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Corporate Social Responsibility in the Extractive Industries of Namibia, South Africa and Zambia: Choices and Consequences

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ABBREVIATIONS

AMV	:	African Mining Vision
BEE	:	Black Economic Empowerment
CGP	:	Code of Good Practice for the Mining Industry, 2009 (South Africa)
CSI	:	Corporate Social Investment
CSR	:	Corporate Social Responsibility
ECC	:	Environmental Clearance Certificate
ECZ	:	Environmental Council of Zambia
EIA	:	Environmental Impact Assessments
EITI	:	Extractive Industries Transparency Initiative
EMA	:	Environmental Management Act 7 of 2007 (Namibia)
EMP	:	Environmental Management Plan
GDP	:	Gross Domestic Product
HDSA	:	Historically Disadvantaged South Africans
HLCS	:	Housing and Living Conditions Standard for the for the South African Mining Industry, 2009
ISDM	:	Integrated, Sustainable Decision-Making
MMDA	:	Mining and Minerals Development Act 7 of 2008 (Zambia)
MPMA	:	Minerals (Prospecting and Mining) Act 33 of 1992 (Namibia)
MPRDA	:	Mineral and Petroleum Resources Development Act, 28 of 2004 (South Africa)
NEEEF	:	New Equitable Economic Empowerment Framework (Namibia)
NEMA	:	National Environmental Management Act 107 of 1998 (South Africa)
NUA	:	Namibian Uranium Association
SADC	:	Southern African Development Community
SARS	:	South African Revenue Service
SLP	:	Social and Labour Plan

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ZCCM-IH : Zambia Consolidated Copper Mines Investments Holdings

ZEMA : Zambia Environmental Management Agency

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Corporate Social Responsibility in the Extractive Industries of Namibia, South Africa and Zambia: Choices and Consequences

*Hanri Mostert**

Kangwa-Musole Chisanga

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Meyer van den Berg

Cheri-Leigh Young

I. INTRODUCTION

Business operations are motivated by profit,[1] but their effects shape people's livelihoods, cultures and social identities,[2] especially in the extractive industries. Increasingly, mining corporations must conduct their businesses responsibly and sustainably, distributing benefits to a broadening range of stakeholders.[3] International legal instruments endorse these expectations,[4] giving credence to the drive towards "corporate social responsibility" ("CSR").

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[1] J Howard, *Corporate Social Responsibility in the Mining Industry* (unpublished LLM thesis, University of Cape Town, 2014) 7-8.

[2] N. Yakovleva, *Corporate Social Responsibility in the Mining Industries* (2009) 1.

[3] ibid

[4] See for example United Nations, *Global Compact brochure on Corporate Sustainability in the World Economy* (2013) available at <https://www.unglobalcompact.org/>; Organisation of Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises (2011) available at <http://www.oecd.org/daf/inv/mne/48004323.pdf at 28>; World Economic Forum, *Joint Statement on Global Corporate Citizenship: the Leadership Challenge for CEOs and Boards* (2002) available at <http://www.weforum.org/ pdf/GCCI/GCC_CEOstatement.pdf>; International Labour Organization,

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In this contribution we explore benefit-sharing by examining CSR in the extractive industries of three members of the Southern African Development Community (SADC): South Africa, Namibia and Zambia. These countries have high economic dependency[5] on their extractive industries.[6] It is not their similarities, however, but the disparities between them which makes for interesting study-material: disparities pertaining to benefit-sharing among stakeholders in the extractive industries raise the question about the motivations for and consequences of particular models of CSR. We evaluate the different approaches to stakeholder sharing of benefits from energy and resource activities, relying on indicators normally used to assess levels of support for CSR initiatives. These indicators are discussed after some preliminary concepts and motivations have been clarified and the legal frameworks of the participant jurisdictions described.

II. CONCEPTS AND MOTIVATIONS

Legally relevant definitions of CSR continue to escape commentators,[7] but globally these concepts remain practically significant.[8] For our purposes and limited scope we accept that, essentially, CSR 'involves a company going beyond its strict legal obligations to take into account the impact its business has on stakeholders other than its shareholders.'[9]

There are various internal and external drivers for CSR. Internal drivers are motivations for *voluntary* CSR initiatives. Among these are enlightened self-interest and community pressure.[10] The United Nations openly encouraged corporations to adopt voluntary initiatives

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International Labour Organization on International Instruments and Corporate Social Responsibility (2007) available at <http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/instructionalmaterial/wcms_101247.pdf>.

[5] All three jurisdictions have been afforded a "high dependency" status on the African Mining Legislation Atlas (AMLA) available at <http://a-mla.org/>.

