OAU Doc CAB/LEG/67/3 rev 5, 21 I.L.M.58 (1982) entered into force 21 October 1986

The ILO Declaration on Fundamental Principles and Rights at Work, (Adopted 18<sup>th</sup> June 1998) (Annex Revised 15<sup>th</sup> June 2010) International Labour Conference

The Rio Declaration on the Environment and Development (Adopted 14 June 1992) (Reaffirming UN Stockholm Declaration 16 June 1972)

The Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III)

The United Nations Convention Against Corruption (UNCAC) (UNGA Res 58/4 of 31<sup>st</sup> October 2003)

### **Legislation**

#### **Nigeria**

Constitution of the Federal Republic of Nigeria (1999)

Niger Delta Development Commission Act, 2000

Nigerian Environmental Impact Assessment Decree 1992, Supplement to Official Gazette Extraordinary, No 73, Vol 79, December 1992

Nigerian Extractive Industries Transparency Initiative Act 2007

Federal Environmental Protection Agency Act, 131 Laws of the Federation of Nigeria (LFN) 5601-5623 (1990)

Nigerian Land Use Act (1978), Laws of the Federation of Nigeria (LFN), (2004)

Minerals Act, 226 Laws of the Federation of Nigeria (LFN) 9746-9817 (1990)

Nigerian Minerals and Mining Decree No. 34 of 1999

Nigerian Minerals and Mining Act 2007

Nigerian National Policy on Solid Minerals (1998)

### **South Africa**

The Constitution of the Republic of South Africa (1996)

Atmospheric Pollution Prevention Act 45 of 1965, Republic of South Africa

Environmental Conservation Act, Act No.73 of 1989, Republic of South Africa

Land Use and Planning Ordinance Act 15 of 1985, Republic of South Africa

Mines and Works Amendment Act No 27 of 1956, Republic of South Africa

Minerals Act No. 50 of 1991, Republic of South Africa

Mineral and Petroleum Resources Development Act No. 28 of 2002

National Environmental Management: Air Quality Act No. 39 of 2004, Republic of South Africa

National Environmental Management: Biodiversity Act 10 of 2004, Republic of South Africa

National Environmental Management Act 1998, Act No. 107, 1998, vol 401, Republic of South Africa, Government Gazette, 27<sup>th</sup> November 1998, amended by Act 56 of 2002, Act 46 of 2003, Act 8 of 2004, Act 62 of 2008

National Road Traffic Act 93 of 1996, Republic of South Africa

National Water Act No. 36 of 1998, Republic of South Africa

Non-Profit Organization Act [1997] (Act No. 71 of 1997) , Republic of South Africa

### **Others**

Chile Law 19,253 of 1993 on Protection, Promotion and Development of Native Peoples of the Department of Planning and Cooperation

Guinea Amended 2011 Mining Code

Indonesian Water Quality Management and Water Pollution Control Regulation (2001)

New South Wales Environmental Offences and Penalties Act (1989)

New South Wales Environmental Offences and Penalties (Amendment) Act (1990) No. 84

The Philippine Mining Act of 1995

USA Federal Water Pollution Control Act, 33 U.S.C. 1251-1387 (2000)

Zimbabwe Mines and Minerals Act Chap 21 05

### **Codes and Standards**

Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry, [2002] available at <<https://www.westerncape.gov.za/Text/2004/5/theminingcharter.pdf>> accessed on the 10<sup>th</sup> August 2016

Department of Trade and Industry, Codes of Good Practice on Broad-Based Black Economic Empowerment, Notice 997 of 2012

IFC, IFC Performance Standards on Environmental and Social Sustainability (2012)

Available

at:<[https://www.ifc.org/wps/wcm/connect/c8f524004a73daeca09afdf998895a12/IFC\\_Performance\\_Standards.pdf?MOD=AJPERES](https://www.ifc.org/wps/wcm/connect/c8f524004a73daeca09afdf998895a12/IFC_Performance_Standards.pdf?MOD=AJPERES)> accessed 11<sup>th</sup> November 2017

EITI, 'The EITI Standard 2016', (2016) Available at:

<[https://eiti.org/sites/default/files/migrated\\_files/english\\_eiti\\_standard\\_0.pdf](https://eiti.org/sites/default/files/migrated_files/english_eiti_standard_0.pdf)> accessed 18<sup>th</sup> September 2018

The EITI Standard, EITI International Secretariat, 11 July 2013,  
<[https://eiti.org/sites/default/files/documents/english\\_eiti\\_standard.pdf](https://eiti.org/sites/default/files/documents/english_eiti_standard.pdf)> Accessed 18<sup>th</sup>  
September 2018

EITI Source Book (2005) available: at  
<[https://eiti.org/sites/default/files/documents/sourcebookmarch05\\_0.pdf](https://eiti.org/sites/default/files/documents/sourcebookmarch05_0.pdf)> Accessed 18<sup>th</sup>  
September 2018

The EITI Statement of Principles and Action [2003]  
<<http://webarchive.nationalarchives.gov.uk/+http://www.dfid.gov.uk/pubs/files/eitidraftreportstatement.pdf>> accessed 31<sup>st</sup> August 2014

