

The Imperatives of Beneficiation Law for Botswana's Diamond-mining Industry and Their Implications for Foreign Investment Protection

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Abstract

This article seeks to investigate the advantages and disadvantages of a beneficiation law for Botswana's mining industry and its implications for foreign investment protection. It argues that the enactment of a beneficiation law could stimulate economic growth and development in Botswana. On a proper analysis of the potential of a beneficiation law it seems plain that it may facilitate the integration of, among other things, the cutting and polishing segments through facilitating backward and forward linkages in the entire diamond value chain. The objective would be to move Botswana's diamond industry a step further as a new and emerging jewellery manufacturing and retail centre in order for it to derive maximum returns from rough diamond production. Quite clearly, the cutting and polishing of diamonds in Botswana is bound to promote employment, which in turn would promote a demand for goods and services that would have a positive impact on economic growth in the country. The authors conclude that, on balance, the opportunities to be accrued from the enactment of this law far outweigh the disadvantages and that beneficiation will not in any way scare investors away, as some have predicted it would.

Keywords: beneficiation law; diamond mining; mining industry; Botswana; foreign investment



Introduction

Botswana was one of the poorest countries in Africa with a per capita gross domestic product (GDP) of approximately US\$70 when it gained independence from Britain in 1966: there was hardly any infrastructure of note; the literacy rate was very low; the industrial sector was almost non-existent, the country being heavily dependent on subsistence farming and government employment.

In the years that followed independence, however, Botswana recorded phenomenal economic growth supported by the discovery of diamonds, and it is now ranked as an upper-middle-income country. It follows from this that Botswana's diamonds are its pride and it is no wonder that the mining sector is the pillar of the economy. The exploration and exploitation of its mineral resources has been instrumental in the country's economic development for more than half a century. Botswana is best known for its diamond mines, but to date steps have not been taken to beneficiate the precious stones within the country.¹ It is in this context that there has been a rigorous debate about the opportunities and challenges for the diamond industry in Botswana that could possibly accompany the enactment of beneficiation legislation.

Sometime in February 2013, the parliament of Botswana engaged in a somewhat heated debate on the enactment of beneficiation legislation: the question whether beneficiation law would scare off investors lay at the heart of it. Accordingly, the motion that was tabled in parliament making a case for the enactment of such legislation was met with mixed feelings in the House.² Some members of parliament believed that it was crucial to have such legislation in place, as it could help to transform the country's abundant minerals and other resources to gain a competitive advantage, whereas others argued that it would be disastrous to enact beneficiation legislation because such legislation would scare away investors. They contended that it would be tantamount to expropriation, or at least likely to lead to some kind of interference in investors' rights. Consequently, the voting results were 19 for the motion and 23 against.

In some respects this article seeks to continue this debate by answering the question whether beneficiation legislation is the best guarantee for local community benefits under Botswana's regulatory regime for diamond mining or whether it is yet another flawed concept that will undoubtedly scare investors away. It therefore investigates the attendant benefits of the enactment of beneficiation legislation and argues that such enactment could stimulate economic growth and development in Botswana. It argues

¹ Ministry of Minerals, Energy and Water Resources (MMEWR), *Botswana Mineral Investment Promotion Report* (MMEWR 2008) 3.

² Ministry of Trade and Industry (Botswana), *Beneficiation Law May Scare Away Investors* (18 February 2013) <www.gov.bw> accessed 20 August 2016.

further that, on balance, the opportunities that could accrue from the enactment of this law far outweigh the disadvantages, and that the measures will not in any way scare investors away, as some have believed. Finally, a compelling case is made for beneficiation legislation to be enacted in Botswana while anticipating the impacts and challenges it is likely to have on Botswana's foreign investment. It is believed that a balanced debate on the matter will present a unique opportunity for legislators to reconsider the question of legislating beneficiation.

Background Information

Botswana is the world's largest producer (by value) and exporter of diamonds, which contribute approximately 30 per cent to the country's GDP.³ The mining sector remains the largest in the economy, accounting for 20.3 per cent of total output,⁴ and has contributed enormously to the economic growth of Botswana in terms of direct foreign exchange and government revenues generated by diamond sales.⁵ Foreign direct investment (FDI) in Botswana is therefore concentrated in the mining sector.⁶

All mineral rights in Botswana are vested in the State and it is the Minister of Minerals, Energy and Water Resources (MMEWR) who should ensure, in the public interest, that the mineral resources of the republic are prospected and exploited in the most efficient, beneficial and timely manner.⁷ The Botswanan legal framework for mining operations is anchored on the Mines and Minerals Act ('the MMA') of 1999. The MMA provides for, among other things, mining licences, retention licences, and prospecting and mineral permits.⁸

Beneficiation is often considered one of the options available to countries seeking to take full advantage of their mineral wealth. In fact, the African Union (AU) formulated a mining vision of February 2009 which envisages having a knowledge-driven African mining sector that catalyses and contributes to the broad-based growth and development of a single African market through, among other things, beneficiation.⁹ The authors of this article therefore seek to weigh up the attendant benefits of the enactment of beneficiation legislation and argue that the enactment of such legislation could stimulate economic growth and development in Botswana.

³ Botswana Annex, SACU-Botswana, Trade Policy Review WT/TPR/S/222/BWA.

⁴ Bank of Botswana, 'Annual Report' (2012) <<http://www.bankofbotswana.bw/assets/uploaded/bob-ar-2012-main.pdf>>.

⁵ Available at DTC (Botswana) website <http://www.dtcbotswana.com/about_us.php> accessed 4 October 2016.

⁶ Bank of Botswana, 'Annual Report' (2009) <<http://www.bankofbotswana.bw/content/2009110614010-annual-report>>.

⁷ The Mines and Minerals Act (MMA) of 1999 s 3, Laws of Botswana.

⁸ Sections 13, 25, 37 and 52 of MMA.

⁹ African Union (AU), *Africa Mining Vision* (AU 2009).

This article is structured as follows: the next section examines the concept of beneficiation and considers the opportunities for and challenges of enacting beneficiation legislation; the section that follows discusses beneficiation law at the international level, using South Africa and Indonesia as case studies; thereafter, we focus on Botswana's diamond industry and the undergirding legal framework, and explore the likely impacts of beneficiation legislation on Botswana with specific regard to the protection of existing and potential foreign investments. The article concludes with some final remarks and recommendations.

Beneficiation as a Concept

In this section, the objective is to examine the concept of beneficiation in depth; it will attempt to answer the question: What is beneficiation and the controversial debate surrounding it? In so doing, it sets off by defining 'beneficiation' and tracking the genesis of beneficiation, which can be traced to the Staples Thesis. It then discusses the types of beneficiation and concludes by providing arguments for and against it.

What is 'beneficiation'?

