

**A DIAMOND’S WEALTH IS FOREVER: COMPARING  
ZIMBABWE’S AND BOTSWANA’S DIAMOND MINING  
LAWS REVEALS CHANGES THAT ZIMBABWE SHOULD  
IMPLEMENT**

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**ABSTRACT**

Zimbabwe should use revenue from diamond mining to reinvest in long-term sustainable industries that are critical in reversing its economic decline. So that Zimbabwe can get the most revenue from a limited resource, it should adopt more stringent mining regulations. Botswana’s complex regulations are a significant factor in its stable economy, and Zimbabwe should learn from this example. Zimbabwe should not sell its diamonds and waste that resource before it enacts better laws. These laws would primarily include and feature increased transparency in its laws, increased requirements regarding the technical capabilities of mining companies, and additional laws to promote the exploration of additional mines.

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## I. INTRODUCTION

Since a civil war in 1979 turned Rhodesia into Zimbabwe, Zimbabwe has suffered from economic instability that has left the country in economic crisis.<sup>1</sup> Where Rhodesia was once a major global exporter of food, Zimbabwe now receives substantial food aid.<sup>2</sup> To recover, Zimbabwe needs reinvestment to stabilize the economy. Zimbabwe's substantial mineral wealth can provide that reinvestment if adequate regulation is enforced. Currently, Zimbabwe does not have sufficient regulation to harness the economic strength that could come from diamond mining. The regulations of the international Kimberley Process, which addresses blood diamonds as discussed below, are not

<sup>1</sup> *The World Factbook: Zimbabwe*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/zi.html> (follow "Introduction" hyperlink) (last visited Mar. 2, 2011).

<sup>2</sup> See, e.g., *Zimbabwe Fact Sheet*, USAID, [http://www.usaid.gov/locations/sub-saharan\\_africa/countries/zimbabwe/zimbabwe\\_fs.pdf](http://www.usaid.gov/locations/sub-saharan_africa/countries/zimbabwe/zimbabwe_fs.pdf).

enough to take the full advantage of such an important resource, and Zimbabwe should not sell diamonds until it enacts far more effective regulation of its mining industry.

In comparison, Botswana's regulation has resulted in far higher profits from diamonds in recent years. Diamond exports account for 30 percent of world diamond sales by value, about one-third of the country's GDP, and about 70 percent of the country's exports.<sup>3</sup> Roughly calculated, Botswana earned \$3.6 billion from diamond sales in 2009.<sup>4</sup> These profits are far greater than Zimbabwe's 2009 legal sales of \$20 million.<sup>5</sup>

The need to establish sufficient laws to protect the future of Zimbabwe's diamond industry is intrinsically important to Zimbabwe's economic future. In 2000, Zimbabwe's government began to encourage seizures of farms in an effort directed toward land redistribution.<sup>6</sup> Instead, the land was often conveyed to ruling party elites.<sup>7</sup> This policy crippled a once flourishing agricultural industry and the national economy.<sup>8</sup> Zimbabwe has a variety of industries in which it could invest, including, most significantly, farming. Short-term profits from diamonds could be used to reinvest in other industries that would provide long-term sustainability. The ability of diamonds to provide this investment is dependent in part on the effective regulation of diamond mining. Zimbabwe should learn from Botswana's example by enacting and enforcing more stringent regulation of their diamond fields. Zimbabwe should not sell its diamonds until its regulations are effective.

In Part I, this paper will briefly analyze background historical and social factors in Zimbabwe's economic crisis and will also briefly discuss the utility of Botswana as a comparison. In Part II, this paper will analyze current Zimbabwe diamond regulation law. In Part III, this paper will explain why international regulation is insufficient with regard to

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<sup>3</sup> *Our Diamonds*, BOTSWANA DIAMONDS, [www.botswana-diamonds.com](http://www.botswana-diamonds.com) (follow "Our Diamonds" hyperlink)(last visited Jan. 6, 2012).

<sup>4</sup> For GDP figures of Botswana, see *The World Factbook: Botswana*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/bc.html> (last visited Mar. 2, 2011) (follow "Economy" hyperlink).

<sup>5</sup> Farai Mutsaka, Peter Wonacott, & Sarah Childress, *Monitor To Clear Zimbabwe Diamonds*, WALL ST. J., May 28, 2010, <http://online.wsj.com/article/SB10001424052748703630304575270681883985308.html?KEYWORDS=mutsaka>. This does not include illegal diamond sales.

<sup>6</sup> *The World Factbook: Zimbabwe*, *supra* note 1.

<sup>7</sup> *Fast Track Land Reform in Zimbabwe*, HUMAN RIGHTS WATCH, Mar. 8, 2002, at 7, available at <http://www.hrw.org/reports/2002/zimbabwe/ZimLand0302.pdf>.

<sup>8</sup> *The World Factbook: Zimbabwe*, *supra* note 1 (follow "Economy" hyperlink).

Zimbabwe's future economic stability. Part IV will analyze the insufficiency of the Kimberley Process. In Part V, this paper will analyze Botswana laws and corporate policies of companies operating in Botswana that could be codified in Zimbabwe's law. Part VI will propose changes to Zimbabwe's current laws.

## II. BACKGROUND

### A. ZIMBABWE IS IN A SEVERE ECONOMIC CRISIS

Zimbabwe has experienced significant economic and political turmoil since the ZANU and ZAPU rebels<sup>9</sup> defeated the white Rhodesian government in 1980 after a fourteen-year civil war.<sup>10</sup> Significant political turmoil erupted in the 1990s when student and worker protests turned to riots.<sup>11</sup> By the mid-1990s, protests had expanded to include industry workers, civil servants, and health-care workers.<sup>12</sup> During this time, HIV/AIDS expanded rapidly throughout the country.<sup>13</sup> De-mobilized veterans of the civil war were disgruntled with the corrupt administration of their compensation for the war, which Robert Mugabe, Zimbabwe's president, promised to solve by giving them more money.<sup>14</sup> Zimbabwe also had a significant debt crisis building as part of the country's inability to pay back a World Bank loan.<sup>15</sup> Food and fuel prices began to rise.<sup>16</sup> Militant strikes began in 1998.<sup>17</sup> In 1999, the Movement for Democratic Change ("MDC") political party formed as a major challenge to Mugabe.<sup>18</sup> Land redistribution became Mugabe's diversion from the political reforms demanded by the MDC.<sup>19</sup>

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<sup>9</sup> ZAPU (Zimbabwe African People's Union) and ZANU (Zimbabwe African National Union) were the two major nationalist guerilla groups in Zimbabwe. *Background Note: Zimbabwe*, U.S. DEP'T OF STATE, <http://www.state.gov/r/pa/ei/bgn/5479.htm> (last visited Mar. 2, 2011). These became the major political parties in the aftermath of the civil war. *See id.*

<sup>10</sup> KENNETH SHILLINGTON, *HISTORY OF AFRICA* 408–409 (Rev. 2d ed. 2005).

<sup>11</sup> U.S. DEP'T OF STATE, *supra* note 9.

<sup>12</sup> *Id.*

<sup>13</sup> *HIV and AIDS in Zimbabwe*, AVERT, <http://www.avert.org/aids-zimbabwe.htm> (*see* section "Pattern of the HIV and AIDS epidemic so far") (last visited Mar. 2, 2011).

<sup>14</sup> HUMAN RIGHTS WATCH, *supra* note 7, at 8.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *See* U.S. DEP'T OF STATE, *supra* note 9.

<sup>19</sup> HUMAN RIGHTS WATCH, *supra* note 7, at 9–10.