[6] The mineral industries of each individual jurisdiction have both continental and global importance. See United States Geological Survey (USGS), *Minerals Yearbook 2011* (2012) 1.4, 1.6, 1.8 available at <http://minerals.usgs.gov/minerals/pubs/country/2011/myb3-sum-2011-africa.pdf>. For a visual of the economic dependency of South Africa, Namibia and Zambia, see < http://a-mla.org/>.

[7] M. Kerr, R. Janda & C. Pitts, *Corporate Social Responsibility: A Legal Analysis* (2009) 5; E. Garriga & D. Mel, 'Corporate Social Responsibility Theories: Mapping the Territory' (2004) 53 *Journal for Business Ethics* 51 at 52; A. Dahlsrud, 'How Corporate Social Responsibility is defined: An Analysis of 37 Definitions' (2008) 15 Corporate Social Responsibility and Environmental Management 1 at 1.

[8] McKinsey Global Survey Results, *Valuing Corporate Social Responsibility* (2009) 1; Above n 2.

[9] J. Corkin, 'Misappropriating citizenship: the limits of corporate social responsibility' in N. Boeger, R. Murray & C. Villiers, (eds) *Perspectives on Corporate Social Responsibility* (2008) 39. Above n 2.

[10] Above n 1 at 24*;* A. D'Amato, S.Henderson & S. Florence (eds) *Corporate Social Responsibility and Sustainable Business: A Guide to Leadership Tasks and Functions* (2009) 4.

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and self-regulatory practices to ensure their actions have minimal impact on society and the environment.[11]

External drivers *compel* practices favourable to the realisation of CSR through legal and regulatory frameworks. We label these *regulated* CSR initiatives. The contentious underlying rationale for such initiatives is that corporations, being fictional entities, cannot be expected to make decisions based on moral considerations.[12] Regulation supposedly ensures that CSR initiatives are realised where internal drivers fail. Regulated CSR initiatives may be strong, in the form of standard command-and-control state regulation with penalties for breach, or disclosure of information aimed at correcting market failures. They may also be weak, when they take the form of state policies encouraging voluntary initiatives.[13]

Two main considerations prompt businesses in the extractives sector to increase their corporate accountability. First, corporate rectification of past wrongs is the *quid pro quo* for benefits reaped at the expense of groups or communities. The exploitation associated with extractive activity motivates expectations of accountability of mining corporations,[14] and highlights the "self-interest" of mining companies in implementing CSR initiatives. Historical debt certainly is an important consideration in the South African mining industry, in which regulated CSR initiatives are significant. It is trite that today's mining companies and/or their forerunners benefitted greatly from the discriminatory practices of colonialism and apartheid,[15] which centred mainly on access to ample, cheap, black labour.[16]

[11] U.N Conference on Environment and Development, *Agenda 21: Program of Action for Sustainable Development,* UN Doc. A/CONF. 151/4 (1992) art 30.3.
[12] W. Shaw *Business Ethics: A Textbook with Cases* (2013) 155.
[13] Kerr, Janda & Pitts (above n 7) 99.
[14] J. Paul, 'Holding Multinational Corporations Responsible Under International Law' (2000-2001) 24 *Hastings International and Comparative Law Review* 285 289; Corporate Accountability Movement discussed above and in J. Clapp & P. Utting (eds), *Corporate Accountability and Sustainable Development* (2008) 17.
[15] The Truth and Reconciliation Commission went so far to state that '(…) the blueprint for "grand apartheid" was provided by the mines and was not an Afrikaner state innovation.' Truth and Reconciliation Commission of South Africa (**"TRC"**), *Truth and Reconciliation Commission of South Africa Report* (Volume 6, Section 2, Chapter 5 and 6) (2003) 151. R Hamann & A. Bezuidenhout ,'The Mining Industry' in D. Fig (ed), *Staking their claims: Corporate Social and Environmental Responsibility in South Africa* (2007) 98.
[16] TRC (above n 15) 140. J. Crush, A. Jeeves & D. Yudelman, *South Africa's Labour Empire: A History of Black Migrancy to the Gold Mines* (1991) 1.

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Second, CSR is necessitated by the significant power wielded by mining companies. Corporate power left unchecked can lead to abuse thereof.[17] CSR measures can limit this power and ensure that the activities of corporations are undertaken in responsible ways.[18] The economic power of mining corporations also often translates into political power, and thus the ability to influence state policies.[19]

In achieving CSR objectives, governments can play a guiding role,[20] as sovereigns over their nations' mineral wealth. A government can set expectations upon companies,[21] for example, by creating legislation that recognises social goals,[22] enforcing these goals, monitoring corporate activities, holding companies accountable and facilitating and overseeing collaboration between companies and civil society. Governments are successful in these respects where companies perceive the achievement of CSR objectives as serving their own interest.[23] In practice, competing interests can cause tension in the relationship between mining companies and civil society.[24] Governments must manage such tensions, but here they can be compromised by political considerations and the interests of governing parties.