Hausmann and others define beneficiation as 'vertical relationships in production chains, known as linkages, which have had a profound impact on economic policy in developing countries, geared towards stimulating structural transformation.'¹⁰ They state that

such policies have been termed differently, such as 'promoting downstream processing; completing value chains'; 'increasing value-added'; and 'beneficiation', but they are all based on the same idea: that it is a logical, natural progression for countries exporting raw materials to move into the processing of such materials, and therefore policies encouraging that progression can accelerate growth.¹¹

Beneficiation is defined in the South African Minerals and Mining Policy White Paper of 1998 as the

successive processes of adding value to raw materials from their extraction through to the sale of finished products to consumers, covering a wide range of very different activities. These include large-scale and capital-intensive operations like smelting and technologically sophisticated refining as well as labour-intensive activities such as craft jewellery.¹²

¹⁰ Ricardo Hausmann, Bailey Klinger and Robert Lawrence, 'Examining Beneficiation' Faculty Research Working Papers Series, RWP08-030 (Centre for International Development, Harvard University 2008) 2.

¹¹ *ibid* 2–7.

¹² South African Government Printing Office, *White Paper: A Minerals and Mining Policy for South Africa* (1998) <http://www.polity.org.za/polity/govdocs/white_papers/minerals98.html>.

Beneficiation legislation would therefore enable minerals to go beyond mere processing but allow the addition of value and downstream linkages.

The Genesis of Beneficiation

Beneficiation has its roots in the Staples Thesis. This is a theory which asserts that ‘the export of natural resources, or staples, from Canada to more advanced economies has a pervasive impact on the economy as well as on the social and political systems.’¹³ It was formulated in the 1920s by economic historians Innis and Mackintosh.¹⁴ This thesis has been neatly captured by Grynberg,¹⁵ who postulates that

the staples thesis or approach is the basis of the contemporary debate on beneficiation and linkages between staples and the manufacturing sector. Innis argues that countries tend to fall into a ‘staples trap’ whereby they would tend to fall back into the export of staples and that growth would occur, but not economic transformation. Mackintosh argues that ‘development spread through backward linkages and that sustained transformation could occur in a staples economy’.¹⁶

There are two broad types of beneficiation, which are now examined.

Downstream versus Side-stream Beneficiation

Beneficiation can be said to be either downstream or side-stream. Downstream is more common and is most commonly pursued by states. Side-stream beneficiation refers to the spill-over effects of downward beneficiation such as the establishment of industries vital to the operation of full diamond production.¹⁷ This article is, however, concerned primarily with downstream beneficiation. Traditionally, downstream beneficiation has been regarded as being the most logical natural progression for a mineral-rich country to leverage its comparative advantage to attain competitive advantage.¹⁸ Downstream beneficiation involves the transformation of raw materials into finished products that

¹³ *Canadian Encyclopaedia* <<http://www.thecanadianencyclopedia.com/articles/staple-thesis>>.

¹⁴ *ibid.*

¹⁵ Roman Grynberg, *Some Like Them Rough: The Future of Diamond Beneficiation in Botswana* (Botswana Institute for Development Policy Analysis (BIDPA) 2013) 2 <www.ecdpm.org/dp142>.

¹⁶ *ibid.*

¹⁷ Roger Baxter, ‘Facilitating Further Minerals Beneficiation in South Africa’ (Chamber of Mines SA, 22 May 2013) <<https://commondatastorage.googleapis.com/comsa/com-presentation-on-beneficiation.pdf>> accessed 18 August 2017.

¹⁸ Southern African Institute of Mining and Metallurgy (SAIMM), ‘The Rise of Resource Nationalism: A Resurgence of State Control in an Era of Free Markets or the Legitimate Search for a New Equilibrium?’ (Michael Solomon, February 2012) 274 <<http://www.saimm.co.za/download/MEC/FOR%20RELEASE%20RESOURCE%20NATIONALIS M%2030%20May%202012.pdf>> accessed 18 August 2017.

would sell at a price higher compared to what the unprocessed raw material would sell for.¹⁹

Opportunities and Challenges of Beneficiation

Opportunities

It is axiomatic that beneficiation has advantages. First, with each successive stage of beneficiation value is added.²⁰ The South African White Paper of 1998 noted that the beneficiation policy would develop South Africa's mineral wealth to its full potential and to the maximum benefit of the entire population.²¹ It has been established that this would be achieved through promoting secondary and tertiary mineral-based industries aimed at adding maximum value to raw materials.²²

Beneficiation has the potential to increase the ratio of beneficiation extent to mineral production, increasing the export revenue, employment opportunities and economic growth.²³ This therefore means that the exports are of better quality and can be competitive in the global market.²⁴

Increased employment opportunities through beneficiation are more visible at the labour-intensive stage when fabricated articles are produced.²⁵ In addition to the advantages of the value added and the new jobs created, fabrication provides much greater scope for product diversification, which makes possible choosing those products best suited to penetrating export markets.²⁶

Hausmann and others posit that the proponents of beneficiation most often point out that the physical proximity to raw materials provides downstream processors with advantages owing to the ability to avoid high freight costs or to transport goods over short distances.²⁷ They cite an example where raw cotton from Africa is shipped to Europe to be processed when it could be processed locally.²⁸ They argue that such an

¹⁹ *ibid.*

²⁰ IC Robinson and MA von Below, 'The Role of the Domestic Market in Promoting the Beneficiation of Raw Materials in South Africa' (1990) 90 (4) *Journal of the South African Institute of Mining and Metallurgy* 2.

²¹ Department of Mineral Resources, South Africa, 'Mineral Beneficiation in South Africa' (2013) <<http://www.pmg.org.za/report/20130226-mineral-beneficiation-south-africa-department-briefing>> accessed 16 June 2016.

²² *ibid.*

²³ Robinson and Von Below (n 20). This was distilled by the Department of Minerals Resources in the South African beneficiation strategy as one of its visions.

²⁴ *ibid.*

²⁵ *ibid.*

²⁶ *ibid.*

²⁷ Hausmann and others (n 10) 5.

²⁸ Hausmann and others (n 10).

observation is more convincing when it is applied to mineral resources with higher transportation costs, such as logs.²⁹ They add that the transportation costs of local supply may be both more secure and cheaper, and could also be more precisely matched to downstream producer needs.³⁰

The Deloitte team presents the benefits of beneficiation law in a simpler, more comprehensible manner. Interestingly, they group them under a few headings: economic, new enterprise development and job creation, increasing tax revenue, and saving on transport and import/export costs. First, they identify economic benefits and state that beneficiation could increase a ratio of beneficiation extent to mineral production and increase export revenue, facilitate economic diversification, and expedite progress towards a knowledge-based economy. Secondly, they state that beneficiation would create opportunities for new enterprise development and contribute to the creation of decent jobs and to the alleviation of poverty.³¹

With regard to revenue potential, beneficiation could increase tax revenue for the government through business creation, increased integration benefits and also potential cost-cutting in a number of ways.³² In terms of ‘saving on import/export costs of beneficiated products’ they anticipate reduced transportation costs of raw materials, reduced costs and fees associated with imports and exports, and this could reduce the delay costs associated with the lack of infrastructure around import/export hubs.