The redistribution program that transferred farming land from white owners to black owners began with a peace agreement signed in 1980.<sup>20</sup> Under the agreement, Britain financially supported redistribution efforts where there were willing buyers and willing sellers.<sup>21</sup> By 1997, 71,000 of a targeted 162,000 families had been displaced as part of this redistribution process.<sup>22</sup> This process was slow despite being supported by future legislation and was a central platform in the MDC's rise to power as part of a slogan of unfulfilled government promises.<sup>23</sup> In 2000, Mugabe began converting land without compensation.<sup>24</sup>

These farm seizures were often led by ZANU-PF political party members who were from Zimbabwe's war of independence.<sup>25</sup> These squatters intimidated, assaulted, and killed farmers to force their relocation.<sup>26</sup> Police ignored court orders to remove the squatters.<sup>27</sup> The farms were then often given to high-ranking government ministers and ZANU-PF leaders.<sup>28</sup> In about one year, the estimated number of squatters grew from 25,000 to 104,000, and they occupied 1,948 farms.<sup>29</sup> Many farmers were forced to leave their homes.<sup>30</sup> A scant two years after the initial seizure, Human Rights Watch noted severe disruptions in agriculture, which were significant given that Zimbabwe was formerly a maize exporter.<sup>31</sup> A farming union reported that 31 percent of farms were facing work stoppages, and 1,000 farms had closed completely.<sup>32</sup> The redistribution program "caused an exodus of white farmers, crippled the economy, and ushered in widespread shortages of basic commodities."<sup>33</sup>

Since 2000, Zimbabwe's economy has contracted by 40 percent.<sup>34</sup> This has been primarily fueled by the collapse of the

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<sup>20</sup> See generally HUMAN RIGHTS WATCH, *supra* note 7 (transfer of land); *id.* at 6 (peace agreement).

<sup>21</sup> *Id.* at 6-7.

<sup>22</sup> *Id.*

<sup>23</sup> See *id.* at 9-10.

<sup>24</sup> *The World Factbook: Zimbabwe*, *supra* note 1.

<sup>25</sup> HUMAN RIGHTS WATCH, *supra* note 7, at 2.

<sup>26</sup> See *id.*

<sup>27</sup> See *id.* at 3.

<sup>28</sup> *Id.* at 7.

<sup>29</sup> *Id.* at 11.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 3.

<sup>32</sup> *Id.* at 14.

<sup>33</sup> *The World Factbook: Zimbabwe*, *supra* note 1.

<sup>34</sup> U.S. DEP'T OF STATE, *supra* note 9.

agriculture sector, once the backbone of Zimbabwe's economy.<sup>35</sup> Zimbabwe exported fifty-seven million kilograms of tobacco in 2009, falling from 237 million kilograms in 2000 when it was the largest crop in Zimbabwe.<sup>36</sup> Poor corn production has led to food short-falls every year since 2001.<sup>37</sup> The United States Agency for International Development ("USAID") alone contributed \$165.9 million in food aid to Zimbabwe in fiscal year 2009.<sup>38</sup> According to a 2008/2009 survey, Zimbabwe is the worst-performing of all African mining countries.<sup>39</sup> Despite these significant economic problems, the United States Department of State indicated that "Zimbabwe is endowed with rich mineral resources. Exports of gold, diamonds, asbestos, chrome, coal, platinum, nickel, and copper could lead to an economic recovery one day."<sup>40</sup> Being the worst mining country simply leaves room for significant improvement.

Zimbabwe is currently exporting diamonds.<sup>41</sup> However, miners in Zimbabwe's main diamond field, named Marange (also known as "Chiadzwa"), are being watched by international monitors who are suspicious that the Zimbabwean government is running smuggling syndicates.<sup>42</sup> Zimbabwe has also provided international monitors with false information.<sup>43</sup> Marange, one of the largest diamond mines in the world, is controlled by ZANU-PF.<sup>44</sup> Black market sales are profitable primarily for the ruling class of Zimbabwe.<sup>45</sup> Marange's wealth, and that of the other mines in Zimbabwe, could be the new tool to pay for Mugabe's strangling of MDC,<sup>46</sup> or it could be the new path to Zimbabwe's resurgence as a stable economy.

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> USAID, *supra* note 2.

<sup>39</sup> Peter Leon, *Creeping Expropriation of Mining Investments: An African Perspective*, 27 J. ENERGY & NAT. RESOURCES L. 597, 639 (2009).

<sup>40</sup> U.S. DEP'T OF STATE, *supra* note 9.

<sup>41</sup> See Desmond McMahon, *Zimbabwean 'Blood Diamonds' Back on the Market*, DIAMOND INVESTING NEWS, Aug. 23, 2010, <http://diamondinvestingnews.com/2152-zimbabwean-blood-diamonds-back-on-the-market.html>.

<sup>42</sup> Celia W. Dugger, *Group Won't Suspend Zimbabwe on Mining Abuses*, N.Y. TIMES, Nov. 7, 2009, <http://www.nytimes.com/2009/11/07/world/africa/07zimbabwe.html>.

<sup>43</sup> *Id.*

<sup>44</sup> Celia W. Dugger, *Diamond Find Could Aid Zimbabwe, and Mugabe*, N.Y. TIMES, June 21, 2010, <http://www.nytimes.com/2010/06/22/world/africa/22zimbabwe.html>.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

## B. BOTSWANA IS A GOOD MODEL COUNTRY FOR ZIMBABWE'S DIAMOND MINING LAWS

While no two countries are exactly alike, Botswana is a good model to follow when considering reforms to Zimbabwe's mining laws. This section first discusses the superficial differences, and then discusses why Botswana is a good comparison country for diamond mining despite these differences. While a comparison of Botswana's and Zimbabwe's economies as a whole may be inappropriate due to significant differences, this article investigates only diamond mining.

### 1. BOTSWANA'S RISE TO PROSPERITY

Unlike Zimbabwe, Botswana had a smooth transition from British rule in 1966.<sup>47</sup> Botswana did not suffer from apartheid-like governments.<sup>48</sup> Instead of civil war, a joint British and tribal government approved proposals leading to creation of a constitution and free elections.<sup>49</sup> Civilian leadership has served in peace and without interruption since 1966.<sup>50</sup> Botswana's economy consists primarily of diamond mining.<sup>51</sup> While the long-term sustainability of a country with only a single finite commodity is questionable,<sup>52</sup> Botswana's mining laws have been extremely effective in realizing substantial profits for the benefit of the entire country.

Mining became a dominant industry in Botswana in the early 1980s, though the South African DeBeers Company discovered diamonds there as early as the late 1960s.<sup>53</sup> From 1967-2006, economic growth averaged 9 percent annually, largely fueled by diamond mining.<sup>54</sup> Botswana has four principal mines that are expected to last another twenty years, though exploration is ongoing.<sup>55</sup>

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<sup>47</sup> *The World Factbook: Botswana*, *supra* note 4 (follow "Introduction" hyperlink).

<sup>48</sup> *Botswana Background Notes*, U.S. DEP'T OF STATE, <http://www.state.gov/r/pa/ei/bgn/1830.htm> (last visited Mar. 2, 2011).

<sup>49</sup> *Id.*

<sup>50</sup> *The World Factbook: Botswana*, *supra* note 4 (follow "Introduction" hyperlink).

<sup>51</sup> *Id.* (follow "Economy" hyperlink).

<sup>52</sup> Robb M. Stewart & J.R. Wu, *Botswana Needs Drivers Beyond Diamonds*, WALL ST. J., Dec. 10, 2000, <http://online.wsj.com/article/SB126045779104485615.html>.

<sup>53</sup> U.S. DEP'T OF STATE, *supra* note 48.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

Diamond exports in Botswana are focused in two areas. In both, DeBeers has formed partnerships with the Botswana government.<sup>56</sup> The first area is actual mining, where the government-DeBeers partnership is named Debswana.<sup>57</sup> The second is sorting, cutting, polishing, aggregating, and marketing diamonds.<sup>58</sup> The partnership that is scheduled to undertake this task is the Diamond Trading Company ("DTC").<sup>59</sup> Currently, DTC only sorts diamonds.<sup>60</sup> However, it is reasonable to conclude that this adds significant value to the industry in Botswana by providing additional jobs and revenue to Botswana and its citizens.

## 2. ZIMBABWE AND BOTSWANA ARE SIMILAR

Not only are Zimbabwe and Botswana neighbors, they are also statistically similar.<sup>61</sup> Percentages and numbers of ethnicities are largely similar, as are literacy rates.<sup>62</sup> These figures show that diamond mining can provide enough profits to avoid ethnic tension, and that Zimbabwe has the ability to learn the skills required of diamond mining.

Moreover, Zimbabwe allows diamond mining by foreign corporations in its borders. Although DeBeers allowed its license on Marange to lapse in 2006 due to concerns over Zimbabwe's stability,<sup>63</sup> other companies have begun diamond mining in Zimbabwe. Two small South African mining companies are mining from Marange, but they have been linked to ZANU-PF officials, the military, and corruption.<sup>64</sup> More interesting are Rio Tinto's small-scale operations in the Murowa field.<sup>65</sup>

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> See *infra* Table 1.