States are involved in CSR goals to varying extents. In Namibia, CSR is unregulated and the state plays no role. In South Africa, CSR is state-regulated, specifically in relation to the

[17] Companies, as juristic persons, with limited accountability shield individuals who manage and direct such legal entities. J. Bendell, 'Barricades and Boardrooms: A Contemporary History of the Corporate Accountability Movement' (June 2004) United Nations Research Institute for Social Development: Technology, Business and Society Programme 13 at 8; J. Marson *Business Law* (2013) 462.
[18] C. Villiers, 'Corporate law, corporate power and corporate social responsibility' in N. Boeger, R. Murray & C. Villiers (eds), *Perspectives on Corporate Social Responsibility* (2008) 103.
[19] J. Hönke, *Transnational Companies and Security Governance* (2013) 99 – 100. E.g. South Africa: mining companies earned over ZAR 351 billion in revenue in 2014. See Price Waterhouse Coopers, *SA Mine 2014: Highlighting trends in the South African mining industry* (2014) 9. A company's ability to provide employment in countries plagued by unemployment is also important. Quantec estimates that 13.5 million South Africans are dependent on income earned from the mining sector. See Oxford Business Group *The Report: South Africa 2012* (2013) 102.
[20] A. Crane, G. Palazzo, L.J. Spence and D. Matten, ' Contesting the Value of "Creating Shared Value"' California Management Review (2014) 2 (56) 130 at 133; L. Albareda, J.M. Lozano and T. Ysa, 'Public policies on corporate social responsibility: The role of governments in Europe' (2007) Journal of Business Ethics 74 391.
[21] In South Africa, the government has set black economic empowerments as a goal for CSR initiatives. R. Hamann, 'Corporate social responsibility, partnerships, and institutional change: The case of mining companies in South Africa' Natural Resources Forum 28 (2004) 278 at 286.
[22] M.E. Porter and M. Kramer, 'Creating Shared Value: How to Reinvent Capitalism and Unleash a Wave of Innovation and Growth' (2011) Harvard Business Review 1 at 14.
[23] R. Hamann (above n 21) 286.
[24] R. Hamann & N. Acutt, 'How should civil society (and the government) respond to 'corporate social responsibility'? A critique of business motivations and the potential for partnerships' Development Southern Africa (2003) 20:2 255 at 265, 266.

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social and labour plan (SLP).[25] Voluntary CSR initiatives are also undertaken independently.[26] The Zambian government's involvement in CSR entails regulation of national development plans and mining policies.[27] The following section deals with the legal frameworks enabling CSR in these three jurisdictions.

III. ENABLING FRAMEWORKS

There are no primary legal frameworks dedicated solely to the regulation of CSR in Namibia, Zambia and South Africa. CSR is varyingly voluntary, as mining companies determine the extent of their involvement in social initiatives. However, in none of the studied jurisdictions the mining industries are self-regulated.[28] CSR is often indirectly implemented as a consequence of the legal framework, most often through the licencing systems. (E.g. mining licences often impose obligations on the holders to facilitate further training of employees.)[29] Such instances of indirect regulation of CSR[30] inform the current legal frameworks in the application of CSR principles in the three jurisdictions.

The constitutions of South Africa, Namibia and Zambia are supreme, each directing the manner in which their mineral resources are regulated.[31] The constitutional provisions determine whether mineral rights are vested in the State;[32] and inform the underlying