Challenges

One must hasten to state that beneficiation is not without its challenges; hence the observation by some that it is not a panacea.³³

First, beneficiation requires high-level skills. Although beneficiation is expected to create significant employment opportunities in the country, substantial investment will have to go into developing the required skills and expertise for the expected job opportunities.³⁴ Failure to build the required talent pool could be grave as it could result in a dependence on highly skilled expatriate labour.³⁵ Hence the saying goes, ‘the

²⁹ *ibid.*

³⁰ *ibid.*

³¹ Department of Mineral Resources (n 21).

³² Deloitte, ‘Positioning for Mineral Beneficiation Opportunity Knocks’ (2008) <www.deloitte.com/> 6.

³³ MJ Morgan, ‘Beneficiation-the pros and cons: Is Africa giving away the value of its minerals by exporting them unrefined?’ (April 2013) 66 *African Business*, 01413 Issue 396 <<https://africanbusinessmagazine.com/uncategorised/beneficiation-the-pros-and-cons/>> accessed 6 June 2017.

³⁴ Creamer Media Reporter, ‘Local Mineral Beneficiation to Present Challenges’ *Mining Weekly* (9 December 2013) <<http://www.miningweekly.com/article/local-mineral-beneficiation-to-present-challenges>>.

³⁵ *ibid.*

success of establishing a local mineral beneficiation sector will also depend on how well the nation is able to develop the required skills and talent pool.³⁶

Hausmann and others are highly critical of beneficiation. Their view is that beneficiation, in the sense of incentivising the domestic processing of natural resources, is not a sensible policy.³⁷ They argue that the capabilities developed through mining can be exploited in other ways.³⁸ In a nutshell, they see beneficiation as a nonsensical concept with a narrow focus as mineral resources could be explored differently. However, they do not offer a concrete or convincing explanation as to why beneficiation, as an option, should not be pursued.

It has also been pointed out that one of the questions countries pursuing beneficiation should be advised to ponder on is: To which markets will they sell their manufactured products?³⁹ It is further suggested that the world's mineral beneficiating companies are located in the developed world, where an established and mature market consumes the products that the industry manufactures.⁴⁰ The argument goes that, as a result, there will be limited local and regional demand for the beneficiation industry's manufactured products, as the country's mineral beneficiation sector may want access to these international markets to sustain its growth objectives.⁴¹

A brief on beneficiation for the government of South Africa produced by the Centre for International Development at Harvard University concluded that 'beneficiation is a bad policy paradigm and should be dropped from South Africa's development strategy.'⁴² While the report acknowledges that 'the exporting of raw natural resources is a legacy of colonialism, in which countries were precluded from developing their own processing capacities in order to supply the motherland with cheap raw materials', it provides 'detailed evidence' that countries do not experience export development downstream.⁴³ The report, in essence, posits that there should not be an outright presumption in favour of beneficiation and that each case should be considered on its merits.⁴⁴

³⁶ *ibid.*

³⁷ Ricardo Hausmann, Dani Rodrick and Charles Sabel, 'Reconfiguring Industrial Policy: A Framework with an Application to South Africa' Conference Paper 2008 on Entrepreneurship and Innovation – Organizations, Institutions, Systems and Regions Copenhagen, CBS (Denmark, 17–20 June 2008).

³⁸ *ibid.*

³⁹ *Mining Weekly* (n 34).

⁴⁰ *ibid.*

⁴¹ *Mining Weekly* (n 34). However, regional integration could be looked at for markets; and with the African tripartite regional integration underway, the future looks more appealing.

⁴² See Morgan (n 33).

⁴³ *ibid.*

⁴⁴ *ibid.*

The report further suggests that policies that enhance downstream processing are misguided.⁴⁵ A focus on beneficiation, the argument goes, is necessarily at the expense of policies that would enable other potential sectors to emerge.⁴⁶ Their findings depict beneficiation as ‘a bad trade-off’ as there are better opportunities that are more often ‘lateral’ than downstream.⁴⁷ They conclude that beneficiation is simply a bad policy paradigm.⁴⁸

Another flaw of the concept is that it may require more research and development, which could render it more costly than not beneficiating.⁴⁹

The next section considers the interface between beneficiation legislation and the protection of foreign investments.

Botswana’s Diamond-Mining Industry and the Regulatory Regime

Botswana has been said to be the ‘Switzerland of Africa’, due mainly to its diamond sector.⁵⁰ The country is home to two of the world’s largest diamond mines, Jwaneng and Orapa,⁵¹ and ranked as the greatest diamond-producing state in the world by value at 21 per cent of global rough-diamond production alone.⁵² Botswana has one of the most lucrative diamond-mining sectors, one that contributes greatly to the wealth of the country.⁵³ The economy is therefore highly anchored on this sector.⁵⁴ It is not disputed that the diamond industry has translated Botswana’s economy into that of a middle-income nation and one of the most dynamic economies in Africa.⁵⁵ Diamond mining has fuelled much of its economic expansion and currently accounts for 70–80 per cent of export earnings.⁵⁶

The search for diamonds in Botswana began in the Tuli Block in 1955.⁵⁷ Diamonds were first discovered in 1959 and the first kimberlites were discovered in 1967.⁵⁸ The first

⁴⁵ See Hausmann and others (n 10) 5.

⁴⁶ Hausmann and others (n 10).

⁴⁷ *ibid.*

⁴⁸ *ibid.*

⁴⁹ Deloitte (n 32) 7.

⁵⁰ Botswana Diamond Plc, ‘Diamond Exploration in Elephant Country’ Diamond Trading Company (2011) <www.botswanadiamonds.co.uk> 4.

⁵¹ Pangolin Diamonds Corporation. ‘All About Botswana’ <<http://www.pangolindiamondscorp.com/about-botswana.php>>.

⁵² *ibid.*

⁵³ European Commission (EU), ‘Country Level Evaluation Botswana’ Final Report (Vol 1) (Main Report Mining 2009). In this sense not only of diamonds but also of copper and nickel.

⁵⁴ EU (n 53).

⁵⁵ Botswana Diamond Plc, ‘Annual Report’ (2012) <www.botswanadiamonds.co.uk>.

⁵⁶ *ibid.*

⁵⁷ See <<http://www.debswana.com/About%20Debswana/Pages/HistoryAndProfile.aspx>>.

⁵⁸ Pangolin Diamonds Corporation (n 51).

mine, Orapa, was discovered in 1967.⁵⁹ The Orapa pipe held great potential and approval was granted to the shareholders to develop it.⁶⁰ A year after, two other small pipes were discovered some 40 kilometres south-east of Orapa, near Letlhakane village.⁶¹ Since then, other mines had been discovered and developed.