<sup>62</sup> *Id.*

<sup>63</sup> Dugger, *supra* note 44.

<sup>64</sup> Edahn Golan, *Zimbabwe's Diamond Mining Companies Government Cohorts, Claims PAC*, INT'L DIAMOND EXCHANGE, June 14, 2010, [http://www.idexonline.com/portal\\_FullNews.asp?id=34146](http://www.idexonline.com/portal_FullNews.asp?id=34146).

<sup>65</sup> *Our Mines*, RIO TINTO DIAMONDS, [http://www.riotintodiamonds.com/ENG/ourmines/index\\_ourmines.asp](http://www.riotintodiamonds.com/ENG/ourmines/index_ourmines.asp) (last visited Mar. 2, 2011).

Rio Tinto Group is a joint British-Australian multinational exploration and mining group.<sup>66</sup> Minerals that the group mines are quite diverse, with the group operating three diamond mines and exploring a fourth site.<sup>67</sup> In comparison, the group has over 150 other mines and exploration projects in other minerals.<sup>68</sup>

Working through a local partnership with Zimbabwe, RioZim, Rio Tinto's operation at Murowa, maintains international certifications in health, safety, and environmental standards.<sup>69</sup> According to the Rio Tinto operation's website, Rio Tinto has donated textbooks, constructed school buildings, sponsored local sports tournaments, built and upgraded clinics, created HIV/AIDS testing programs, drilled for water, provided skills training to farmers and herdsman, assisted local start-up businesses, developed cross-bred cattle to improve local herds, and donated the cattle necessary for locals to cross-breed their own cattle.<sup>70</sup> However, the sorting operations similar to those undertaken by DTC are performed in Belgium.<sup>71</sup> These operations show that Zimbabwe can have some foreign investment, but that the large-scale operations can be required to parallel some smaller operations.

Zimbabwe also appears to have sufficient diamond resources to make the comparison with Botswana meaningful. While knowing how many diamonds exist that exploration has not identified is impossible, Zimbabwe's Marange field is one of the largest in the world.<sup>72</sup> In addition to Murowa, Zimbabwe also has the River Ranch Field.<sup>73</sup> These mines, and any others discovered, should, if effectively exploited, bring substantial prosperity to Zimbabwe for some time.

There are two differences that could cause problems for this analysis. Population size and government stability could adversely affect

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<sup>66</sup> *At a Glance*, RIO TINTO, [http://www.riotinto.com/aboutus/19602\\_overview.asp](http://www.riotinto.com/aboutus/19602_overview.asp) (last visited Oct. 16, 2011).

<sup>67</sup> *Our Operations*. RIO TINTO, [http://www.riotinto.com/ourproducts/our\\_operations.asp](http://www.riotinto.com/ourproducts/our_operations.asp) (last visited Mar. 2, 2011).

<sup>68</sup> *Id.*

<sup>69</sup> *The Murowa diamond mine*, RIO TINTO DIAMONDS, [http://www.riotintodiamonds.com/ENG/ourmines/murowa\\_diamond\\_mine.asp](http://www.riotintodiamonds.com/ENG/ourmines/murowa_diamond_mine.asp) (last visited Mar. 2, 2011).

<sup>70</sup> *Sustainable Development Programmes*, RIO TINTO MUROWA DIAMONDS, [http://www.murowadiamonds.com/sustainable\\_development.html](http://www.murowadiamonds.com/sustainable_development.html) (last visited Mar. 2, 2011).

<sup>71</sup> RIO TINTO DIAMONDS, *supra* note 69.

<sup>72</sup> *See Dugger*, *supra* note 44.

<sup>73</sup> Farai Mutsaka, *Kimberley Process Deadlocked Over Sale of Diamonds*, ZIMBABWE INDEPENDENT, June 4, 2010, <http://www.theindependent.co.zw/local/27029-kp-deadlocked-over-sale-of-zim-diamonds.html>.

the implementation of any modified laws. However, these two problems should be understood in this article's perspective of making sure that Zimbabwe's existing law puts it into the best position possible to take advantage of substantial diamond profits to stabilize its economy.

The first problem is the difference in population size. Botswana's smaller population means that a single strong industry could more strongly impact the entire population.<sup>74</sup> However, in comparison, Zimbabwe has a variety of industries in which it could invest, including, most significantly, farming.<sup>75</sup> This article does not argue that diamonds are a source of long-term sustainability for Zimbabwe. Rather, this article argues that the short-term profits from diamonds could be used to reinvest in other industries that would provide long-term sustainability.

As outlined above, there is also an issue with government stability. Botswana has not had significant political strife.<sup>76</sup> Zimbabwe, on the other hand, has had significant problems with government violence and corruption that has directly impacted diamond mining.<sup>77</sup> This article does not seek to discuss the enforceability of laws. However, before any laws can be appropriately enforced, a country needs to have appropriate laws that encourage compliance.

### III. ZIMBABWE'S CURRENT LAWS ARE INSUFFICIENT

This section analyzes the current state of Zimbabwean law. Weaknesses are noted with an eye toward creating a system beneficial to everyone. Such a system needs certain requirements: the expertise and capital of a foreign corporation to bring heavy mining equipment, foreign investors need to be attracted by profits to invest, workers need to be paid salaries sufficient to attract them to the fields, and government officials and police need to be incentivized toward legal taxation rather than toward taking bribes.

This section will analyze laws impacting mining and will briefly analyze some taxation laws unique to Zimbabwe. It will not address criminal law. While corruption is a problem for Zimbabwe, it is outside the scope of this article.

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<sup>74</sup> See *infra* Table 1.

<sup>75</sup> *The World Factbook: Zimbabwe*, *supra* note 1 (follow "Economy" hyperlink).

<sup>76</sup> *Id.* (follow "Introduction" hyperlink).

<sup>77</sup> Mutsaka et al., *supra* note 5.

### A. ZIMBABWE'S LAWS IMPACTING MINING

Zimbabwe has several bodies of law that impact mining operations. This section analyzes three groups of laws. First, the Mines and Minerals Act governs the mechanics of claiming a piece of land and beginning to mine from it. While this is the focus of this article, laws governing corporations operating within Zimbabwe also have a profound effect on large-scale mining operations necessary to mine Zimbabwe's diamond fields. The second section will briefly analyze Zimbabwe's highly problematic Empowerment and Indigenization Act ("Indigenization Act"), which requires 51 percent of Zimbabwean companies to be owned by native Zimbabweans. The third section will briefly indicate that labor and safety laws are not a problem.

#### 1. THE MINES AND MINERALS ACT IS INSUFFICIENT

Zimbabwe's Mines and Minerals Act ("ZMMA") is a needlessly complex document, resulting in poor transparency. Twenty-seven sections are spread across 125 pages, three times longer than Botswana's parallel act.<sup>78</sup> Requirements to attain the necessary licenses are not clear, and the authority for making and challenging decisions is similarly unclear. Certain sections of the ZMMA will be analyzed followed by an illustration of what an applicant must do to get a mining lease to begin mining.

The ZMMA begins by vesting mineral rights in the President.<sup>79</sup> While largely symbolic, this misplaces the benefit of mineral rights in the Presidency and the government rather than in the people. As will be shown, this perspective leads to problems, primarily including the restriction of discretion to only high members of government, and a related lack of transparency. The ZMMA should reflect what is best for society as a whole, not what is best for Mugabe.

The Zimbabwe Department of Mines is run by the Minister of Mines.<sup>80</sup> The Secretary oversees the Mining Affairs Board ("Board"), which performs the duties required by the ZMMA.<sup>81</sup> Zimbabwe is separated into mining districts, each overseen by a mining commissioner

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<sup>78</sup> See generally, Zimbabwe Mines and Minerals Act of 1961; Botswana Mine and Minerals Act of 1999.

<sup>79</sup> Mines and Minerals Act of 1961 § 2 (Zim.).

<sup>80</sup> See *id.* §§ 5(1) (interpretation of "Minister"), 5(2), 5(3), 6(2).