[25] Mining companies must stipulate the amount which will be committed to SLP projects and are required to spend the determined amount. Mineral and Petroleum Resources Development Regulations, 2004 (**"MPRDA/reg"**) 46(e). See further: Mineral and Petroleum Resources Development Act 28 of 2002 (**"MPRDA"**) read with the Broad-Based Socio Economic Empowerment Charter for the Mining and Minerals Industry (as amended in 2010) Government Notice 838 *Government Gazette* 33573 of 20 September 2010 (**"Mining Charter"**), Housing and Living Conditions Standard for the Mining Industry Government Notice 445 of 29 April 2009 (**"HLCS"**), Code of Good Practice for the Mining Industry *Government Gazette* 32167 of 29 April 2009 (**"CGP"**), Companies Act, 2008 (**"Companies Act"**), Broad-Based Black Economic Empowerment Act, 2003 (**"BBBEE Act"**), The Institute of Directors in Southern Africa, *The King Code of Corporate Governance for South Africa (The Institute of Directors in Southern Africa) September 2009* (2009) (**"King Code"**).
[26] Above n 1 at 34.
[27] Ministry of Mines, Energy and Water Development*, Mineral Resource Development Policy, July 2013 and Sixth National Development Plan 2011-2015* (2013) 120.
[28] South Africa - Department of Mineral Resources in conjunction with the Department of Environmental Affairs and the Department of Water, Agriculture and Forestry; Namibia – the Ministry of Mines and Energy; Zambia Ministry of Mines, Energy and Water Development.
[29] In South Africa: Mining Charter, para 2.5; Zambia: MMDA, s 13.
[30] Above n 1 at 26**.**
[31] Constitution of the Republic of South Africa, 1996 ("Constitution RSA"), s 2; Constitution of the Republic of Namibia, 1990 ("Constitution NAM"), art 1(6); Constitution of the Republic of Zambia ("Constitution ZAM"), 1996, art 1(3).
[32] E.g. Constitution NAM, 1990, art 1(2), *Rostock CC and Another v Van Biljon* 2011 (2) 751 (HC) [9].

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objectives of the principal mining legislation.[33] Principal legislation gives effect to these constitutional imperatives: for South Africa, the Mineral and Petroleum Resources Development Act, 28 of 2004 ("MPRDA"); for Namibia, the Minerals (Prospecting and Mining) Act 33 of 1992 ("MPMA"); and for Zambia, the Mining and Minerals Development Act 7 of 2008 ("MMDA"). Secondary legislation also affects the nature and extent of CSR initiatives:[34] legislation governing companies[35] and the environment[36] has the greatest impact on CSR, particularly in the context of sustainability and community development. The legal framework of the mining industry is further influenced by voluntary codes of social responsibility developed for the private sector[37] or in collaboration with organs of state.[38]

Each of the jurisdictions subscribes to various international law mechanisms. The primary soft law mechanisms that enhance the implementation of CSR are the Kimberley Process,[39] the Extractive Industries Transparency Initiative (EITI)[40] and the African Mining Vision (AMV).[41] Adopted at the 2009 Africa Union (AU) Summit, the **AMV** states Africa's long term and broad development objectives for its mineral sector: to ensure that revenues and profits generated from the extractive industry in member states trickle down to the citizens, adding measurable value to the socio-economic well-being of their respective economies.[42] The **Kimberley Process** is an international initiative aimed at stopping the trade of conflict diamonds. South Africa and Namibia are signatories and participate in the Certification Scheme.[43] Zambia has not yet met the minimum requirements for participation.[44] The **EITI** is a global standard for revenue transparency in extractive industry payments and receipts,

[33] E.g. South Africa, the objectives of the MPRDA include facilitation of extraction of mineral resources while ensuring social and economic development. Constitution RSA, s 24 and MPRDA s 2.
[34] E.g. South Africa, the secondary legislation includes the Mining Charter, the HLCS, the CGP, the Companies Act, and the BBBEE Act.
[35] South Africa: Companies Act; Namibia: Companies Act 28 of 2004; Zambia: Companies Act 1 of 2000.
[36] South Africa: National Environmental Management Act 107 of 1998 (**"NEMA"**); Namibia: Environmental Management Act 7 of 2007 (**"EMA"**); Zambia: Environmental Management Act 12 of 2011 (**"ZEMA"**).
[37] E.g. South Africa: King Code; Namibia: Corporate Governance Code for Namibia, 2014; Zambia: International Standard on Social Responsibility ISO 26000, 2010.
[38] E.g. South Africa: Mining Charter; Zambia: Sixth National Development Plan (2013-2016).
[39] For more information, see< http://www.kimberleyprocess.com/>.
[40] Available at <https://eiti.org>/.
[41] See <http://www.africaminingvision.org/>.
[42] K. Musumali, 'African Mining Vision (AMV) what it means to Zambia' *Zambian Mining Magazine*, 19 February 2014.
[43] This scheme aims to combat the link between illicit international trade in rough diamonds and armed conflict. Kimberley Process Certification Scheme available at <http://www.South Africa dpmr.co.za/ pages/what-we-do/kimberly-process>.
[44] See <http://www.kimberleyprocess.com/ en/candidates>.