Leading the pack of mining companies is the De Beers Botswana Mining Company, which started business in 1969.⁶² This was a joint venture between De Beers (85 per cent) and the Botswana Government (15 per cent).⁶³

Today, a number of mining companies other than De Beers are to be found in Botswana. For instance, the Botswana Diamond Company (BOD) discovered the newest producing diamond mine in the world, the Karowe Diamond Mine, which is said to produce exceptional stones and some very rare blue diamonds.⁶⁴ According to the directors of BOD, more diamond mines are yet to be discovered in Botswana.⁶⁵

Towards Beneficiation

The initial position of De Beers on beneficiation and its shift thereafter, through its managing directors, is worth mentioning. Ralfe first considered that Botswana diamonds should be polished where they could yield more revenues, and that an attempt to beneficiate locally was only a national folly and not an acknowledgement of its economic realities.⁶⁶ This company has always resisted beneficiation and, as a result, the Batswana have for a very long time not benefited from their wealth. De Beers' stance on beneficiation six years later, though, was radically opposed to its earlier statement. Penny stated:

For the African diamond producing countries, beneficiation is not optional, not a passing whim motivated by political correctness, but an imperative, an absolutely essential and critical part of their macroeconomic policy designed to uplift their economies to provide education and jobs and healthcare for their people and to make poverty history ... We [De Beers] don't embrace this out of misguided enthusiasm or altruism. No, we embrace it because it makes good business sense and because it is the right thing to do.⁶⁷

⁵⁹ See <<http://www.debswana.com/About%20Debswana/Pages/HistoryAndProfile.aspx>>.

⁶⁰ *ibid.*

⁶¹ *ibid.*

⁶² Leon Daniels, 'Spotlight on Botswana' (2004) Rough Diamond Review.

⁶³ Daniels (n 62).

⁶⁴ Botswana Diamond Plc, 'Botswana Diamond Fact Sheet' (2013) <www.botswanadiamonds.co.uk>.

⁶⁵ *ibid.*

⁶⁶ DIB Online, 'DeBeers Managing Director Interview', Diamond Intelligence Briefs (2001) 343 <<http://www.diamondintelligence.com/magazine/default.aspx?SubCatId=35>>.

⁶⁷ John Helmer, 'ALROSA Attacks African Diamond Beneficiation' (25 October 2007) <<http://johnhelmer.online/?s=ALROSA+Attacks+African+Diamond+Beneficiation>>.

It is believed that Botswana's opportunity to fight for downstream linkages came in 2005, when the De Beers' mining licence expired and was due for renewal.⁶⁸ At that point, the government had greater leverage and therefore insisted that De Beers should help Botswana to develop a diamond-cutting and -polishing industry.⁶⁹ It was apparent that De Beers could not evade undertaking some level of beneficiation at least. A contract which ensured the local cutting and polishing of diamonds then came into force.⁷⁰ The Diamond Trading Company Botswana (DTCB) was established in 2006, replacing the Botswana Diamond Valuing Company (BDVC).⁷¹ The aim of this new entity was to make diamonds available for sale in Botswana for local manufacturing.⁷²

The headquarters of DTCB was accordingly moved from London to Botswana;⁷³ moreover, in 2012, a state diamond trading company was established.⁷⁴ This state-owned company sells diamonds independently of the DTCB joint venture.

The next section of this article analyses the various pieces of legislation that underpin the diamond-mining industry.

Legislative Framework

Mines and Minerals Act (MMA) and Regulations

It is important to note from the outset that the provisions of this Act and its regulations have failed dismally to facilitate beneficiation in Botswana, and with regard to beneficiation only a few sections of the Act are worthy of discussion in this article.

All mineral rights in Botswana are vested in the State and it is the Minister of MEWR who should ensure, in the public interest, that the mineral resources of the republic are prospected and exploited in the most efficient, beneficial and timely manner.⁷⁵ The Botswana legal framework for mining operations is anchored on the MMA. It creates an environment to obtain, inter alia, mining licences, retention licences, prospecting licences and mineral permits for small-scale mining operations.⁷⁶ Retention licences allow prospectors to defer the mining of uneconomic deposits for up to six years.⁷⁷ Mining licences are issued to Botswana-registered companies only. Licence applicants

⁶⁸ Letsema Mbayi, 'Linkages in Botswana's Diamond Cutting and Polishing Industry' MMCP Discussion Paper No 6 (University of Cape Town & Open University 2011).

⁶⁹ *ibid.*

⁷⁰ Botswana Annex 1, 'SACU Trade Review Policy' (2009) WT/TPR/222/BWA.

⁷¹ *ibid.*

⁷² *ibid.*

⁷³ This is now the biggest rough-diamond sorting and valuation facility globally.

⁷⁴ Michael Brook, *The Journey of Botswana's Diamonds* (Diamond Trading Company 2012).

⁷⁵ See generally the Mines and Minerals Act of 1999, Laws of Botswana.

⁷⁶ Sections 13, 25, 37 and 52, Mines and Minerals Act of 1999, Laws of Botswana.

⁷⁷ Section 30, Mines and Minerals Act of 1999, Laws of Botswana.

must show proof of both technical competence and access to adequate financial resources.⁷⁸ Government participation in mining licences is negotiated on a full participation basis.⁷⁹

Section 12 of the Act provides for preferential treatment for Botswana products in so far as the purchase, construction and installation in the diamond operations are concerned. A thorough perusal of the Act and its Regulations for provisions which could be used to facilitate beneficiation failed dismally. Only the above sections are relevant; hence the need to look for lessons from other jurisdictions.

Other Acts and Regulations Regulating Diamond Mining

*Diamond Cutting Act*⁸⁰

The Diamond Cutting Act regulates the cutting, sawing, cleaving and polishing of rough and uncut diamonds and provides for other such related matters.⁸¹ Section 29 also provides for preferential treatment for Botswana as far as installing, purchasing and constructing facilities is concerned.

*Exports and Imports of Rough Diamonds Regulations*⁸²

These deal with regulating the exportation of rough diamonds out of and their importation into Botswana. They place particular emphasis on the possession of a ‘Kimberly Process Certificate’, without which the importation and exportation of rough diamonds would not be possible.

The tentative conclusion to be drawn here is that Botswana’s beneficiation strategy is not ambitious enough. For instance, the target by 2021 is to have increased the number of cutting factories and improved the training and development of the locals. What about diamond jewellery manufacturing and retailing? A careful look at Botswana’s legal framework for diamond mining will show it to be shallow and therefore not having sufficient ‘teeth’ to advance full diamond beneficiation.

Comparing Botswana’s Diamond Legal Framework with Similar Extant Legislation in South Africa and Indonesia

This section compares and contrasts Botswana’s diamond legislation with similar laws in South Africa and Indonesia and asks whether or not there are any lessons Botswana can learn from these two resource-rich countries.

⁷⁸ Botswana Annex 1 (n 70).

⁷⁹ Brook (n 74).

⁸⁰ Chapter 66:04 of 1979, Laws of Botswana.

⁸¹ See the Preamble to the Act.

⁸² Statutory Instrument No 24 of 2004, published 19 March 2004.

South African Legal Framework

Economic development in South Africa has always been possible due to its mining industry:⁸³ mining remains at the heart of South Africa's economy. As a result, it is a sector that has hitherto always been prioritised.⁸⁴ It is ranked fifth in the world, following China, the United States, Australia and Brazil, and is one of the richest in terms of in-situ mineral resources, which are estimated at around US\$2.5 trillion, with more than a century of exploitable life remaining.⁸⁵

South Africa is committed to promoting downstream beneficiation;⁸⁶ its beneficiation strategy dates from 2011.⁸⁷ The objective of this strategy is to transform the country's sheer comparative advantage into a national competitive advantage through legislation.⁸⁸ It identifies ten strategic mineral commodities.⁸⁹ In this regard, beneficiation can be said to be sector-specific as the strategy targets only a handful of minerals.