<sup>81</sup> *Id.* §§ 6, 7.

tasked with the daily implementation of the instructions from the Minister and Board.<sup>82</sup>

The ZMMA vests significant discretion in the government without providing factors for evaluation, as will be shown by the Minister's ability to fix royalties. Section 245 of the ZMMA governs the fixing of royalties due to Zimbabwe and the landowner.<sup>83</sup> This is an annual decision vested solely in the authority of the Minister.<sup>84</sup> The Minister "shall have regard to" market prices, representations from the Chamber of Mines about royalties, and "any other matter which he deems fit."<sup>85</sup> As will be seen, "other" factors are a common piece of the ZMMA. This section is missing any objective criteria against which the Minister can evaluate his decision, which the companies wishing to invest in Zimbabwe can predict costs, or which the companies already invested in Zimbabwe can challenge if significant increases in royalties are required.<sup>86</sup> The ZMMA distinctly lacks these objective criteria.

Not only does Zimbabwe vest significant authority behind arbitrary discretion, but the authority vests in high members of the Ministry of Mines and the Zimbabwean government. The President owns the rights to minerals.<sup>87</sup> The Minister decides whether materials are defined as minerals under the ZMMA or not.<sup>88</sup>

Illustrating the complexity of this system is Part VIII, which provides procedures as to how applicants can secure mining leases. First, an applicant needs to pay for a prospecting license, find an approved prospector, and then have the prospector peg<sup>89</sup> the land to be mined. Only permanent residents of Zimbabwe or their agents may get a prospecting license.<sup>90</sup> The mining commissioner appears to have sole discretion to refuse prospecting licenses, though refusals must be reported to the Secretary.<sup>91</sup> Special mining leases are up to the President to decide.<sup>92</sup> This

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<sup>82</sup> *Id.* § 5, Part XXV (interpretation of "mining commissioner").

<sup>83</sup> *Id.* § 245. Prospectors can peg land owned by third-party landowners. *See, e.g., id.* §§ 32, 179. The ZMMA contemplates a landowner having claim to royalties. *See, e.g., id.* § 188(10).

<sup>84</sup> *Id.* § 245(1).

<sup>85</sup> *Id.* § 245(3).

<sup>86</sup> *Id.* § 245.

<sup>87</sup> *Id.* § 2.

<sup>88</sup> *Id.* § 5(2)–(3).

<sup>89</sup> Pegging is the process by which a prospector places alphabetically marked metal pegs into the ground to demarcate square area. *Id.* §§ 5 (interpretation of "peg"), 47. Registering the pegged area prevents the site from being considered abandoned. *Id.* § 48.

<sup>90</sup> *Id.* § 20(1).

<sup>91</sup> *Id.* § 20(3).

vesting of authority in government leaders rather than delegating authority to mining experts strongly suggests that Zimbabwe is interested only in the political ramifications of mining decisions.

Prospectors must be permanent residents of Zimbabwe or must have the prior written consent of the Secretary.<sup>93</sup> The grounds for obtaining consent are unstated. The applicant must satisfy the mining commissioner that the applicant is “fit,” defined as including the extent of knowledge of pegging procedures, and of the rights and duties of prospectors, owners, and occupiers of land under the Mines and Minerals Act.<sup>94</sup> The Act does not state what extent of knowledge is sufficient, or how the extent of knowledge is measured. Despite these apparent grounds for accepting or rejecting an application, § 15(3) actually governs what the Secretary can do.<sup>95</sup> This section conflicts with itself: § 15(3)(a) permits the Secretary to grant the application if he is satisfied that “no good cause to the contrary exists,” whereas § 15(3)(c) simply states that the Secretary may reject an application.<sup>96</sup> It is unclear whether rejection must be made on good faith, or at the sole discretion of the Secretary. Either way, as neither basis is clearly defined, the Secretary is vested with vast discretion to deny applications to prospectors.

While it is unlikely that a company would have difficulty finding a prospector, these standards certainly increase the chances that mining companies would hire officially certified prospectors to rubber-stamp documents already created by prospectors with far more clear expertise.

After a company pays for a prospecting license and finds a prospector, the prospector must prospect and peg the land.<sup>97</sup> Prospecting and pegging are generally within the discretion of the prospector.<sup>98</sup> Prospecting and pegging can be banned from certain land.<sup>99</sup> Discretion to ban prospecting and pegging in certain areas appears to be vested solely in the authority of the Minister of Mines.<sup>100</sup> While there are procedures to give notice of a ban, there are no rules addressing how the Minister of

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<sup>92</sup> *Id.* §§ 162(2), 163(1).

<sup>93</sup> *Id.* § 15(1).

<sup>94</sup> *Id.* § 15(2).

<sup>95</sup> *Id.* § 15(3).

<sup>96</sup> *Id.* § 15(2).

<sup>97</sup> *See generally, id.* §§ 20–48.

<sup>98</sup> *See id.* § 38.

<sup>99</sup> *Id.* § 35(1).

<sup>100</sup> *Id.*

Mines should ban pegging from certain land; no rules control or moderate the Minister of Mines' discretion to ban pegging.<sup>101</sup>

Next, an applicant needs to submit the actual mining lease application.<sup>102</sup> Submitted applications must contain details including what types of minerals the application covers, a sketch of the area in which the mine would be located, a list of all mining locations registered in the name of the applicant, the name and address of the occupier of the land, and "any other information relevant to the application which may be required [of the applicant] by the mining commissioner or the Board."<sup>103</sup> Another requirement of dubious importance is that "[t]he boundaries of the area applied for [in the sketch] shall be straight lines."<sup>104</sup> Approval is subject to the Board's discretion, without clearly defined evaluating factors.<sup>105</sup> This section focuses on the Board's evaluation that the project "has a reasonable prospect of success."<sup>106</sup> Additionally, the Board must be satisfied that the applicant will be able to pay, that the mining operations will continue for a significant period of time, and that the ground applied for is open to prospecting.<sup>107</sup> Again, the Board has wide discretion in determining "other" factors, with the Act expressly permitting approval contingent on "any other factor [that] the Board may deem to be relevant."<sup>108</sup> Finally, the "decision of the Board to grant or refuse an application under this section shall be final and without appeal."<sup>109</sup>

The design of the ZMMA clearly demonstrates that Zimbabwe is more interested in the political interests of mining decisions rather than environmental or economic interests. Native Zimbabweans are required to be central to the mining process. Additionally, authority vested in upper government members, coupled with ambiguous criteria to make decisions, results in poor transparency and a lack of legitimate reasons for Zimbabwe's mining decisions.

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<sup>101</sup> *Id.* §§ 35(1)–(11).

<sup>102</sup> *Id.* §§ 135–57.

<sup>103</sup> *Id.* § 135(2).

<sup>104</sup> *Id.* § 135(4).

<sup>105</sup> *See generally, id.* § 137.

<sup>106</sup> *Id.* § 137(2).

<sup>107</sup> *Id.* § 142(3).

<sup>108</sup> *Id.* § 142(5).

<sup>109</sup> *Id.* § 142(6).

The ZMMA also contains a section attaching different regulations to alluvial deposits.<sup>110</sup> Specifically, this section requires the continuous working of the site.<sup>111</sup> At the Minister's discretion, the holder of the license can be ordered to work the site or allow someone else to work the site.<sup>112</sup> While this is useful for Zimbabwe to keep some activity in its feeble economy, allowing licenses to go to alluvial miners strips larger companies from investing in the significantly more lucrative mining of kimberlite pipes.<sup>113</sup> DeBeers allowed its license to lapse,<sup>114</sup> and now Marange, described above, is being mined as an alluvial site. While Zimbabwe certainly will get some profits from this enterprise, it will not get the extensive profits that could come from a well-funded mining operation employing many Zimbabwe citizens.

Finally, the ZMMA confuses mining law with property law. Contained within the ZMMA are regulations governing the construction of fences when mines are adjacent to pastures.<sup>115</sup> There are regulations governing how liquor is sold near mining locations.<sup>116</sup> Additionally, there are several sections regulating the use of water<sup>117</sup> despite having a separate Water Act.<sup>118</sup>

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<sup>110</sup> *Id.* § 219.

<sup>111</sup> *Id.* § 219(1).

<sup>112</sup> *Id.* § 219(5).