Equator Principles, ‘The Equator Principles III’ (2013) Available at: <[http://equator-principles.com/wp-content/uploads/2017/03/equator\\_principles\\_III.pdf](http://equator-principles.com/wp-content/uploads/2017/03/equator_principles_III.pdf)> accessed 18<sup>th</sup>  
September 2018

Global Gas Flaring Reduction (GGFR): A Public Private Partnership, ‘A Voluntary Standard for Global Gas Flaring and Venting Reduction’ Report Number 4, World Bank Group, May 2004

International Cyanide Management Institute, ‘International Cyanide Management Code’ (2014) available at <<https://www.cyanidecode.org/about-cyanide-code/cyanide-code>> accessed 18<sup>th</sup> September 2018

The Africa Mining Vision, African Union, available at:  
<<http://www.africaminingvision.org/>> accessed 29<sup>th</sup> May 2017

The Banking Association of South Africa, Code of Conduct for Managing Environmental and Social Risk (2011) available at <<http://www.banking.org.za/docs/default-source/market-conduct-division/the-banking-association-south-africa-code-of-conduct-for-management-environmental-and-social-risk.pdf?sfvrsn=2>> accessed 25<sup>th</sup> August 2016



The Global Mining Initiative, International Council on Mining and Metals, available at <https://www.icmm.com/en-gb/about-us/our-organisation/annual-reviews/our-history>> accessed 18<sup>th</sup> September 2018

The Kimberley Process, available at: <https://www.kimberleyprocess.com/en/what-kp>> accessed 29<sup>th</sup> May 2017

The OECD Principles of Corporate Governance, available at: <https://www.oecd.org/corporate/ca/corporategovernanceprinciples/31557724.pdf>> accessed 29<sup>th</sup> May 2017

The UN Global Compact available at: <https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-1>> accessed 29<sup>th</sup> May 2017

UN, 'The UN Guiding Principles on Business and Human Rights: Relationship to UN Global Compact Commitments' (2011) Available at: [https://www.unglobalcompact.org/docs/issues\\_doc/human\\_rights/Resources/GPs\\_GC%20note.pdf](https://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/GPs_GC%20note.pdf)> accessed 11<sup>th</sup> November 2017

The World Bank OP/BP 4.00, 'The World Bank Operations Manual, 'Operational Policies' (2005) Available at <http://siteresources.worldbank.org/OPSMANUAL/Resources/OP4.00andTableA1.pdf>> accessed 30<sup>th</sup> September 2017

## **Dissertations**

Coomans F, 'The Ogoni Case before the African Commission on Human and Peoples Rights' (2002) available at <http://www.righttoenvironment.org/ip/uploads/downloads/OgoniCaseProf.Coomans.pdf>> accessed 28<sup>th</sup> July 2017

James T, 'Teaching Private Governance: A Critical analysis of the UN Global Compact' (Masters Thesis, University of British Columbia, 2006) available at: <[https://circle.ubc.ca/bitstream/handle/2429/17655/ubc\\_2006-0206.pdf?sequence=1](https://circle.ubc.ca/bitstream/handle/2429/17655/ubc_2006-0206.pdf?sequence=1)> accessed 25<sup>th</sup> August 2014

Parker V, 'Rio Tinto and Madagascar – is it equitable?,' (2004) available at: <<http://www.andrewelestrust.org/Reports/QitFer%20Minerals%20Madagascar.pdf>> accessed 12<sup>th</sup> November 2017

Uzoigwe M U, 'Exploring Multi-Stakeholder Initiatives for Natural Resource Governance The Example of the Nigerian Extractive Industries Transparency Initiative (NEITI)' ( PhD Thesis, University of Birmingham, 2011) available at: <<http://etheses.bham.ac.uk/3346/9/Uzoigwe12PhD.pdf>> accessed 2<sup>nd</sup> September 2014

## **Conferences**

British All Party Parliamentary Group on Nigeria Transcript, 'Nigeria's Solid Minerals Sector: Alternative Investment Opportunities', 19<sup>th</sup> May 2016, available at <<https://www.chathamhouse.org/sites/default/files/events/2016-05-19-Nigeria-solid-minerals-appg-transcript.pdf>> accessed 18<sup>th</sup> September 2018

Comino M, and Leadbeter P, 'Enforcement of Pollution Laws in Australia- Past Experience and Current Trends', Published in proceedings of Fifth International Conference on Environmental Compliance and Enforcement 16-20 November 1998, Monterey, California, USA, available at <<http://www.inece.org/5thvol1/comino.pdf>> accessed 12<sup>th</sup> October 2015

De Backer S, 'Mining Investment and Financing in Africa: Recent Trends and Key Challenges, Africa's Mining Industry: The Perceptions and Reality' [2012] available at: <<http://www.mineafrica.com/documents/2%20-%20Steve%20De%20Backer.pdf>> accessed 11<sup>th</sup> November 2017

Domingo E G, 'Public Policy and Initiatives on Institutionalizing CSR in the Philippine Mining Industry' [2003] International Conference on Public Policy for Corporate Social Responsibility 8-9 October 2003, Washington DC

Ebigbo P O, 'Appraising the impact of economic reform programme on micro, small and medium scale enterprises.' (2008) 19<sup>th</sup> Enugu International Trade Fair Colloquium