Worth mentioning is the fact that the strategy is based on already existing legislation.⁹⁰ These incentives, policies and legislation are identified as the instruments necessary as an enabling environment for beneficiation.⁹¹ Some of these instruments include the Minerals and Mining Policy for South Africa,⁹² the Minerals and Petroleum Resources Development Act (MPRDA),⁹³ the Broad-Based Socio-economic Empowerment Charter (BBSEE) for the South African Mining Industry,⁹⁴ the Precious Metals Act⁹⁵ and the Diamonds Second Amendment Act.⁹⁶ A discussion of some of these instruments is critical to the discussion in this article.

The Mineral and Petroleum Resources Development Act 26 of 2002 (MPRDA)

This Act is equivalent to Botswana's MMA. Section 3 of the Act can be equated to section 3 of Botswana's MMA in that both Acts require the responsible ministers to

⁸³ SAIMM (n 18) 270.

⁸⁴ SAIMM (n 18) 271.

⁸⁵ Peter Leon, 'SA's Mining Industry in Decline: An Analysis' *Politicsweb* (1 September 2010) <<http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71654/page71656?oid=196410&sn=Detail&pid=71616>>.

⁸⁶ SAIMM (n 18) 271.

⁸⁷ South Africa's Beneficiation Strategy (2011).

⁸⁸ *ibid.*

⁸⁹ *ibid.*

⁹⁰ SAIMM (n 18) 272.

⁹¹ See South Africa's Beneficiation Strategy (n 87).

⁹² 1998.

⁹³ Act 26 of 2002.

⁹⁴ 2004.

⁹⁵ 37 of 2005.

⁹⁶ 30 of 2005.

ensure the sustainable development of mineral resources.⁹⁷ However, the MPRDA, unlike the MMA, goes further than that. The MPRDA has a section dedicated to beneficiation, a provision the MMA lacks. In fact, section 26 of the MPRDA stipulates that the minister may prescribe ways of promoting beneficiation in South Africa, acting on the advice of the board, if such a move would be of economic value.⁹⁸ The Act provides that no external beneficiation is to occur without a written notice and consultation with the minister.⁹⁹

Through section 26 of the Act, it has been possible to pursue the beneficiation of minerals and petroleum in South Africa. The South African government had pushed for further amendments to the Act for three years before that was finally achieved in March 2014.¹⁰⁰ This puts South Africa in a somewhat stronger position when compared to Botswana. A section 26 equivalent or better in the MMA would enable Botswana to ensure the beneficiation of its precious diamonds.

The South African Mining Charter of 2004 (BBSEE)

In terms of this Charter, mining companies are to bind themselves to identifying their current levels of beneficiation and, furthermore, to making it known to which stages of beneficiation they can go.¹⁰¹ It would appear they are to agree to state the extent to which they are able and willing to take local beneficiation.

The Charter makes it possible for these companies to offset the value of the level of beneficiation achieved by them against their historically disadvantaged South Africans' (HDSA) ownership commitments.¹⁰² The latter objective can be understood by recourse to the objectives of the Charter. One of the objectives of this Charter is to ensure that the HDSA participate in the nation's wealth derived from mineral resources. As a result, some level of beneficiation in these mining companies can be compromised and allowed, provided the HDSA are part of these companies. One thing remains clear: the aim is to have South Africans participate in the exploitation of the nation's mineral resources.

The Diamonds Amendments Act 29 of 2005

The Diamonds Act 56 of 1986 was amended in 2005. The aim of the amendment was to enhance access to rough diamonds for jewellery manufacturing locally as well as to

⁹⁷ Section 3 MPRDA.

⁹⁸ Section 26(1)–(2) MPRDA.

⁹⁹ Section 26(3) MPRDA.

¹⁰⁰ David McKay, 'SA Parliament Approves MPRDA Amendments' *Miningmx* (6 March 2014) <<http://www.miningmx.com/page/news/markets/1640257-SA-parliament-approves-MPRDA-amendments#.U0LoZ2bNtdg>>.

¹⁰¹ Clause 4.8 BBSEE.

¹⁰² *ibid.*

facilitate the beneficiation of diamonds.¹⁰³ Chapter II, Part 1 of the Amendment Act is more illustrative in that it introduces South Africa's Diamond and Precious Metals Regulator.¹⁰⁴ According to the Act, the Regulator is to ensure that the diamonds are exploited and developed in a manner that is beneficial to the nation and also to ensure equitable access and the promotion of local beneficiation.¹⁰⁵ The Regulator is also expected, when evaluating the applications of interested investors, to ensure equitable access to and local beneficiation of the diamonds.¹⁰⁶ Also introduced in the Act is the definition of beneficiation as the 'polishing of a diamond or the setting of a diamond in a tool, in an article or in jewellery.'

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

The Precious Metals Act

The objective of this Act is to provide for the acquisition, possession, smelting, refining, beneficiation, use and disposal of precious metals.¹⁰⁷ Just like the Diamonds Amendment Act, it establishes and sets out the objects of the Regulator in the exact same terms as the latter Act.¹⁰⁸ It further provides for the issuance and renewal of a precious metal beneficiation licence.¹⁰⁹ This licence is issued to those who can show an ability to beneficiate the precious metals. This position, also compared to Botswana legislation, is progressive in that licences are issued only to those with the ability to beneficiate locally.

The Indonesian Legal Framework

Background to the Indonesia's Mineral and Mining Law

Indonesia's mining system was traditionally based on Contracts of Work (CoW), established in 1967.¹¹⁰ A CoW is basically an agreement between the Indonesian government and an investor company.¹¹¹ Such a contract would set out the rights and

¹⁰³ See Department of Mineral Resources (DMR) 'Beneficiation Economics' <<http://www.dmr.gov.za/mineral-policy-promotion/beneficiation-economics>> accessed 10 August 2017.

¹⁰⁴ Section 3(1).

¹⁰⁵ Section 3(1)(a)–(b).

¹⁰⁶ Section 5(1)(a).

¹⁰⁷ Act 37 of 2005.

¹⁰⁸ Section 2(a) and (b).

¹⁰⁹ Section 8(1)(b).

¹¹⁰ PricewaterhouseCoopers (PwC), *Mining in Indonesia: Investment and Taxation Guide* (2012) <www.pwc.com/id>.