<sup>113</sup> Kimberlite pipes are the primary geologic source of diamonds. Kimberlite pipes are formed by a series of very deep volcanic eruptions, deeper than the eruptions that create what we think of as volcanoes. The Kimberlite pipes are often filled back in over time, often with a lake, marsh or river forming at the top of the pipe. The mining of Kimberlite pipes requires extreme expertise and significant expense. See generally, e.g., Diamonds: Diamond Geology, ALL ABOUT GEMSTONES, [http://www.allaboutgemstones.com/diamond\\_geology.html](http://www.allaboutgemstones.com/diamond_geology.html) (last visited Mar. 2, 2011). Alluvial deposits are created by erosion to Kimberlite pipes, often found around the top of Kimberlite pipes. Alluvial deposits are mined by sifting the diamonds from the mud or other environment in which the diamonds are trapped ("over-burden"). The over-burden is removed by digging, panning, or other simple but labor-intensive measures. *E.g., id.* Only 10% of the world's diamond production is by alluvial mining. Alluvial Diamond Mining Fact Sheet, DIAMONDFACTS.ORG, [http://www.diamondfacts.org/pdfs/media/media\\_resources/fact\\_sheets/Alluvial\\_Mining\\_Background.pdf](http://www.diamondfacts.org/pdfs/media/media_resources/fact_sheets/Alluvial_Mining_Background.pdf) (last visited Mar. 2, 2011). See generally, e.g., Diamonds: Diamond Geology, ALL ABOUT GEMSTONES, *supra*.

<sup>114</sup> Dugger, *supra* note 44.

<sup>115</sup> Mines and Minerals Act of 1961 § 189 (Zim.).

<sup>116</sup> *Id.* § 190.

<sup>117</sup> *Id.* §§ 191–195.

<sup>118</sup> See, e.g., *id.* § 195(1).

## 2. THE INDIGENIZATION AND ECONOMIC EMPOWERMENT ACT HAMPERS INVESTMENT

Zimbabwe's Indigenization and Economic Empowerment Act of 2007, ("IEEA") requires that indigenous Zimbabweans own 51 percent or more of all companies operating within Zimbabwe.<sup>119</sup> Indigenous Zimbabweans are defined as Zimbabweans previously disadvantaged due to race and the descendants of such persons.<sup>120</sup> The purpose of the Act is to correct the wrongs done by colonialism.<sup>121</sup> According to the Itemization and Empowerment (General) Regulations of 2010 ("Regulations"), this is accomplished by "ced[ing]" control to indigenous Zimbabweans.<sup>122</sup> The government maintains a list of potential indigenous Zimbabwean candidates.<sup>123</sup>

This law discourages investment, as is often noted and need not be repeated again.<sup>124</sup> It also encourages foreign companies that wish to invest to create joint venture subsidiaries, as RioTinto did with RioZim. Where companies create distinct and separate entities to work with Zimbabwe, Zimbabwe is insulated from the full expertise of the company; Zimbabwe is limited to only that expertise which the parent company provides the subsidiary. Zimbabwe needs significant investment to provide jobs and to stabilize the economy. Laws that discourage investment or encourage partial investment are harmful to Zimbabwe. This law should be repealed.

## 3. LABOR AND SAFETY LAWS ARE SUFFICIENT

According to the Zimbabwe Mining Handbook, the authority of unions in Zimbabwe is strong enough that labor concerns are addressed by the government.<sup>125</sup> The National Employment Councils and the

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<sup>119</sup> Indigenization and Economic Empowerment Act of 2007 § 3(1)(a) (Zim.).

<sup>120</sup> *Id.* § 2 (interpretation of "indigenous Zimbabwean").

<sup>121</sup> Zimbabwe's Indigenization Law Provokes Controversy, GLOBALPOST, May 30, 2010, <http://www.globalpost.com/dispatch/zimbabwe/100324/zimbabwes-indigenization-law-provokes-controversy?page=full>.

<sup>122</sup> Itemization and Empowerment (General) Regulations of 2010 § 3(a) (Zim.).

<sup>123</sup> *Id.* § 15(1)(b).

<sup>124</sup> See, e.g., Leon, *supra* note 39, at 639–40.

<sup>125</sup> INTERNATIONAL BUSINESS PUBLICATIONS USA, ZIMBABWE MINING HANDBOOK 240 (2010).

Zimbabwe Congress of Trade Unions collectively have successfully fought for salary increases, a forty-hour work week, and minimum wages.<sup>126</sup> They have successfully staged national work stoppages.<sup>127</sup> Some parts of organized labor transitioned to politics, forming the MDC.<sup>128</sup> To the extent that the success of the unions will continue, it appears that labor law in Zimbabwe will continue to evolve and improve. As such, this article does not further address labor issues.

### B. ZIMBABWE'S TAXATION LAWS

Zimbabwe currently offers extensive tax incentives to qualifying firms, including no taxes for the first five years of operation, duty-free importation of capital equipment for Export Processing Zones ("EPZs"), duty-free importation of all raw materials and intermediate goods required in production, exemption from fringe benefits taxes on EPZ employees, and an exemption from profit taxes on foreign firms operating in EPZs.<sup>129</sup> Additionally, firms operating in EPZs have "favourable tax regimes" and do not need to pay duties.<sup>130</sup> While this tax regime certainly would attract businesses, the tax incentives may not effectively capture profits from diamond mining enterprises that are already highly profitable and already incentivize firms to Zimbabwe. The use of taxes and EPZs are further discussed below.

### V. INTERNATIONAL LAWS AND TREATIES ARE INSUFFICIENT

This section investigates the two sources of international law concerning Zimbabwe's diamond mining industry. The first is the Kimberley Process, and the second is treaties with particular countries. Neither source greatly impacts Zimbabwe's ability to gain substantial revenue from diamond mining.

The primary existing international treaty regulating diamonds in Zimbabwe is the Kimberley Process ("KP"). The KP was enacted to

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 240-41.

<sup>128</sup> *Id.* at 241.

<sup>129</sup> *Id.* at 259-60.

<sup>130</sup> *Id.* at 261.

decrease the use of rough diamonds to finance rebel groups.<sup>131</sup> These diamonds are called “blood diamonds” or “conflict diamonds.”<sup>132</sup> The KP was created in response to wars largely in West Africa, such as in Sierra Leone.<sup>133</sup> Member states signed the KP in 2003.<sup>134</sup>

The KP is largely a certification scheme only, with limited measures to verify that the diamonds are actually from conflict-free zones. The minimalist requirements state that participant countries should establish internal controls to eliminate conflict diamonds from circulation; designate importing and exporting authorities; ensure that diamonds are shipped in tamper-resistant containers; enforce the Certification scheme; collect production, import and export data; and take note of additional internal controls.<sup>135</sup> The KP relies on industry self-regulation.<sup>136</sup> These requirements clearly focus on the transportation of diamonds through international trade routes to ensure that diamonds are traceable and that non-certified diamonds do not enter trade flows.

While some argue that these requirements are insufficient even to reduce the sale of conflict diamonds,<sup>137</sup> these requirements certainly do not address the failures of Zimbabwe's mining industry to provide Zimbabwe substantial profit.<sup>138</sup> While Zimbabwe certainly should abide by these regulations, it should go further in promoting its interest in receiving legal revenues to the state to promote state-organized infrastructure and social programs.

Zimbabwe has also signed several bilateral international treaties (“BITs”) that regulate trade.<sup>139</sup> In the case of the Zimbabwe-Netherlands BIT, Zimbabwe has simply ignored agreements not to indigenize the companies.<sup>140</sup> Indeed, the International Centre for Settlement of

<sup>131</sup> What is the Kimberley Process?, KIMBERLEY PROCESS, [http://www.kimberleyprocess.com/home/index\\_en.html](http://www.kimberleyprocess.com/home/index_en.html) (last visited Mar. 2, 2011).

<sup>132</sup> Frequently Asked Questions, KIMBERLEY PROCESS, [http://www.kimberleyprocess.com/faqs/index\\_en.html](http://www.kimberleyprocess.com/faqs/index_en.html) (last visited Mar. 2, 2011).

<sup>133</sup> Background, KIMBERLEY PROCESS, [http://www.kimberleyprocess.com/background/index\\_en.html](http://www.kimberleyprocess.com/background/index_en.html) (last visited Mar. 2, 2011).

<sup>134</sup> See John R. Crook, ed., *Contemporary Practice of the United States Relating to International Law*, 104 AM. J. INT'L. L. 100, 137 (2010).

<sup>135</sup> *Kimberley Process Certification Scheme § IV*, KIMBERLEY PROCESS, <http://www.kimberleyprocess.com/download/getfile/4>.

<sup>136</sup> *Id.*

<sup>137</sup> Mutsaka, *supra* note 73; see also Cook, *supra* note 134, at 138.