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promoting open and accountable management of natural resources with the support and cooperation of governments, companies and civil society.[45] Zambia is the only EITI compliant country studied: Namibia is not a signatory[46] and South Africa has declined participation.[47] South Africa is, however, a founding member of the Open Government Partnership (**"OGP"**), which aims to 'secure concrete commitments from governments to promote transparency, empower citizens, fight corruption, and harness new technologies to strengthen governance.'[48] The OGP is a broader initiative, requiring a general commitment to transparency, whereas the EITI focuses only on the extractive industries.[49] This broader focus may be motivating South Africa's reluctance to participate in the EITI.[50]

The applicable international treaties have not been incorporated into domestic legislation in any of the jurisdictions studied. Development agreements[51] between holders of mineral rights, the local community and the state are also generally not utilized. Namibia is the only jurisdiction to provide for development agreements,[52] but these are rarely used in practice.

Given the tentative frameworks supporting CSR in the jurisdictions studied, the extent to which such initiatives are supported and implemented should be examined. Below, we discuss the indicators that best reflect issues of benefit-sharing.

IV. INDICATORS OF CORPORATE SOCIAL RESPONSIBILITY

[45] One of the main criteria is that all stakeholders must be represented and able to operate free of "undue influence or coercion". Where normal channels of public accountability in a resource-dependent country are lacking, the EITI can be harnessed to hold the government accountable for resource revenues. B. Sovacool, *Energy & Ethics: Justice and the Global Energy Challenge* (2013) 104.
[46] See African Mining Legislation Atlas (AMLA) <http://a-mla.org/index.php/countries/35?name=Namibia>.
[47] See T. Holmes, 'South Africa shuns transparency initiative' *Mail & Guardian* 22 November 2013, available at <http://mg.co.za/article/2013-11-22-00-South Africa -shuns-transparency-initiative>.
[48] Open Government Partnership, available at <http://www.opengovpartnership.org/ >.
[49] W.R. Nadège Compaoré 'Occassional Paper No 146 - Governance of Africa's Resources Programme: Towards Understanding South Africa's Differing Attitudes to the Extractive Industries Transparency Initiative and the Open Governance Partnership' in South African Institute of International Affairs *Occassional Papers* (2013) 7 (available at <http://www.saiia.org.za/ type/occasional-papers>).
[50] ibid
[51] Tri-partite agreements used to provide and manage expectations of stakeholders in the mining development process. See J. Otto, *Community Development Agreement Model Regulations and Example Guidelines* (2009) 1.
[52] E.g. Namibia: MPMA, s 49.

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CSR is more than a set of negative duties imposed on corporations. True, CSR initiatives often require companies merely to refrain from causing social and environmental damage;[53] but sometimes positive action is required. The prevalence of CSR initiatives can be measured and evaluated in different ways.[54] Howard's exposition of the prominent features of CSR for the mining context[55] is used as the standard of evaluation here. Four clusters of CSR indicators reflect benefit-sharing trends from the different jurisdictions: (i) integrated, sustainable decision making; (ii) stakeholder engagement; and (iii) ownership, state participation, local shareholding and community investment; and (iv) transparency and accountability.

A. Integrated, Sustainable Decision-Making ("ISDM")

Sustainable development[56] 'seeks to meet the needs and aspirations of the present without compromising the ability to meet those of the future.'[57] It involves combining social and economic development with the protection of the environment and furtherance of social well-being.[58] Characterised by high social and environmental impacts in pursuit of non-renewable resources, the mining industry is under pressure to consider sustainable development in making business decisions.[59]

ISDM envisages corporate responses to social and environmental concerns to promote sustainable development:[60] businesses must integrate social and environmental considerations into their operational concerns,[61] but need not prioritise social and sustainability issues over

[53] Kerr, Janda & Pitts (above n 7) 498.
[54] For example, CSR indices (see M. Gjolberg 'Measuring the immeasurable: Constructing an index of CSR practices and CSR performance in 20 countries' Scandinavian Journal of Management Vol 25(1) (2009) 10) or measuring public perception of CSR. See International Council on Mining and Metals (**"ICMM"**), *ICMM Stakeholder Perception Study* (2014) available at <http://www.icmm.com/ >. Mining companies may internally develop ways of measuring the outcomes of their CSR investments. See F.Vanclay, A.M. Esteves, I. Aucamp and D.M. Franks, *Social Impact Assessments: Guidance for assessing and managing the social impacts of projects* (2015) 60.
[55] Above n 1 at 9-19.
[56] Sustainable development is a constitutional imperative – see Constitution RSA, 1996 s 24(b)(iii).
[57] The United Nations, *Report of the World Commission on Environment and Development* (1987) 34. See also The Mining, Minerals and Sustainable Development Project (**"MMSDP"**) *Breaking New Ground: Mining, Minerals and Sustainable Development* (2012) 21.
[58] R. Slootweg, F. Vanclay & M. van Schooten, 'Integrating environmental and social impact assessment' in H. Becker & F Vanclay. (eds), *The International Handbook of Social Impact Assessment: conceptual and methodological advances* (2003) 56.
[59] *A renewed EU strategy for Corporate Social Responsibility* (2011). ISDM also features prominently in the accepted definitions of CSR of the United Kingdom and Canada. See Kerr, Janda & Pitts (above n 7) 6 – 7.
[60] Kerr, Janda & Pitts (above n 7) 106.
[61] MMSDP (above n 57) 18.