¹¹¹ *ibid.*

obligations of the parties concerning mining operations.¹¹² This contract was specific in the sense that it applied to a certain designated mining area, known as the ‘contract area’.¹¹³ The investor company had exclusive authority in the contract area and was responsible for the management and all mining activities in the area.¹¹⁴ Interestingly, the law governing CoWs has over the time been agreed to be *lex specialis* in consonance with the maxim *lex specialis derogate legi generali*.¹¹⁵ As a result, in any conflict between the provisions of the CoW and other laws or regulations, the CoW would prevail.¹¹⁶

The CoW system has since been abolished and replaced with the Minerals and Coal Mining Act (MCMA).¹¹⁷ The MCMA is now the primary legislation regarding mineral and coal mining in Indonesia. Consideration C of this Act recapitulates the Indonesian position, namely, that in the light of national and international developments, CoWs are now irrelevant, but that regulations and laws to ensure maximum yield and sustainable development are needed.¹¹⁸ This Act is supplemented by a number of regulations, and these also form part of the discussion below.

Analysis of Main Features of Mining Regulatory Framework in Indonesia: Minerals and Coal Mining Act and its Regulations

Indonesia has made strides in ensuring and promoting beneficiation in clear, concise manner through legislation. Although its law is relatively new, it displays a commitment as a developing country towards Indonesians by enhancing their lives with their own wealth.

Generally, a balance is struck between the interests of the government and those of investors. It is interesting to note that although Indonesia expects investors under old contracts to adjust to the new law, it did not expropriate nor nationalise their investments. On the contrary, the contracts are to remain valid until expiration, at which time they will be expected to follow the new law. This trend is discussed further below.

¹¹² *ibid.*

¹¹³ *ibid.*

¹¹⁴ *ibid.*

¹¹⁵ Hikmahanto Juwana, ‘Amending Contracts of Work: Rectifying Past Misconstruals’ *The Jakarta Post* (19 March 2014) <<http://www.thejakartapost.com/news/2014/03/19/amending-contracts-work-rectifying-past-misconstruals.html>>.

¹¹⁶ *ibid.*

¹¹⁷ Law 4 of 2009.

¹¹⁸ Consideration C, Minerals and Coal Mining Act (MCMA).

First of all, the introduction of the MCMA replaced the previous system of CoWs, as introduced by consideration C of the Act. This effectively revoked the law of 1967 and all its supplementary regulations on CoWs.¹¹⁹

The Act provides that, despite the change of laws, the CoWs shall remain in place and end only on their expiry date.¹²⁰ These CoWs are to be subjected to the new law after a year of its coming into effect.¹²¹ Many of the CoWs are being renegotiated to ensure that they align with the beneficiation requirements; many companies have shown their willingness to renegotiate their contracts.¹²² The law further provides support on how these companies may transform: for instance, the law makes it possible for investors under CoW to start beneficiating or to co-operate with other companies once the transition period has lapsed in order to attain the minimum beneficiation requirements.¹²³

In terms of article 34 of the MCMA, mining businesses are classified into two classes, namely, mineral mining and coal mining. These mining businesses can take the form of the Mining Business Permit (IUP), the Smallholder Mining Permit (IPR) or the Special Mining Permit (IUPK).¹²⁴ The IUP and IUPK licences come in two different forms:¹²⁵ one may be for exploration purposes, general inspection and feasibility study and the other for operation production.¹²⁶ Investors can carry out these functions in part or as a whole, which means it is possible to have two different investors holding IUP licences for the same contract area.¹²⁷ Investors would have to secure any of these licences to conduct any mining activities in Indonesia. They would then have to comply with the minimum requirements attached to each of them. Transition of the CoW into either of the abovementioned permits is provided for in the law.¹²⁸

The law distinguishes between minerals that may and may not be exported.¹²⁹ The first category comprises certain minerals that may be exported only once certain minimum requirements of processing have been met.¹³⁰ These minerals are listed in Annex I of the Trade Regulation, and they may be exported without the prior approval of the Trade

¹¹⁹ Section 173 MCMA.

¹²⁰ Sections 169(a) and 172.

¹²¹ Section 169(b).

¹²² Editorial Staff, 'Government Concludes Renegotiations with 25 Miners' *Jakarta Post* (7 March 2014) <<http://www.thejakartapost.com/news/2014/03/07/govt-concludes-renegotiations-with-25-miners.html>>.

¹²³ Article 12, Permen ESDM Regulation 01 of 2014.

¹²⁴ Section 35 MCMA.

¹²⁵ Articles 36(1) and 76.

¹²⁶ Article 36(1).

¹²⁷ Article 36(2).

¹²⁸ Article 112(8), Government Regulation of the Republic of Indonesia 1 of 2014.

¹²⁹ Articles 2 and 3 of Permenday (Trade Regulation) 04/2014.

¹³⁰ Article 2.

Minister.¹³¹ Included in the first category are minerals which are to be exported only after specific minimum processing requirements have been met; the approval of the Trade Minister is to be sought for each shipment to enable their exportation;¹³² these minerals are contained in Annex II of the Trade Regulation. The second category comprises those metals whose exportation is totally prohibited;¹³³ these minerals are contained in Annex III of the Trade Regulation.

The IUP and IUPK holders are required to add value to the minerals explored.¹³⁴ In addition, guidance on beneficiation is provided through government regulations.¹³⁵ It would appear that, flowing from the above discussion on the categorisation of minerals, the law is such that no minerals are to leave Indonesia in pure raw form. There are specific minimum requirements that should be satisfied before any minerals may leave the country: the minimum requirements are progressive, because beneficiation requirements increase yearly.¹³⁶ For instance, copper, which is an Annex II metal, the minimum requirement at the end of 2014 was 25 per cent. By the end of 2015, the beneficiation expected of copper processing was 40 per cent and by end of 2016 companies were expected to beneficiate at a level of 60 per cent.

In fact, the law provided that, regarding Annex II minerals, they could be exported only until 2017.¹³⁷ The companies were also preparing themselves for the oncoming total export ban on Annex II minerals.

Category two is concerned with total beneficiation onshore.¹³⁸ This means that minerals such as bauxite and nickel, which are found in Annex III, can never be exported in raw form but must be processed to the final form. According to a Finance Ministry press release, the aim is to aid the acceleration of local beneficiation through the construction of the processing and refining plant (smelter).¹³⁹

In terms of the law, the transferability of ownership and/or shares to third parties in the holders of IUP and IUPK is prohibited.¹⁴⁰ Transferability is possible only through the Indonesian Stock Exchange, albeit being conditional upon certain stages of exploration having being achieved.¹⁴¹ The other exception to the non-transferability of ownership

¹³¹ Article 6(1)(a).

¹³² Article 6(1)(b).

¹³³ Article 2.

¹³⁴ Section 102 MCMA.

¹³⁵ Section 103 MCMA.

¹³⁶ Ministry of Finance of the Republic of Indonesia, Secretary General Communication and Information Services Bureau, 'Policy of Export Duty of Mineral Product' (Press release 2014).

¹³⁷ Article 3, Permen ESDM Regulation 01 of 2014.

¹³⁸ Annex III Minerals.

¹³⁹ Ministry of Finance of the Republic of Indonesia (n 136).

¹⁴⁰ Article 93(1) MCMA.

¹⁴¹ Article 93(2).

and/or shares can be granted by the minister provided that such transfer does not go against the legislation.¹⁴²

It seems that the Indonesian government has every area covered. With the transfer of shares prohibited, Indonesia is able to avoid situations where company ownership changes hands before the next expected stage of beneficiation. Should this be allowed to happen, it would work against the aim of beneficiation. This provision is also intended to prevent prospective shareholders making their money at the exploration stage and then withdrawing, to the detriment of beneficiation.