Guarini E and Nidasio C, 'CSR Role in Public – Private Partnership: Models of Governance' [2003] European Academy of Business in Society, Copenhagen available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2379382](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2379382) accessed 18<sup>th</sup> September 2018

Hatcher P, "Casting The New Rules of Engagement: The World Bank Group & The Politics of Mining In Papua New Guinea", International Conference Mining & Mining Policy in the Pacific: History, Challenges and Perspectives, 22-25 Nov 2011

Ifeanyi A, 'Environmental Impact Assessment as a tool for sustainable development: The Nigerian experience' Proceedings of the FIG XXII International Congress, April 19-26, Washington, D.C. USA, 1-13

Plan of Implementation of the World Summit on Sustainable Development, available at [http://www.un.org/esa/sustdev/documents/WSSD\\_POI\\_PD/English/WSSD\\_PlanImpl.pdf](http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf) accessed 27<sup>th</sup> August 2016

Rampedi M P, 'Experiences in Environmental Compliance and Enforcement in Limpopo Province, South Africa' (2006), Seventh International Conference on Environmental Compliance and Enforcement, Marrakech, 9 – 15 April 2005)

Steenkamp N C and Clark-Mostert V, ‘ Impact of Illegal Mining at Historic Gold Mine Locations, Giyani Greenstone Belt Area, South Africa’ 9<sup>th</sup> International Mining History Congress, 17-20 April 2012, available at

<[https://www.researchgate.net/publication/268004416\\_Impact\\_of\\_Illegal\\_Mining\\_at\\_Historic\\_Gold\\_Mine\\_Locations\\_Impact\\_of\\_Illegal\\_Mining\\_at\\_Historic\\_Gold\\_Mine\\_Locations\\_Giyani\\_Greenstone\\_Belt\\_area\\_South\\_Africa](https://www.researchgate.net/publication/268004416_Impact_of_Illegal_Mining_at_Historic_Gold_Mine_Locations_Impact_of_Illegal_Mining_at_Historic_Gold_Mine_Locations_Giyani_Greenstone_Belt_area_South_Africa)> accessed 28<sup>th</sup> June 2016

Utting P, UN-Business Partnerships: Whose Agenda Counts? Oslo, Norway, 8<sup>th</sup> December, 2000, available at:

<[http://www.unrisd.org/80256B3C005BCCF9/\(httpAuxPages\)/A687857BD5E36114C1256C3600434B5F/\\$file/utting.pdf](http://www.unrisd.org/80256B3C005BCCF9/(httpAuxPages)/A687857BD5E36114C1256C3600434B5F/$file/utting.pdf)> accessed 25<sup>th</sup> August 2014

## **NGO Reports**

A Corpwatch Report, ‘Barrick’s Dirty Secrets: Communities Worldwide Respond to Gold Mining’s Impacts’ (2007) 5 available at:

<<http://www.corpwatch.org/sites/default/files/Barrick%27s%20Dirty%20Secrets.pdf>> accessed 19<sup>th</sup> September 2018

BankTrack, ‘Credit Agricole: Quit Coal’, May 2016, available at <

[http://www.banktrack.org/download/credit\\_agricole\\_coal\\_bank\\_briefing\\_2016\\_pdf/credit\\_agricole\\_coal\\_bank\\_briefing\\_2016.pdf](http://www.banktrack.org/download/credit_agricole_coal_bank_briefing_2016_pdf/credit_agricole_coal_bank_briefing_2016.pdf)> accessed 27 February 2017

Banktrack, ‘Equator Principles Analysis of The Rampal Coal Fired Power Plant Project, Bangladesh’ (2015) available at:

<[https://www.banktrack.org/download/rampal\\_equator\\_principles\\_full\\_analysis\\_pdf/rampal\\_equator\\_principles\\_full\\_analysis.pdf](https://www.banktrack.org/download/rampal_equator_principles_full_analysis_pdf/rampal_equator_principles_full_analysis.pdf)> accessed 19<sup>th</sup> September 2018

BankTrack, ‘Principles, Profits, or Just PR?: Triple P Investment Under the Equator Principles An Anniversary Assessment’ (June 2004) available at:

<<https://www.scribd.com/document/34117090/Principles-Profits-or-Just-Big-Oil-PR>>  
accessed 19<sup>th</sup> September 2018

BankTrack, 'The Silence of the Banks: An Assessment of equator principles reporting',  
(2007) available at:

<[https://www.banktrack.org/download/the\\_silence\\_of\\_the\\_banks\\_1/0\\_0\\_071203\\_silence\\_of\\_the\\_banks.pdf](https://www.banktrack.org/download/the_silence_of_the_banks_1/0_0_071203_silence_of_the_banks.pdf)> accessed 19<sup>th</sup> September 2018

Earth Rights International, 'Total Impact: The Human Rights, Environmental and Financial Impacts of Total and Chevron's Yadana Gas Project in Military- Ruled Burma (Myanmar)' (2009) Report available at <<https://www.earthrights.org/sites/default/files/publications/total-impact.pdf>> accessed 25<sup>th</sup> September 2015