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economic concerns. Strong economic structures are a prerequisite for social and environmental development.[62]

There exists no single, practical framework for the achievement of sustainable development. There is clear acknowledgment, though, that a purely social or environmental focus is unrealistic and a balanced approach is instead required.[63] Components of this indicator for the mining industry are: (1) legislative and/or regulatory support for ISDM in the mining sector; (2) responses to environmental concerns; and (3) responses to socio-economic concerns.

1. Legislative / Regulatory Support

The increasing legislative and regulatory focus on the requirements of sustainability is certainly noticeable in South Africa.[64] The Mining Charter requires incorporation of processes contained in the Stakeholders' Declaration.[65] These instruments require mining companies to integrate sustainable development concerns into their decision-making processes. Failure to engage with sustainability appropriately, when developing the requisite SLP, could result in the delay or non-award of a mining right.[66] The legal requirements nevertheless do not compel sufficient action to facilitate CSR.[67] Commentators want mining companies to move beyond the narrow legislative requirements to realise CSR goals more fully.[68]

By contrast, neither the Namibian nor Zambian legal framework contains legal directives that necessitate considerations of sustainability in the context of the decision-making process. Zambia's EITI status could, however, be impacted if sustainability-relevant obligations are

[62] ibid at 19.
[63] The first Principle of the "Rio Declaration" (from the 1992 United Nations Conference on Environment and Development). MMSDP (above n 57) 19. See Kerr, Janda & Pitts (above n 7) 106.
[64] The Mining Charter (par 5) was amended in 2010 to include considerations of sustainable development.
[65] Department of Mineral Resources *Stakeholders' Declaration on Strategy for the sustainable growth and meaningful transformation of South Africa's Mining Industry* (2010) 1.
[66] S 22 MPRDA. S 47 and s 93 of the MPRDA are also applicable where a mining company fails to comply with the Mining Charter, MPRDA or Code.
[67] L. Harees, *The Mirage of Dignity on the Highways of Human Progress: The Bystander's Perspective* (2012) 164.
[68] See K. Mncwabe, 'Mining for goodwill will reap profits', *Mail & Guardian,* 19 February 2015; M. Hadebe "When communities suffer from mining" (2015) available at <http://www.iol.co.za/business/opinion/when-communities-suffer-from-mining-1.1813993#.VUdiEXIcQcA>.

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not considered.[69] There has also been a voluntary commitment towards sustainability in the Uranium industry in Namibia. The Namibian Uranium Association ("NUA")[70] recognises CSR as a core business interest and encourages its members to pursue the implementation thereof.[71]

2. Responses to Environmental Concerns

ISDM necessitates that mining companies consider environmental issues. South Africa,[72] Namibia[73] and Zambia[74] have taken steps to regulate the legal protection of the environment. South Africa[75] and Zambia[76] both require the completion of Environmental Impact Assessments ("EIA") before mining rights are awarded, while Namibia requires an environmental clearance certificate ("ECC") to allow extraction.[77] South Africa also requires the submission of an Environmental Management Plan ("EMP") in the application for mining or production rights.[78] The Namibian requirement to complete an EIA is not absolute and depends on the discretion of the Environmental Commissioner.[79] Still, completion of an EIA, to the satisfaction of the Mining Commissioner, is generally a standard term and condition of any mineral license.[80]

Absent strict environmental rules, EIAs can be used to promote the goals of environmental preservation and protection.[81] They can inform the conditions of the permit or licence