There is a further obligation on the IUP and IUPK holders to ensure that priority is given to locals for employment and general mining services.¹⁴³ The holders are also required to involve local businessmen when carrying out the operational production.¹⁴⁴ The government has been taunted for not leaving anything to chance in advancing local beneficiation:¹⁴⁵ for example, for having in place an expansive definition of ‘mining services’, to the extent that even non-traditional services can be subsumed under such a provision through the MoEMR Regulation 24 of 2012.¹⁴⁶

It is interesting to note how Indonesia is determined to take every opportunity it has to promote downstream beneficiation, which is seen always to lead to spill-over effects in other sectors of the economy. Not only does this result in a mining industry boom; it also boosts the services sector.

The development and empowerment of communities where investors are based is also at the heart of this Act: the IUP and IUPK holders are required to devise their strategies to include community development programmes.¹⁴⁷ Moreover, additional guidance on issues of development as required above is to be given from time to time by way of government regulations.¹⁴⁸ Mining companies have an obligation to improve the livelihoods of locals in their areas of operation.

The law provides for shares to be divested from foreign parties in a sequential manner.¹⁴⁹ The MCMA provides that the shares of foreign holders from IUP and IUPK should

¹⁴² Article 93(3).

¹⁴³ Article 106.

¹⁴⁴ Article 107.

¹⁴⁵ Bill Sullivan, ‘Expanding the Concept of Mining Services Provider to Include Non-Traditional Mining Services Providers: More Empire Building at MoEMR’ (Christian Teo Purwono & Partners 2013) <http://mail.britcham.or.id/images/sector_groups/energy/june_coal_asia-mining_industry_regulation_in_indonesia-mining_services-article.pdf>.

¹⁴⁶ *ibid.*

¹⁴⁷ Article 108 MCMA.

¹⁴⁸ Article 109.

¹⁴⁹ Article 112.

begin to be divested within at least nine months after their five-year expiry.¹⁵⁰ The divestment process is set out in the procedures for Divestment and Share Pricing Changes to Investment in Mineral and Coal Mining Business Regulation,¹⁵¹ and upon divestment, priority is to be given to the government, state-owned companies, regional government-owned companies or a national private company.¹⁵² This Regulation also provides for divestment to take place in a progressive way so that by the tenth year of production 51 per cent of the shares are locally owned.¹⁵³ Companies are expected to follow this divestment procedure to the letter, and investors who fail to comply risk having their licences revoked or suspended.¹⁵⁴

As mentioned above, section 103 of the MCMA provides that guidance as to how beneficiation is to be carried out will be made available through government regulations. One such regulation is the ESDM Regulation concerning the incremental added value of minerals through the activities of processing and refining or smelting minerals.¹⁵⁵ The law stipulates that Mining Business Permit (IUP) holders for production operation and Special Mining Permit (IUPK) holders for metal mineral production should process and/or refine or smelt certain metal mineral commodities domestically.¹⁵⁶ They are expected to do the same with non-metal mineral and rock-mining commodities.¹⁵⁷

The beneficiation of mineral mining commodities may take three forms:¹⁵⁸ first, it may either entail processing or refining specific kinds of metal mineral mining commodity together with its associated minerals.¹⁵⁹ Secondly, it may entail processing specific types of non-metal mineral mining commodity.¹⁶⁰ Thirdly, it may entail processing specific types of rock-mining commodity.¹⁶¹

Regulation 7 of 2012 further states that this required domestic beneficiation can be achieved directly by the IUP and IUPK holders or through co-operation with identical licence-holders. This is a requirement more particularly aimed at processing and refining or smelting.

¹⁵⁰ Article 112(1).

¹⁵¹ MEMR 27 of 2013.

¹⁵² Article 112(1).

¹⁵³ MEMR 27 of 2013.

¹⁵⁴ MEMR 27 of 2013.

¹⁵⁵ ESDM Regulation, Act 7 of 2012.

¹⁵⁶ Article 7(1), ESDM Regulation concerning the increment added value of mineral through the activities of processing and refining or smelting mineral.

¹⁵⁷ Article 7(2).

¹⁵⁸ Article 3 of PerMen ESDM Regulation concerning the increase of mineral added value through mineral processing and refining activity domestically.

¹⁵⁹ Article 3(1)(a).

¹⁶⁰ Article 3(1)(b).

¹⁶¹ Article 3(1)(c).

In addition, the law stipulates that in the event that IUP and IUPK operation production permit-holders are compelled to consider co-operation with other licence-holders, they should first seek the approval of the director-general on behalf of the minister.¹⁶² The regulation further allows for these holders to engage in partnerships with other entities in the event that they are unable to meet the domestic beneficiation requirements on their own.¹⁶³ The use of the term ‘entities’ tends to suggest that this is different from the latter instance, where they are to collaborate with other licence-holders. This is determined by the fact that the envisaged partnership may be in the form of shares.¹⁶⁴ In this instance, they are also expected to seek the consent of the director-general on behalf of the minister.¹⁶⁵

Moreover, in the event that neither co-operation nor partnership is possible, as discussed above, for economic reasons the IUP and IUPK operation production permit-holders may consult the director-general.¹⁶⁶ The director-general may, after conducting a feasibility study, appoint other licence-holders to take over from the holders who are unable to discharge their mandate.¹⁶⁷

Arguments for and against Beneficiation

The observation to be drawn from the discussion above is that South Africa does not really have an over-arching beneficiation law, but rather a beneficiation strategy, which has been in place since 2011. This strategy is anchored in various pieces of legislation, as discussed above. Although it is evident that South Africa has reached a milestone through putting in place the appropriate legislation to facilitate beneficiation, it is doubtful whether this strategy can be said to have been a total success. In fact, it has been held that it is questionable whether the strategy in its current form is able to deal adequately with the complexities that face the mining industry in South Africa.¹⁶⁸ It is further argued that this strategy is not adequate, because it does not deter countries such as China from purchasing raw materials and later beneficiating them in their home states.¹⁶⁹ What this means is that the raw materials from South Africa are used to bolster China’s economy rather than South Africa’s. This is so because the addition of value that is usually labour intensive occurs in China and not in South Africa, the primary

¹⁶² Article 8(3), ESDM Regulation concerning the increment added value of mineral through the activities of processing and refining or smelting mineral.

¹⁶³ Article 9.

¹⁶⁴ Article 9(2).

¹⁶⁵ Article 9(3).

¹⁶⁶ Article 10(1).

¹⁶⁷ Article 10(2)–(3), MEMR 27 of 2013.

¹⁶⁸ SAIMM (n 18) 271.

¹⁶⁹ SAIMM (n 18).

producer. Nevertheless, South Africa is better placed in this respect compared to Botswana as none of the latter's legislation even mentions the word 'beneficiation'.