<sup>138</sup> See generally Kimberley Process Certification Scheme, *supra* note 135.

<sup>139</sup> Leon, *supra* note 39, at 640.

<sup>140</sup> *Id.*

Investment Disputes (“ICSID”)<sup>141</sup> found that Zimbabwe had violated a just compensation clause of the BIT by indigenizing a company.<sup>142</sup> Certainly, to the extent that Zimbabwe ignores these agreements, these agreements have no effect on improving Zimbabwe’s mining laws.

## VI. BOTSWANA HAS A MODEL SET OF LAWS AND CORPORATE POLICIES THAT HAVE PROVEN EFFECTIVE IN BOTSWANA’S SUCCESS

According to the World Bank, “in a [n]utshell: [c]lever minerals policy [in Botswana] initiated and stimulated [economic] growth, and well-thought long-term development planning was crucial in channeling budget surpluses (from diamond revenues) into public investments that promoted growth and human development while maintaining fiscal discipline.”<sup>143</sup> Botswana’s laws and corporate policies are clearly a model for Zimbabwe and any other country wishing to substantially profit from mineral resources.

### A. BOTSWANA’S LAWS IMPACTING MINING

This section will investigate three aspects of Botswana mining law. First, Botswana primarily relies on the Mines and Minerals Act of 1999 to govern mining operations. Second, Botswana also has other minerals acts that regulate mine management, safety, and import and export controls. Finally, Botswana does not have ownership requirements.

Botswana organizes administration of mining differently than Zimbabwe. The Minister of Minerals, Energy and Water Resources oversees the Departments of Mines, of Geological Survey, and of Water Affairs, as well as the government’s electric and water utilities.<sup>144</sup> Mine

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<sup>141</sup> The ICSID is a leading international arbitration institution for state signatories to the ICSID Convention. The Convention is a World Bank formulation designed to facilitate private international investment. About ICSID, INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES, [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICSID\\_Home](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICSID_Home) (last visited Mar. 2, 2011).

<sup>142</sup> Leon, *supra* note 39, at 640.

<sup>143</sup> Alberto Criscuolo, Briefing Note: Botswana, THE WORLD BANK (June 19, 2008), <http://search.worldbank.org/all?qterm=briefing%20note%20botswana> (follow “Botswana” hyperlink).

<sup>144</sup> MINISTRY OF MINERALS, ENERGY, AND WATER RES., <http://www.mmewr.gov.bw/about/> (last visited Mar. 2, 2011).

prospecting is generally covered by the Department of Geological Survey while mining leases are covered by the Department of Mines.<sup>145</sup>

### 1. MINES AND MINERALS ACT OF 1999

Unlike the ZMMA, Botswana's Mines and Minerals Act of 1999 ("BMMA") is a focused document resulting in transparent law. Rather than the ZMMA's much larger document, the BMMA contains fourteen sections spread across fifty-two pages.<sup>146</sup> As will be shown, Department of Mines officials are provided clear criteria for making their decisions. This also provides potential investors with clear criteria for evaluating costs and benefits to evaluate projects.

While likely of symbolic importance only, the BMMA vests mineral rights in the Republic subject to other provisions.<sup>147</sup> The Minister of Mines acts "in the public[s] interest."<sup>148</sup> This is compared to the ZMMA's vesting of mineral property rights in the President, as discussed above.

The BMMA provides objective criteria for government officials to make decisions, as shown by the determination of royalties. Unlike the ZMMA's vesting of discretion, the BMMA requires royalties to be fixed percentages of gross market value.<sup>149</sup> Section 66(2) contains the percentages for different types of minerals, while § 66(3) defines gross market value.<sup>150</sup> If problems arise with this procedure, the BMMA permits the Minister to rely on industry norms subject to judicial review.<sup>151</sup> Compared to the ZMMA, the BMMA contains objective criteria subject to judicial review. This is a transparent law that provides investors with a clear understanding of the potential benefits and costs of mining in Botswana.

The simplicity of the BMMA will be illustrated by the procedures required to begin mining. After consulting with the

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<sup>145</sup> Compare Service: Prospecting Licence, MINISTRY OF MINERALS, ENERGY, AND WATER RES., [http://www.mmewr.gov.bw/services/service-details/?service\\_id=2](http://www.mmewr.gov.bw/services/service-details/?service_id=2) (last visited Mar. 2, 2011) with Service: Mining License Application, MINISTRY OF MINERALS, ENERGY, AND WATER RES., [http://www.mmewr.gov.bw/services/service-details/?service\\_id=1](http://www.mmewr.gov.bw/services/service-details/?service_id=1) (last visited Mar. 2, 2011).

<sup>146</sup> See generally Mines and Minerals Act of 1999 (Act No. 17) (Bots.), available at <http://www.mines.gov.bw/mines%20and%20minerals%20%20Act.pdf>.

<sup>147</sup> *Id.* § 3.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* § 66(2).

<sup>150</sup> *Id.* §§ 66(2)–(3).

<sup>151</sup> *Id.* § 66(5).

Department of Geological Survey to identify a piece of land that a company wishes to mine, the company must apply for a prospecting license under the BMMA.<sup>152</sup> The requirements for completing a prospecting license under the BMMA are more simple than those under the ZMMA. First, the BMMA provides a template form appended as Form I to the BMMA.<sup>153</sup> The BMMA requires that the Minister grant the license if (a) the applicant has the adequate finances, technical competence, and the experience to carry out the proposed operation, (b) the proposed operation is adequate and makes proper provision for environmental protection, (c) the proposed prospecting area does not infringe on an existing prospecting area, and (d) the applicant is not in default.<sup>154</sup> The BMMA provides the Minister with the authority necessary to verify these requirements<sup>155</sup> and provides the Minister with recourse if an existing license may have been abandoned.<sup>156</sup> If the license is granted, the Minister is provided with another form to issue to the applicant.<sup>157</sup>

If a prospecting operation reveals minerals of value that the prospector wishes to mine but that the prospector cannot mine immediately, the next step is to apply for a retention license under Part V.<sup>158</sup> Similar to the process to apply for a prospecting license, applicants for retention licenses have specific and concrete requirements. An applicant must provide a completed Form III appended to the BMMA<sup>159</sup> not less than three months prior to the expiration of the prospecting license.<sup>160</sup> The applicant must complete a feasibility study showing that mining immediately is not feasible,<sup>161</sup> prospecting has been completed,<sup>162</sup> and the applicant is not in default.<sup>163</sup> Part V does not mention discretion of the Minister or any other government official, but focuses on concrete requirements.<sup>164</sup>

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<sup>152</sup> The Department of Geological Survey procedures are briefly discussed below. The Department of Geological Survey also offers a prospecting license.

<sup>153</sup> *Id.* § 13.

<sup>154</sup> *Id.* § 14(1).

<sup>155</sup> *Id.* § 14(2).

<sup>156</sup> *See id.* § 14(3).

<sup>157</sup> *Id.* § 16.

<sup>158</sup> *Id.* § 27(1).

<sup>159</sup> *Id.* § 25(1).

<sup>160</sup> *Id.* § 25(2).

<sup>161</sup> *Id.* § 27(1)(a).

<sup>162</sup> *Id.* § 27(1)(b).

<sup>163</sup> *Id.* § 27(1)(c).

<sup>164</sup> *See generally id.* §§ 25–36.

If a holder of a prospecting license or a retention license wishes to mine from the licensed area, the holder must apply for a mining license under Part VI.<sup>165</sup> The BMMA limits applicants for mining licenses to legally incorporated companies.<sup>166</sup> Then, the applicant must complete Form V.<sup>167</sup> Additionally, the applicant must show that the proposed mining operation is the most efficient and beneficial use of the mineral resources;<sup>168</sup> the proposed mining area does not infringe on other licenses;<sup>169</sup> the proposed mining area extends to cover only that area reasonably required for surface mining;<sup>170</sup> the applicant has adequate financial resources, technical competence and experience to carry on effective mining operations;<sup>171</sup> and in the case of an application to mine diamonds, an agreement has been reached following a negotiation under section 51.<sup>172</sup> Though the BMMA does permit the government to acquire a 15 percent stake in any mining license,<sup>173</sup> the BMMA provides measures that require active government participation and contribution to the project.<sup>174</sup> As with the other licenses, the government informs the applicant of its decision by use of a form.<sup>175</sup>

The themes of these provisions repeat throughout the BMMA. The Minister and the Department of Mines are given a clear scope to make decisions. Unlike in Zimbabwe, discretion is not a feature of the BMMA. Rarely does the Act refer to the President, and the Department of Mines carries all decisions related to mining.<sup>176</sup> Moreover, applicants do not have to be native Botswanans. Disputes resort to the court systems. This is transparent law that allows applicants to clearly understand their rights and obligations.