[69] Above n 47.
[70] A voluntary organisation, committed inter alia to promoting sustainable development in the Namibian uranium sector. See <http://www.chamberofmines.org.na/>; <http://namibianuranium.org/about-nua/>.
[71] See < http://namibianuranium.org/corporate-social-responsibility-csr/>.
[72] Constitution, RSA, S 24; National Water Act 36 of 1998; National Environmental Management Act 107 of 1998 (**"NEMA"**); National Environmental Management: Air Quality Act 39 of 2004; and National Environmental Management: Waste Act 59 of 2008.
[73] Constitution NAM art 95; EMA.
[74] MMDA, ZEMA together with the regulations thereto, the Town and Country Planning Act 21 of 1997 and the Lands Act 20 of 1996. Any matters that are not canvassed by these statutes are governed by common law.
[75] The MPRDA, s 22 (4).
[76] MMDA, s 115. Zambia Environmental Management Agency (**"ZEMA Agency"**) is mandated to enforce the principles of EIA. EMA, ss9(2) (h), (m) and (o).
[77] Item 3.2 and item 3.3 of GN 29 of *Government Gazette* 4878 of 06 February 2012.
[78] MPRDA, s 22 (4) (a).
[79] EIA Regulations, 12(1)(d) read with EMA, s 33(1).
[80] MPMA, s 50(f)(i). This requirement does not apply in respect of applicants for non-exclusive prospecting licenses or persons who peg a mining claim.
[81] See H. Ndhlovu-Chanda *et al*, "State of Human Rights Report on Zambia: Human Rights and the Environment" (2010) Human Rights Commission 53.

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awarded to the company, thereby requiring adherence to environmental standards.[82] South Africa[83] and Namibia[84] both impose restrictions and conditions relevant to environmental preservation within the mining licence itself, and offices exist to ensure compliance.[85]

When it comes to managing corporate responses to environmental concerns, it has yet to be seen whether the *laissez faire* approach of the Namibian government fares better at ensuring benefit-sharing in contrast to the more strictly regulated contexts of its South African and Zambian counterparts. In our view a more regulated approach is favourable, especially where a country has a history of corporate corner-cutting on environmental issues.[86]

3. Responses to Socio-economic Concerns

In contrast with the regulation of environmental concerns, the mechanisms in place to address social and community concerns are more complicated, because of the various interests at stake in communities. For want of scope, the discussion below focuses only on some aspects: the role of social and labour plans ("SLPs") and conduct codes in meeting CSR objectives; economic empowerment; and community engagement and investment initiatives.

In all three countries, social obligations are imposed on mining companies upon grant of[87] - and persist throughout the duration of - a mining right.[88] Mine closure requires the mining company to rehabilitate the land on which it has been operating. Costs incurred are for the company's own account.[89] Surrounding communities may need to be compensated for

[82] Ensuring that EIA's are implemented in practice has proved to be challenging. See generally A.R. Paterson and L.J. Kotzé *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009).
[83] MPRDA, ss 19(2)(e), 25(e) and 47(1)(c).
[84] MPMA, s 35(e)(iii).
[85] South Africa: the Department of Environmental Affairs. See LexisNexis, *South African Mineral and Petroleum Law Circular* (August 2014) read with Proc 14 *Government Gazette* 36512, Proc 17 *Government Gazette* 36541 and MPRDA Amendment Act, 49 of 2008. Namibia: Environmental Commissioner may appoint environmental officers to carry Environmental Management Act (**"EMA"**), s 18(1) and s 20(2). Zambia: independent environmental regulator, the Zambia Environmental Management Agency ("ZEMA").
[86] See, for example, *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Limited & Others* 2006 (5) SA 333 (W), *Harmony Gold Mining Company Ltd v Regional Director: Free State, Department of Water Affairs and Forestry* 2006 JDR 0465 (SCA), *Kebble v The Minister of Water Affairs and Forestry* 2007 JDR 0872 (SCA). See also L. Kotzé and A. Paterson, *The Role of the Judiciary in Environmental Governance: Comparative Perspectives* (2009) 590.
[87] South Africa: the MPRDA, s 10 read with s 16, 22, 23, 27 and 84 and MPRDA/reg 42; Zambia: MMDA, s 25(3)(g) and 30(1)(d); Namibia: MPMA, s 50(b) and s 50(c).
[88] E.g. South Africa, s 22(1) read with MPRDA/reg 46.
[89] E.g. Zambia, MMDA, s 119; South Africa: NEMA, s 24 (7), MPRDA/reg 46(4) (iv); Namibia: EMA, s 3 and Environmental Impact Regulations, 2012, 8(j) (aa).

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degradation of the land. [90] Mining companies must hence plan financially for the costs of closure throughout the lifetime of the mine.[91]

In South Africa, SLPs are the main mechanism for giving effect to social considerations in South Africa. Applications for mining rights must be accompanied by valid SLPs,[92] which will apply until the relevant closure certificate is issued.[93] From the investment perspective of a mining company, the South African requirements in terms of social considerations are the most detailed and onerous of the jurisdictions studied. Mining companies must be cognisant of the economic and social background and trends of the community in which they operate. The Mining Charter[94] consistently emphasises community development and requires mining companies to make a meaningful contribution to developing the community surrounding the mine.