In contrast, Indonesia has made strides in ensuring and promoting beneficiation through legislation in a clear, concise manner. Although its law is relatively new, it displays a commitment as a developing country towards Indonesians by enhancing their lives with their own wealth. And a balance is to be struck between the interests of the government and those of investors. It is interesting to note that although Indonesia expects investors under old contracts to adjust to the new law, it did not expropriate or nationalise their investments. On the contrary, the contracts are to remain valid until they expire, at which time they will be expected to follow the new law. This is to be commended.

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

The question whether beneficiation law scares investors off lies at the heart of this study. But it has been established that, if properly legislated, beneficiation can be a blessing. In the case of Indonesia, it would appear that beneficiation law has not driven away foreign investors, as seems to be the fear of Botswana's policy-makers. Quite the contrary, in fact: companies are rushing to set up smelters in Indonesia. Like Botswana, Indonesia did not have the ideal infrastructure to support the move to beneficiation, but since the legislation has been passed efforts are being made to put the necessary infrastructure in place.

The next section examines the interface between beneficiation law and the protection of foreign investment in Botswana.

Likely Impacts of Enactment of Beneficiation Legislation on Protection of FDI in Botswana

The fundamental question is really whether the enactment of beneficiation legislation in Botswana can be equated to creeping expropriation or to any other unlawful interference with foreign investments? Justice Brennan identified three factors that determine whether foreign investment is being interfered with.¹⁷⁰ He stated that one has to look at the government actions, the economic impact of regulation and the extent to which regulation has interfered with distinct investment-backed expectations.¹⁷¹

¹⁷⁰ Penn Central Transportation Co v New York City 438 US 104 (1978).

¹⁷¹ *ibid.*

State sovereignty is a concept that is well accepted under international customary law. It is not surprising, therefore, that states have continued to retain exclusive control over and the power to regulate the investments within their borders. The right of states to regulate foreign investments has been reiterated in a number of international instruments;¹⁷² states have the right to control the admission of foreign investors and investments under customary international law.¹⁷³ Article 2 of the Charter of Economic Rights and Duties of States (CERDS) provides that states have the right to ‘regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities.’¹⁷⁴

Therefore, the host state can employ those controls necessary to derive the desired benefits from its exclusive power over foreign investments in its territory, in this way retaining its policy space. The argument is that states should be allowed to regulate onshore foreign investments and that external encroachment on such investment would constitute interference in state sovereignty. This is better explained in India’s submission to the World Trade Organization (WTO) when it stated that

developing countries, therefore, need policy space so that they can determine for themselves how the process of economic development can be speeded up and the welfare of their citizens enhanced. This also includes the policy space to determine the manner in which investment shall be regulated and channelled.¹⁷⁵

As has been argued, the regulation of investments from entry to exit is seen to be particularly essential to developing countries, as such right lies with the host state.¹⁷⁶ Nevertheless, sight is never lost of the host state’s right to regulate foreign investments and not to confuse this with indirect expropriation.¹⁷⁷

From the foregoing, the present authors argue that beneficiation, unlike nationalisation or expropriation, does not seek to infringe on foreign investments and should therefore not be equated to either of the latter measures. Indeed, the enactment of beneficiation legislation could have an effect on existing foreign investments, the sole impact being an obligation to do more by beneficiating locally. For potential investors, this would mean a case of ‘be prepared, the bar has been raised higher’. However, states coming

¹⁷² See UN GA Resolution 1803 (XVII) (1962); GA Resolution 3281 (XXIX) (1974); GA Resolution 3201 (1974).

¹⁷³ G Kreijen, ‘The Definition of Investment and Aspects of Nationality Planning’ University of Amsterdam Guest Lecture (Amsterdam, Netherlands, 7 March 2014).

¹⁷⁴ Article 2, CERDS 1964.

¹⁷⁵ Submission by India to the WTO WGII (October 2002).

¹⁷⁶ Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press 2010).

¹⁷⁷ *Renée Rose Levy de Levi v Republic of Peru* (February 2014) ICSID Case no ARB/10/17 (2010).

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

Conclusion

Given the controversy surrounding the enactment of beneficiation laws in economies such as Botswana's, the question this study has attempted to answer is this: Is beneficiation the best guarantee for local communities to benefit from Botswana's diamond-mining industry or it is just another flawed concept that will undoubtedly scare investors away?

This article has offered insights into the opportunities and challenges arising from the enactment of beneficiation legislation. The linkages and/or the interface between beneficiation law and international investment protection were also considered.

On balance, this article has argued that the opportunities ensuing from enactment far outweigh the costs. To cement this argument, the article has drawn on lessons and inspiration from South Africa and Indonesia, which are both success stories regarding the introduction full beneficiation law in respect of mineral resources.

From the discussion, it has been revealed that downstream beneficiation has more benefits for both investors and local communities. It is axiomatic that if there is no legislation in place to promote beneficiation, investors will merely take advantage of the situation, explore and beneficiate minerals offshore, and therefore take employment opportunities and other side-stream benefits away from the host states. This means that if they continue without a law in place to aid onshore beneficiation, economies such as Botswana's will never be able to take full advantage of their mineral wealth. As a result, it is strongly recommended that the government of Botswana and other similarly placed countries should view beneficiation legislation as a tool that can unlock their mineral wealth and therefore contribute significantly to the development of their countries. Through enhanced beneficiation, the government of Botswana, the Botswana and the investors themselves will be able to benefit. For the local communities, as seen in the case of South Africa and more so in the case of Indonesia, investors can do more for the local communities where they mine, for example by employing the services of the locals. Wealth is therefore distributed within communities and not concentrated in the investors alone.

However, in enacting beneficiation legislation, the policy-makers should exercise caution to ensure there is no substantial encroachment on existing foreign investments. A balance should be struck between the interests of the government and those of investors. For instance, Indonesia has been accused of trying to exploit every opportunity to maximise its beneficiation policy. One area pointed out is where the law

imposes an obligation on investors to source local services and goods for use in mining services and operations. The argument is that the law obliging investors to source locally is couched in such wide and general terms that even non-traditional mining services are covered.

In addition, it is strongly recommended that the government of Botswana or any other state, in enacting beneficiation legislation, should not repeat the kind of legislation that Indonesia has in place. A single document such as a ‘beneficiation code’ containing all the relevant provisions may suffice to ensure that the law is comprehensive, stable and easily accessible. Having a haphazard number of stand-alone regulations from several ministries in place can create a level of uncertainty and confusion, which is undesirable.

In conclusion, the likely impact of beneficiation legislation on foreign investments can only be an obligation on them to ensure the greater addition of value to diamonds and other minerals. Contrary to the sceptics’ belief, this does not discourage or deflate foreign investments; rather, it has the potential to enhance them, because in the case of Botswana both the Botswana and the investors are likely to benefit from such an arrangement.

Having found no substantial negative impacts of the enactment of beneficiation legislation, it is argued that beneficiation legislation is the best guarantee of local community benefits under Botswana’s regulatory regime for diamond mining. It is not a flawed concept that is likely to scare the foreign investors away but, on the contrary, one that has the potential to add value to Botswana’s economy.

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