Global Policy Forum, 'Global Counter Summit, Panel 1: Greenwash, Blue-Wash and the Corporate Takeover of the UN' (23 June 2004) available at <<https://www.globalpolicy.org/empire/32250.html>> accessed 20<sup>th</sup> July 2015

Greenpeace, Pascua Lama Investor Briefing: What Barrick Gold is hiding from its shareholders, August 2013, available at:  
<[http://www.greenpeace.org/argentina/Global/argentina/report/2013/cambio\\_climatico/Accionistas-inlges.pdf](http://www.greenpeace.org/argentina/Global/argentina/report/2013/cambio_climatico/Accionistas-inlges.pdf)> accessed 12<sup>th</sup> November 2017

Human Rights Watch, Gold's Costly Dividend: Human Rights Impacts of Papua New Guinea's Porgera Gold Mine, 2011 available at <  
<https://www.hrw.org/sites/default/files/reports/png0211webwcover.pdf>> accessed 20<sup>th</sup> October 2015

IndustriAll, 'Rio Tinto in Africa: Global Citizen or Corporate Shame?' (2012) available at <  
<http://www.industriall-union.org/sites/default/files/uploads/documents/industriall-rio-tinto-africa-report.pdf>> accessed 04 August 2017

IndustriALL, 'Unsustainable: The Ugly Truth About Rio Tinto', (2014), 7 available at: <[http://www.industrialunion.org/sites/default/files/uploads/documents/Rio\\_Tinto\\_Campaign/a4\\_rio\\_tinto\\_report\\_final2.pdf](http://www.industrialunion.org/sites/default/files/uploads/documents/Rio_Tinto_Campaign/a4_rio_tinto_report_final2.pdf)> accessed 12<sup>th</sup> November 2017

International Union of Conservation (IUCN) and International Council on Mining and Metals (ICMM), 'The improvement of biodiversity management in mining' available at: <<https://www.iucn.org/theme/business-and-biodiversity/our-work/global-business-partnerships/international-council-mining>> accessed 26<sup>th</sup> August 2016

Kotze H, 'Responding to the growing socio-economic crisis? A review of civil society in South Africa' (2003), in Centre for Civil Society (ed) Development Update: The Deepening divide – civil Society and Development in South Africa in 2001/2002, 4:4, pp 1-32

Mining Watch Canada, 'Report of the International NGO Fact-Finding Mission to Tanzania, April 16, 2002, available at: <<https://miningwatch.ca/blog/2002/4/16/report-international-ngo-fact-finding-mission-tanzania>> accessed 19<sup>th</sup> September 2018

Natural Resources Canada, 'Building the Canadian Advantage: A CSR Strategy for the International Extractive Sector' (2011) available at <<http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/mineralsmetals/pdf/mms-smm/pubr-pubr/pdf/bca-rac-eng.pdf>> accessed 16/05/2017

OECD, 'Annual Report on the OECD Guidelines for Multilateral Enterprises' [2017] available at <<http://mneguidelines.oecd.org/2017-Annual-Report-MNE-Guidelines-EN.pdf>> accessed 4<sup>th</sup> September 2018

Saldanha J, Lindsay A, Niaudet G, Gomart F, ‘Learning From the EITI: Lessons for Effective Country-by-Country Data Disclosure Requirements’ [2011], CIDSE Development Organization

South African National Biodiversity Institute, South African Mining and Biodiversity Forum (SAMBF), available at <<http://biodiversityadvisor.sanbi.org/industry-and-conservation/conservation-and-mining/connect-2/south-african-mining-and-biodiversity-forum-sambf/>> accessed 26<sup>th</sup> August 2016

South Asia for Human Rights ‘Report of the Fact Finding Mission to Rampal, Bangladesh’ (2015) <<https://www.southasianrights.org/wp-content/uploads/2015/09/Report-of-the-FFM-Rampa-Bangladesh.pdf>> accessed 1<sup>st</sup> June 2017

Sutton M W and Weiersbye I M, ‘South African Legislation Pertinent to Gold Mine Closure and Residual Risk’ (2007), Mine Closure, Santiago, Chile, available at: <[http://wiredspace.wits.ac.za/jspui/bitstream/10539/12692/2/Appendix%20II%20Sutton\\_and\\_Weiersbye\\_2007.pdf](http://wiredspace.wits.ac.za/jspui/bitstream/10539/12692/2/Appendix%20II%20Sutton_and_Weiersbye_2007.pdf)> accessed 13<sup>th</sup> November 2017

Svensson B R, ‘Global Gas Flaring Reduction in Key Countries’ (2012) International Gas Union, pp7, available at <<http://members.igu.org/old/IGU%20Events/wgc/wgc-2012/wgc-2012-proceedings/programme-committee-papers/programme-committee-a-pgca/committee-session-6.2/global-gas-flaring-reduction-in-key-countries/@@download/download>> accessed 28<sup>th</sup> March 2016

Transparency International Bangladesh, ‘Rampal and Matarbari Power Projects: Governance Challenges in Environmental Impact Assessment and Land Acquisition’ (2015) <[https://www.ti-bangladesh.org/beta3/images/2015/es\\_ffs\\_coal\\_15\\_en.pdf](https://www.ti-bangladesh.org/beta3/images/2015/es_ffs_coal_15_en.pdf)> accessed 1<sup>st</sup> June 2017