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<sup>165</sup> *Id.* § 37(1).

<sup>166</sup> *Id.* § 37(4).

<sup>167</sup> *Id.* § 38.

<sup>168</sup> *Id.* § 39(1)(a).

<sup>169</sup> *Id.* § 39(1)(b).

<sup>170</sup> *Id.* § 39(1)(c).

<sup>171</sup> *Id.* § 39(1)(d).

<sup>172</sup> *Id.* § 39(1)(h). Section 51 requires negotiations for diamond mining to be conducted with the government. *Id.* § 51(1). It also requires that all negotiations be concluded within six months, or the application will fail. *Id.* § 51(2).

<sup>173</sup> *Id.* § 40(1).

<sup>174</sup> *Id.* §§ 40(1), 40(1)(a)–(b).

<sup>175</sup> *Id.* § 41.

<sup>176</sup> Presidential approval is required to mine from burial grounds, national or ancient monuments, or any land used or reserved for the purposes of Government. *Id.* § 60(1)(i).

## 2. OTHER ACTS

The Department of Geological Survey offers the prospecting licenses that the ZMMA controls.<sup>177</sup> The Department also offers a reconnaissance permit that allows the holder to survey the entire country without financial obligation.<sup>178</sup> Generally, the Department of Geological Survey is responsible for gathering data on Botswana's mineral wealth, and the Department has received significant technical aid from foreign countries.<sup>179</sup> The World Bank significantly credits the Department of Geological Survey for the mineral development in Botswana.<sup>180</sup> This is compared to Zimbabwe's restrictive control of prospecting licenses discussed above.

Botswana's other laws controlled by the Department of Mines do not significantly impact property rights of mines. The Mines, Quarries, Works and Machineries Act largely covers management requirements and safety regulations.<sup>181</sup> The Export and Import of Rough Diamond Regulations effectively codifies the Kimberley Process.<sup>182</sup> The Precious and Semi-Precious Stones (Protection) Act provides penalties for the smuggling of precious and semi-precious stones.<sup>183</sup> The Explosives Act provides the authority to enact safety regulations covering the use, transport, storage, and other aspects of the use of explosives.<sup>184</sup> While Zimbabwe may learn from these regulations, they do not concern this article's investigation of profits from diamond mining.

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<sup>177</sup> BOTSWANA DEP'T OF MINES, MINING LICENCE & MINERALS PERMITS APPLICATION REQUIREMENTS 2 (2007), available at <http://www.gov.bw/PageFiles/7995/ml%20mp%20applications%20guide.pdf>.

<sup>178</sup> Criscuolo, supra note 143; Mining in Botswana - Overview, MBENDI.COM, <http://www.mbendi.com/indy/ming/af/bo/p0005.htm> (last visited Mar. 2, 2011).

<sup>179</sup> Criscuolo, supra note 143.

<sup>180</sup> *Id.*

<sup>181</sup> See generally Mines, Quarries, Works and Machinery Act (Act No. 15/1995) (Bots.), available at <http://www.mines.gov.bw/PR-VOL-VII-CHP-44-02-MINES,QUARRIES,WORKS%20AND%20MECHINERY.pdf>.

<sup>182</sup> See generally Export and Import of Rough Diamonds Regulations, 2004 (Bots.), available at <http://www.gov.bw/PageFiles/7999/gazette-%20%20kp%20regulations%20Botswana.pdf>; see, e.g., *id.* § 3.

<sup>183</sup> See generally Precious and Semi-Precious Stones (Protection) Act (Act No. 16/2005) (Bots.), available at <http://www.mines.gov.bw/PR-VOL-X-CHP-66-03%20PRECIOUS%20AND%20SEMI%20PRESCIOUS%20TONES%20%28PROTECTION%29.pdf>; see, e.g., *id.* §§ 4-7.

<sup>184</sup> See generally Explosives Act (Act No. 36/1968) (Bots.), available at <http://www.mines.gov.bw/Chpt24-02%20Explosives.pdf>.

### 3. NO OWNERSHIP REQUIREMENTS

Botswana does not have any prohibitions on foreign ownership of companies.<sup>185</sup> This encourages investment, showing investors that their investments will not be seized.

### B. BOTSWANA'S TAXATION LAWS

Botswana realizes profits from mining from royalties and taxes. It has a low corporate tax rate of 15 percent,<sup>186</sup> with an extra 10 percent as an additional tax.<sup>187</sup> Large mining projects could negotiate alternative taxation schemes with the government.<sup>188</sup> Royalties are tax-deductible.<sup>189</sup> Capital and exploration expenditures can be written-off.<sup>190</sup> Botswana does not appear to have anything similar to BITs or EPZs.

### C. BOTSWANA'S CORPORATE POLICIES

The corporate responsibility of DeBeers favorably impacts Botswana's economy. Examining these policies will identify additional factors that Zimbabwe should consider when formulating better laws to support its mining industry. However, this article does not focus on the issues covered in these policies, so it will not analyze them in significant depth.

DeBeers's subsidiary Diamond Trading Company's ("DTC") corporate policies<sup>191</sup> are encapsulated in its Better Practice Principles ("BPP").<sup>192</sup> The 2008 version is a twenty-four-page document of policies covering conflict diamonds, employment, health and safety, non-discrimination, child labor, environmental issues, and general human

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<sup>185</sup> U.S. DEP'T OF STATE, *supra* note 48.

<sup>186</sup> *Id.*

<sup>187</sup> Botswana: Domestic Corporate Taxation, LOWTAX GLOBAL TAX & BUS.PORTAL, <http://www.lowtax.net/lowtax/html/botswana/jbodctx.html> (last visited Mar. 3, 2011).

<sup>188</sup> Criscuolo, *supra* note 143 (this is part of a general discussion of the factors of growth in Botswana).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> The DTC has been awarded a monopoly contract by the Botswana government.

<sup>192</sup> See Best Practice Principles, HOME - THE DEBEERS GROUP, <http://www.debeersgroup.com/diamond-trading-company/Sights-and-Sightholders/BPP/> (last visited Mar. 3, 2011).

rights issues.<sup>193</sup> Of particular interest are sections B5.1 Employment, B5.2 Health & Safety, B5.3 Non-Discrimination and Disciplinary Practices, B5.4 Child Labour, B5.5 Forced Labour, B5.6 Human Rights, and B6 Environmental Responsibilities.<sup>194</sup> These sections set minimum standards<sup>195</sup> that DTC requires of itself, and all contractors, assessors, consultants and other personnel working with DTC.<sup>196</sup>

Above, it was concluded that Zimbabwe's labor unions provided sufficient support to the interests of Zimbabwe industrial workers. This conclusion will not be undermined here by proposing additional labor standards. However, if Zimbabwe were to investigate labor laws involving the mining industry, Zimbabwe should look to these policies.

More importantly, these policies illustrate the importance of encouraging responsible companies to invest. Allowing a company like DeBeers to mine kimberlite pipes rather than corrupt military officers to mine alluvial deposits will substantially improve Zimbabwe's economic condition when policies like the BPP are brought to Zimbabwe.

## VII. PROPOSALS

Having compared Zimbabwe's and Botswana's respective laws and policies surrounding mining, fostering investment requires increasing transparency, adding favorable substantive laws, repealing indigenous requirements, and making better use of tax laws.

### A. INCREASE TRANSPARENCY

Zimbabwe should increase transparency by creating concrete requirements rather than vesting decision-making authority in ambiguous terms. Zimbabwe currently vests authority in the discretion of upper-level government officials. Instead, it should create specific requirements that low-level officials can monitor. Using template forms and bullet-list requirements, like Botswana did in the BMMA, would result in more transparent law. This would allow lower-level officials to make the

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<sup>193</sup> Best Practice Principles The Assurance Programme Manual 2008, HOME - THE DEBEERS GROUP, 3, 24  
[http://www.debeersgroup.com/ImageVault/Images/id\\_1620/scope\\_0/ImageVaultHandler.aspx](http://www.debeersgroup.com/ImageVault/Images/id_1620/scope_0/ImageVaultHandler.aspx)  
(last visited Mar. 3, 2011).