UNEP Finance Initiative, 'Sustainability Banking in Africa', (2005) available at [http://www.unepfi.org/fileadmin/documents/ceo\\_brief\\_sust\\_banking\\_in\\_africa\\_2005.pdf](http://www.unepfi.org/fileadmin/documents/ceo_brief_sust_banking_in_africa_2005.pdf)> accessed 25<sup>th</sup> August 2016

UNEP Finance Initiative, 'Banking on Value: A New Approach to Credit Risk in Africa', (2007) available at [http://www.unepfi.org/fileadmin/documents/banking\\_on\\_value.pdf](http://www.unepfi.org/fileadmin/documents/banking_on_value.pdf)> accessed 25<sup>th</sup> August 2016

WWF, 'Financial market regulation for sustainable development in the BRICS countries', (2015), available at [http://www.sustainablefinance.ch/upload/cms/user/201506\\_wwf\\_international\\_report\\_brics.pdf](http://www.sustainablefinance.ch/upload/cms/user/201506_wwf_international_report_brics.pdf)> accessed 25<sup>th</sup> August 2016

## **Reports**

Access Bank 2013 Equator Principles Report, available at: [https://www.banktrack.org/download/2013\\_equator\\_principles\\_report/accessbank2013equatorprinciplereporting.pdf](https://www.banktrack.org/download/2013_equator_principles_report/accessbank2013equatorprinciplereporting.pdf)> accessed on 19<sup>th</sup> September 2018

Ashton P, Love D, Mahachi H, Dirks P, 'An Overview of the Impact of Mining and Mineral Processing Operations on Water Resources and Water Quality in Zambezi, Limpopo and Olifants Catchments in South Africa' (2001) Mining, Minerals and Sustainable Development (Southern Africa) Project, Pretoria

Barrick Gold Corporation, UN Global Compact: Communication on Progress, 2010/2011, available at: [https://www.unglobalcompact.org/system/attachments/11120/original/UNGC\\_-\\_2010-2011\\_COP.pdf?1309986379](https://www.unglobalcompact.org/system/attachments/11120/original/UNGC_-_2010-2011_COP.pdf?1309986379)> accessed 12<sup>th</sup> November 2017

Barrick Gold Corporation, 'UN Global Compact: Communication on Progress', 2011/2012 available at:



<[https://www.unglobalcompact.org/system/attachments/15984/original/barrickresponsibility\\_com\\_2011\\_gindexes\\_1\\_.pdf?1340046852](https://www.unglobalcompact.org/system/attachments/15984/original/barrickresponsibility_com_2011_gindexes_1_.pdf?1340046852)> accessed 12<sup>th</sup> November 2017

Barrick, 'Responsible Mining' 2012 Corporate Responsibility Report, available at:  
<<https://barrick.q4cdn.com/788666289/files/responsibility/report/Barrick-2012-Corporate-Responsibility-Report.pdf>> accessed 19<sup>th</sup> September 2018

Barrick, 'Responsible Mining' 2013 Responsibility Report, available at:  
<<https://barrick.q4cdn.com/788666289/files/responsibility/report/Barrick-2013-Corporate-Responsibility-Report.pdf>> accessed 19<sup>th</sup> September 2018

Barrick Gold, 'Responsible Mining: Responsibility Report', (2014), available at:  
<<http://barrick.q4cdn.com/808035602/files/responsibility/2014-Responsibility-Report.pdf>>  
accessed 12<sup>th</sup> November 2017

Barrick Gold Corporation, Annual Report, (2014), available at:  
<<http://s1.q4cdn.com/808035602/files/annual-report/Barrick-Annual-Report-2014.pdf>>  
accessed 12<sup>th</sup> November 2017

Barrick Gold Corporation, UN Global Compact: Communication on Progress, 2015,  
available at:  
<[https://www.unglobalcompact.org/system/attachments/cop\\_2015/167121/original/GRI\\_Content\\_Index\\_2014.pdf?1434027041](https://www.unglobalcompact.org/system/attachments/cop_2015/167121/original/GRI_Content_Index_2014.pdf?1434027041)> accessed on 2<sup>nd</sup> October 2015

Business Partners for Development, 'Tri-Sector Partnership Results and Recommendations: Putting Partnering to Work', 1998-2001 available at:  
<<http://www.oecd.org/unitedkingdom/2082379.pdf>> accessed 15<sup>th</sup> May 2017

Central Bank of Nigeria, Nigerian Sustainable Banking Principles, (July 2012)

EcoBank, Equator Principles Reporting 2014, available at:

<<http://www.ecobank.com/group/EcobankReport2014.pdf>> accessed on the 23<sup>rd</sup> of March 2016

Ekepa M, Tulin J, Coumans C, ‘ Request for Review Submitted to the Canadian National Contact Point Pursuant to the OECD Guidelines for Multinational Enterprises: Specific Instance Regarding The Operations of Barrick Gold Corp. at the Porgera Joint Venture Mine on the Land of the Indigenous Ipili of Porgera, Enga Province, Papua New Guinea’ 2011, Porgera SML Landowners Association, Akali Tange Association, Mining Watch Canada, available at <[http://oecdwatch.org/cases/Case\\_210/929/at\\_download/file](http://oecdwatch.org/cases/Case_210/929/at_download/file)> accessed 12<sup>th</sup> October 2015

The Equator Principles, ‘A Financial industry benchmark for determining, assessing and managing environmental and social risk in projects’ (2013), available at:

<<http://www.equator-principles.com/index.php/ep3>> accessed 22<sup>nd</sup> August 2016

Extractive Industries Transparency Initiative, ‘Advancing The EITI In The Mining Sector’, (2009) available at: <<https://eiti.org/files/MINING%20Compressed.pdf>> accessed 20<sup>th</sup> October 2015

Fall P L, Zahran M M, “United Nations corporate partnerships: The role and functioning of the Global Compact” JIU/REP/2010/9 Joint Inspection Unit, Geneva 2010, available at:

<[https://www.unjiu.org/sites/www.unjiu.org/files/jiu\\_document\\_files/products/en/reports-notes/JIU%20Products/JIU\\_REP\\_2010\\_9\\_English.pdf](https://www.unjiu.org/sites/www.unjiu.org/files/jiu_document_files/products/en/reports-notes/JIU%20Products/JIU_REP_2010_9_English.pdf)> accessed 19<sup>th</sup> September 2018

Fox T, Ward H, Howard B, ‘Public Sector Roles In Strengthening Corporate Social Responsibility: A Baseline Study’ [2002] The World Bank, available at: <

<http://pubs.iied.org/pdfs/16017IIED.pdf?>> Accessed 20<sup>th</sup> June 2014

Federal Republic of Nigeria, Environmental Impact Assessment (EIA) Act 86, 1992,  
Guidelines for Review of EIA Report in Nigeria, Federal Ministry of Environment, (2009)

First Rand Bank, Rand Merchant Bank, 'Report to Society' (2015) available at  
<<http://www.firstrand.co.za/Sustainability/ReportsToSocietyRMB/2015%20RMB%20report%20to%20society.pdf>> accessed 20<sup>th</sup> August 2016

GEITI, 'Validation of the Extractive Industries Transparency Initiative in Ghana', Final Report, 9<sup>th</sup> February 2010, available at  
<[https://eiti.org/files/Ghana\\_Validation\\_Reports\\_ENG\\_0.pdf](https://eiti.org/files/Ghana_Validation_Reports_ENG_0.pdf)> accessed 18<sup>th</sup> October 2015

Guaranty Trust Bank, 'The GTBANK Corporate Social Responsibility Report', (2014)  
available at: <<https://www.gtbank.com/uploads/csr-reports/2014-report/2014-csr-report-small.pdf>> accessed 19<sup>th</sup> September 2018

Joseph E, 'A new Business Agenda for Government', [2003] Institute for Public Policy Research, available at:  
<[https://www.ippr.org/files/images/media/files/publication/2011/05/a\\_new\\_business\\_agenda\\_full\\_1293.pdf](https://www.ippr.org/files/images/media/files/publication/2011/05/a_new_business_agenda_full_1293.pdf)> accessed 11<sup>th</sup> November 2017

Kebusek M E, 'Is EITI Really Helping Improve Global Good Governance? Examining the Resource Curse, Corruption, and Nigeria's EITI Implementation Experience' [2010], Leadership Initiative for Transformation and Empowerment available at:  
<<http://nidprodev.org/EITI%20-%20Nigeria%20Analysis.pdf>> accessed 11<sup>th</sup> November 2017

McKinsey and Company, 'Assessing the Global Compact's Impact', (2004), available at <  
[http://europeandcis.undp.org/guides/poverty/spd/ras/mckinsey\\_report\\_gc.pdf](http://europeandcis.undp.org/guides/poverty/spd/ras/mckinsey_report_gc.pdf)> accessed 16<sup>th</sup> July 2015

Ministry of Mines and Steel Development, 'A Brief on the Minerals and Metals Sector and Its Potential to Diversify the Nigerian Economy: A Presentation to President Muhammadu Buhari' July 2015

Ministry of Mines and Steel Development, Roadmap for the Growth and Development of the Nigerian Mining Industry, (2016), available at <[http://www.minesandsteel.gov.ng/wp-content/uploads/2016/09/Nigeria\\_Mining\\_Growth\\_Roadmap\\_Final.pdf](http://www.minesandsteel.gov.ng/wp-content/uploads/2016/09/Nigeria_Mining_Growth_Roadmap_Final.pdf)> accessed 07/10/2016

Nigerian Sustainable Banking Principles, Guidance Note, July 2012

Nedbank Group, 'Sustainability Review', [2015] available at <<https://www.nedbank.co.za/content/dam/nedbank/site-assets/AboutUs/Sustainability/Supporting%20Documents/Sustainability%20Review%20Final%2011%20March%202016.pdf>> accessed 21<sup>st</sup> August 2016

PW Nigeria Limited, Environmental Protection & Rehabilitation Program for PW Kaduna Quarry & Asphalt Plant, Final Report, January 2014