<sup>194</sup> *Id.* at 3.

<sup>195</sup> *See generally id.*

<sup>196</sup> *Id.* at 10–16.

majority of findings, it would allow potential investors to understand their rights and obligations, and it would allow courts to review decisions. This would benefit everyone.

### **B. ADD FAVORABLE LAWS**

Zimbabwe should also adopt several aspects of Botswana law to its own law. First, Zimbabwe should add technical requirements for licenses found in the BMMA. These requirements allow Zimbabwe to verify that the companies that are occupying Zimbabwe resources for years under license are capable of handling the monumental task to mine from kimberlite pipes.

Second, Zimbabwe should add surveying laws similar to Botswana's reconnaissance license and Department of Geological Survey. Identifying additional diamond mines expands the natural resource wealth of Zimbabwe. In the short-term, this leads to the hiring of additional workers and brings investment as surveying companies enter Zimbabwe. In the long-term, this encourages investors to mine from a variety of resources, and reduces the speculation risk to companies. Zimbabwe's advertisement of a known amount of mineral resources is certainly a better advertisement than that of potential mineral resources.

Third, Zimbabwe should investigate safety regulations involved in all aspects of mining to verify that Zimbabwe's standards are sufficient to ensure minimum safety. While largely outside the scope of this article, encouraging companies to invest in Zimbabwe does not mean allowing them to use bad safety and labor practices.

### **C. REPEAL INDIGENOUS REQUIREMENTS.**

These requirements exist in two different sources: the Empowerment and Indigenization Bill and within Zimbabwe law itself. Both sources deter potential investors because of the history of the farm seizures. Mining kimberlite pipes requires significant expense, the loss of which could be devastating to a company. Repeal of indigenous requirements would make the statement that Zimbabwe is against seizures similar to the seizures of farms.

#### **D. REFORM TAXATION AND ROYALTY SYSTEM**

Zimbabwe should follow Botswana's low taxation method that also allows royalties to be tax-deductible. While this may mean lower profits in the short-term, in the long-term it means more companies investing in Zimbabwe.

Additionally, Zimbabwe could use EPZs to encourage the investment of diamond refining to occur in Zimbabwe rather than Belgium. Specific diamond EPZs could be used to encourage the investment of everything having to do with diamond mining. Appropriate placements of these EPZs could be significantly beneficial to urban centers.

Zimbabwe should also ensure that however the money is being earned, investments are being made that will benefit Zimbabwe in the future. Rio Tinto has built schools, clinics, and other improvements. Zimbabwe should provide financial incentives for these improvements in a way that encourages the training of the teachers, doctors, nurses, and other personnel in these locations.

Just like in its mining laws, however, Zimbabwe needs to be transparent in how it earns its money. It should not try to fool companies by lowering taxes only to raise royalties, or by some other scheme. Zimbabwe needs to be careful to be transparent in everything that it does to encourage investors into the country.

#### **VIII. CONCLUSION**

The problems of Zimbabwe are immense. As USAID reports:

The challenges that face Zimbabwe are numerous, not least of which is a fragile transitional government that is wrestling with internal power struggles and languishing in bankruptcy, unable to cover even the most critical budget items. The economy has collapsed, the capacity of the public health and education sectors is deeply eroded, and investment within the private sector has slowed to a crawl. Meanwhile, poverty continues to

increase, and a burgeoning, multi-faceted humanitarian crisis persists.<sup>197</sup>

With laws unfriendly to investment, Zimbabwe seems doomed to wallow in this chaotic economy.

However, if Zimbabwe modifies its laws, Zimbabwe's significant diamond resources could be the key to recovery. Transparent laws with investment-friendly provisions that also protect the workers of Zimbabwe based upon proven and successful laws would significantly increase the attractiveness of investing in Zimbabwe. Harnessing the potential of immense diamond profits could provide the capital necessary to right Zimbabwe. However, as diamonds are a finite resource, Zimbabwe should be concerned with making changes quickly before the resource is squandered.

Table 1. Comparison of Botswana and Zimbabwe's social and economic statistics.

Factor	Botswana	Zimbabwe
Population	appx 2 million. <sup>198</sup>	appx. 11.5 million <sup>199</sup>
Ethnicities	Tswana (or Setswana) 79%, Kalanga 11%, Basarwa 3%, other, including Kgalagadi and white 7% <sup>200</sup>	Shona 82%, Ndebele 14%, other African 2%, mixed and Asian 1%, white less than 1% <sup>201</sup>
Literacy	81.2% <sup>202</sup>	90.7% <sup>203</sup>
Education Expenditures	8.7% of GDP (2007) <sup>204</sup>	4.6% of GDP (2000) <sup>205</sup>
Disease	AIDS prevalence second highest	15.3% (2007 est.) <sup>207</sup>

<sup>197</sup> USAID Africa: Zimbabwe, USAID, [http://www.usaid.gov/locations/sub-saharan\\_africa/countries/zimbabwe/](http://www.usaid.gov/locations/sub-saharan_africa/countries/zimbabwe/).

<sup>198</sup> *The World Factbook: Botswana*, supra note 4 (last visited Mar. 2, 2011) (follow "People and Society" hyperlink).

<sup>199</sup> *The World Factbook: Zimbabwe*, supra note 1 (last visited Mar. 2, 2011) (follow "People and Society" hyperlink).

<sup>200</sup> *The World Factbook: Botswana*, supra note 4 (last visited Mar. 2, 2011) (follow "People and Society" hyperlink).

<sup>201</sup> *The World Factbook: Zimbabwe*, supra note 1 (last visited Mar. 2, 2011) (follow "People and Society" hyperlink).

<sup>202</sup> *The World Factbook: Botswana*, supra note 4 (last visited Mar. 2, 2011) (follow "People and Society" hyperlink).

<sup>203</sup> *The World Factbook: Zimbabwe*, supra note 1 (last visited Mar. 2, 2011) (follow "People and Society" hyperlink).

<sup>204</sup> *The World Factbook: Botswana*, supra note 4 (last visited Mar. 2, 2011) (follow "People and Society" hyperlink).

<sup>205</sup> *The World Factbook: Zimbabwe*, supra note 1 (last visited Mar. 2, 2011) (follow "People and Society" hyperlink).

		in the world <sup>206</sup>	
GDP per capita		\$12,800 (2009 est.) <sup>208</sup>	Less than \$100 (2009 est.) <sup>209</sup>
Population	below	30.3% (2003) <sup>210</sup>	68% (2004) <sup>211</sup>
poverty line			
Unemployment rate		7.5% (2007 est.) <sup>212</sup>	95% (2009 est.) <sup>213</sup>
Budget		rev.: \$3.88 billion; exp: \$6.112 billion (2009 est.) <sup>214</sup>	rev: \$133 million; exp: \$258 million (2008 est.) <sup>215</sup>

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<sup>207</sup> *The World Factbook: Zimbabwe*, *supra* note 1 (last visited Mar. 2, 2011) (follow “People and Society” hyperlink).

<sup>206</sup> *The World Factbook: Botswana*, *supra* note 4 (last visited Mar. 2, 2011).

<sup>208</sup> *The World Factbook: Botswana*, *supra* note 4 (last visited Mar. 2, 2011).

<sup>209</sup> *The World Factbook: Zimbabwe*, *supra* note 1 (last visited Mar. 2, 2011) (follow “Economy” hyperlink).

<sup>210</sup> *The World Factbook: Botswana*, *supra* note 4 (last visited Mar. 2, 2011).

<sup>211</sup> *The World Factbook: Zimbabwe*, *supra* note 1 (last visited Mar. 2, 2011) (follow “Economy” hyperlink).

<sup>212</sup> *The World Factbook: Botswana*, *supra* note 4 (last visited Mar. 2, 2011).

<sup>213</sup> *The World Factbook: Zimbabwe*, *supra* note 1 (last visited Mar. 2, 2011) (follow “Economy” hyperlink).

<sup>214</sup> *The World Factbook: Botswana*, *supra* note 4 (last visited Mar. 2, 2011).

<sup>215</sup> *The World Factbook: Zimbabwe*, *supra* note 1 (last visited Mar. 2, 2011) (follow “Economy” hyperlink).