Rio Tinto, United Nations Global Compact: Communication on Progress, 2010, available at: <[http://www.riotinto.com/sustainabledevelopment2013/pdf/ungc\\_2010.pdf](http://www.riotinto.com/sustainabledevelopment2013/pdf/ungc_2010.pdf)> accessed 25<sup>th</sup> September 2015

Rio Tinto, 2013 Sustainable Development: Supporting our Licence to Operate, 2013, available at: <[http://www.riotinto.com/documents/RT\\_SD\\_report\\_2013.pdf](http://www.riotinto.com/documents/RT_SD_report_2013.pdf)> accessed 12<sup>th</sup> November 2017

Ruggie J, 'Protect, Respect and Remedy: a Framework for Business and Human Rights' (2008) A/HRC/8/5 <[http://dag.un.org/bitstream/handle/11176/269890/A\\_HRC\\_8\\_5-EN.pdf?sequence=3&isAllowed=y](http://dag.un.org/bitstream/handle/11176/269890/A_HRC_8_5-EN.pdf?sequence=3&isAllowed=y)> accessed 11th November 2017

Standard Bank of South Africa Limited, 'Our Environmental and Social Risk Management', [2015] available at [http://sustainability.standardbank.com/environmental\\_and\\_social\\_risk\\_management.php](http://sustainability.standardbank.com/environmental_and_social_risk_management.php) accessed 21st August 2016

The United Republic of Tanzania, Office of the Prime Minister, Regional Administration and Local Government, District Commissioner of Tarime, 'The Report of the Inquiry into the Death of Five People on 16/05/2011 shot by the police at the North Mara mine', 13 June 2013, available at: [https://miningwatch.ca/sites/default/files/commission\\_of\\_inquiry\\_report\\_english.pdf](https://miningwatch.ca/sites/default/files/commission_of_inquiry_report_english.pdf) accessed 12th November 2017

United Nations Environment Programme, 'Draft business plan of the artisanal and small scale gold mining (ASGM) Partnership Area' August 7, 2008

Ward H, 'Legal issues in Corporate Citizenship', (2003), Report prepared for the Swedish Partnership for Global Responsibility. Stockholm: Ministry of Foreign Affairs, available at <http://pubs.iied.org/pdfs/16000IIED.pdf> accessed 5<sup>th</sup> May 2017

Ward H, 'Public Sector Roles in Strengthening Corporate Social Responsibility: Taking Stock' [2004] The World Bank available at: <http://pubs.iied.org/pdfs/16014IIED.pdf> accessed 15th June 2014

World Bank, 'Strategy for African Mining' [1992] World Bank Technical Paper Number 181, African Technical Department Series, available at: <http://documents.worldbank.org/curated/en/722101468204567891/pdf/multi-page.pdf> accessed 11<sup>th</sup> November 2017

The World Bank Group, Corporate Social Responsibility Practice, 'Race to The Top: Attracting And Enabling Global Sustainable Business' [2003] Business Survey Report 1-28

## Websites and Newspapers

BBC News, 'Mining Firms Polluting Africa' (BBC 20 November 2007)

<<http://news.bbc.co.uk/1/hi/world/africa/7103114.stm>> accessed 04 August 2017

Dorin A, '2015 Burkina Faso Mining Code' (July 2015), available at

<[https://www.mayerbrown.com/files/Publication/e46c25d2-177a-4d54-bb05-6ddc6cc59bbc/Presentation/PublicationAttachment/70a1a597-4938-4da2-810c-77c2ba7f214d/July2015\\_Burkina\\_Faso\\_Mining\\_Code.pdf](https://www.mayerbrown.com/files/Publication/e46c25d2-177a-4d54-bb05-6ddc6cc59bbc/Presentation/PublicationAttachment/70a1a597-4938-4da2-810c-77c2ba7f214d/July2015_Burkina_Faso_Mining_Code.pdf)> accessed 21<sup>st</sup> March 2016

Equator Principles, 'Equator Principles and Nigeria's Financial Industry', (2012) available at

<<http://www.equator-principles.com/index.php/in-the-media/in-the-media-by-year/89-media-2012/278-equator-principles-and-nigerias-financial-industry>> accessed 21<sup>st</sup> March 2016

Equator Principles, 'Standard Bank Becomes First African Bank to Chair Equator Principles

Association' (2015) available at <<http://www.equator-principles.com/index.php/all-ep-association-news/ep-association-news-by-year/98-2015/392-standard-bank-becomes-first-african-bank-to-chair-equator-principles-association>> accessed 19<sup>th</sup> August 2016

Henao L A, 'Chile Fines Canada's Barrick Gold Corp. \$16m For Environmental Violations'

*The Associated Press*, (Toronto 2013) available at <<http://globalnews.ca/news/587893/chile-fines-canadas-barrick-gold-corp-16m-for-environmental-violations/>> accessed 27<sup>th</sup> October 2015

IFRS, 'IFRS Application Around the World Judicial Profile: Nigeria' available at <

<http://www.ifrs.org/Use-around-the-world/Documents/Jurisdiction-profiles/Nigeria-IFRS-Profile.pdf>> accessed on 28<sup>th</sup> March 2016

Jarroud M, 'Chilean Court Suspends Pascua Lama Mine', *Inter Press Service News Agency*

(Santiago 10 April 2013) <<http://www.ipsnews.net/2013/04/chilean-court-suspends-pascua-lama-mine/>> accessed 29<sup>th</sup> May 2017

Lenin J, 'French Banks Say No to Bangladesh Coal Plant', *The Guardian* (London, 25 June 2015) available at: <<https://www.theguardian.com/environment/blog/2015/jun/25/french-banks-say-no-to-bangladesh-coal-plant>> accessed 27 February 2017

London Mining Network, 'Rio Tinto: A Record Fit for the Olympics?', (2012), 4 available at: <<https://londonminingnetwork.org/2012/08/rio-tinto-a-record-fit-for-the-olympics-2/>> accessed 12<sup>th</sup> November 2017

Mathiesen K, 'Barclays ends financing of controversial mountaintop removal mining', *The Guardian* (London, 7 April 2015) available at <<https://www.theguardian.com/environment/2015/apr/07/barclays-ends-financing-of-controversial-mountaintop-removal-mining>> accessed 25<sup>th</sup> February 2017

Mining Watch Canada, 'Barrick Settlement on Rapes and Killings in Papua New Guinea Proof that Victims Need Independent Legal Counsel', 2015 available at <<http://www.miningwatch.ca/news/barrick-settlement-rapes-and-killings-papua-new-guinea-proof-victims-need-independent-legal-cou>> accessed 25<sup>th</sup> October 2015

Rio Tinto, RTFT Launches two major improvement projects at its Sorel-Tracy Operation in Quebec available at: <[http://www.riotinto.com/ourcommitment/features-2932\\_5387.aspx](http://www.riotinto.com/ourcommitment/features-2932_5387.aspx)> accessed on 10<sup>th</sup> October 2015

The British Library, 'Socio-Legal Studies: An Introduction to Collections' available at: <<http://www.bl.uk/reshelp/findhelpsubject/busmanlaw/legalstudies/soclegal/sociolegal.html>> accessed 13<sup>th</sup> August 2017

The Environmental Impacts of Freeport-Rio Tinto's Copper and Gold Mining Operation in Indonesia, 2006, available at <<http://freewestpapua.org/documents/the-environmental-impacts-of-freeport-rio-tintos-copper-and-gold-mining-operation-in-indonesia-june-2006/>> accessed on 30<sup>th</sup> September 2015

Udo B, 'How Corrupt Government Officials Helped Ruin Nigeria's Mining Sector – Minister' *Premium Times* (Abuja, 15<sup>th</sup> October 2016) available online at <http://www.premiumtimesng.com/news/headlines/212822-interview-corrupt-govt-officials-helped-destroy-nigerias-mining-sector-minister.html>> accessed 15<sup>th</sup> October 2016

UK Procurement Pledge for Local Authorities,  
<<https://www.local.gov.uk/sites/default/files/documents/lg-procurement-pledge-pdf-550.pdf>>  
accessed 19<sup>th</sup> September 2018

Vidal J, 'Shell Announces £55m Pay Out for Nigeria Oil Spills', *The Guardian* (London 7<sup>th</sup> January 2015)

Vidal J, 'Zambian Villagers take Mining Giant Vedanta to Court over Toxic Leaks', *The Guardian* (Chingola, Zambia 1<sup>st</sup> August 2015)

Wakili I, 'Federal Executive Council Approves N30bn for Mining' *Daily Trust* (Abuja, 20<sup>th</sup> October 2016) available at <<http://www.dailytrust.com.ng/news/general/fec-approves-n30bn-for-mining/167754.html>> accessed 21st October 2016

<http://www.proudlysa.co.za/>

WWF, 'Whale talks allow banks to voice concerns over Sakhalin Energy Expansion' 12 February 2012, available at:  
<[http://www.wwf.org.uk/about\\_wwf/press\\_centre/?unewsid=5682](http://www.wwf.org.uk/about_wwf/press_centre/?unewsid=5682)> accessed 20<sup>th</sup> March 2016



BPP List of Civil Society Organizations in Nigeria,

[http://www.bpp.gov.ng/index.php?option=com\\_joomdoc&view=documents&path=CSO\\_LIS\\_T.pdf&Itemid=569](http://www.bpp.gov.ng/index.php?option=com_joomdoc&view=documents&path=CSO_LIS_T.pdf&Itemid=569) accessed 19<sup>th</sup> September 2018

<http://eiti.org>

<http://eiti.org/supporters/companies?page=2>

<http://www.equator-principles.com/index.php/ep3>

<http://www.equator-principles.com/index.php/members-and-reporting>

<https://www.fidelitybank.ng/corporate-social-responsibility/>

<http://www.kimberleyprocess.com>

[www.nigerianstat.gov.ng/download/481](http://www.nigerianstat.gov.ng/download/481)

<http://www.okinternational.org/mining>

[http://www.sakhalinenergy.com/en/company/company\\_assets/index.wbp](http://www.sakhalinenergy.com/en/company/company_assets/index.wbp)

<http://www.sustainability-indices.com>

<http://www.unepfi.org/member/wema-bank-plc/>>

<http://www.unglobalcompact.org>