The MPRDA regulations prescribe the contents of the SLP, requiring mining companies to undertake a number of programmes and projects aimed at the development of the surrounding community.[95] A human resources development programme is required, which requires mechanisms for advancing individuals already employed by the mine through mentorship programmes, career progression plans and bursaries.[96] Measures to address housing and living conditions around the mine must be included in the SLP.[97] A local economic development programme must also be included in the SLP which must include infrastructure and poverty eradication projects.[98] Prior to the closure of a mine in South Africa, mining companies must give effect to the educational programmes as stipulated in the SLP. The envisaged effect of these programmes is a lowering of unemployment rates in the surrounding community by equipping its members with skills that may be used elsewhere once the mine closes.

South Africa's Code of Good Practice (**CGP**) aims to facilitate the successful implementation of the Mining Charter and is intended for the use of all stakeholders including communities,

[90] E.g. Zambia, MMDA, ss 123 (1), (4) and (5).
[91] Only South Africa expressly provides for this in the MPRDA, s 41.
[92] MPRDA/reg 42.
[93] MPRDA/reg 43.
[94] Mining Charter paragraph 2.6.
[95] MPRDA/reg 46.
[96] MPRDA/reg 46(b).
[97] MPRDA/reg 46(c)(iv).
[98] MPRDA/reg 46(c)(iii).

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mining companies and unions.[99] The CGP contains various elements for evaluation, each linked to a scorecard measuring compliance.[100] Rural and community development is, for instance, measured by how black people, previously excluded from many benefits in the mining industry are provided with sustainable access to the mainstream economy. A scorecard mechanism is used. The relevant Scorecard states that good practice requires mining companies to cooperate to form integrated development plans. Companies must assist government with implementation such development plans in communities where mining occurs or where the majority of a mine's workers come from a particular community.

Namibia and Zambia have no legal requirements for the development of local communities. Zambia, however, requires the production of labour plans.[101] Despite the lack of legal requirements, Zambian mining companies invest heavily in the education, health, sport and infrastructure sectors, as well as local supply chains.[102] Namibia, too, emphasises voluntary CSR initiatives, primarily through the New Equitable Economic Empowerment Framework ("NEEEF").[103] The NEEEF promotes the idea that CSR is entrenched in the modern business environment.[104] Similar to the South African Broad-Based Black Economic Empowerment ("B-BBEE") framework,[105] the NEEEF aims to provide the overarching framework for transformation,[106] with its primary purpose being socio-economic development.[107] As a policy document, the NEEEF is not binding. There are accordingly no mechanisms to ensure accountability and it is inconsistently applied in practice, undermining transparency efforts. Nevertheless, the NEEEF, and the B-BBEE framework, are designed to be incentive-driven to encourage the business sector to take transformation more seriously.[108]

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[99] CGP 6.
[100] See especially paragraph 2.6 of the CGP to which the rest of this paragraph refers.
[101] The MMDA requires Zambian employees employed in the mining sector to receive further training.
[102] ICMM (above n 54).
[103] Government of the Republic of Namibia 'The New Equitable Economic Empowerment Framework'. See A. Stritter, "Namibia" in E. Richer la Flèche (ed), *The Mining Law Review* (3rd edn, 2014) London Law Business Research Ltd 204.
[104] NEEEF, *Community Investment*.
[105] B-BEEE Act 53 of 2003; Preferential Procurement Policy Framework Act 5 of 2000; B-BEEE Codes of Good Practice *Government Gazette* 38766 of 6 May 2015.
[106] NEEEF, *Objectives*.
[107] NEEEF, *Rationale*.
[108] No penalties are implemented for non-compliance, but companies will not be eligible to apply for certain government tenders. NEEEF, *Compliance, Enforcement and Penalties*.

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As with the South African B-BEEE framework, the NEEEF in Namibia envisages sector-specific charters.[109] It aims to promote more equitable and balanced ownership of business in Namibia, without compromising the constitutional protection of private property as well as the promotion of foreign investment.[110] The NEEEF envisages the transformation of corporate ownership in the economy to be steadily changed[111] by assisting previously disadvantaged Namibians[112] to (i) buy into existing businesses on commercial or near-commercial terms; and (ii) establish new businesses. It also foresees introduction of a training levy[113] to promote empowerment and transformation through practical training and skills development.[114]

Finally, fiscal wealth can be shared with communities by requiring mining companies to make direct investments into communities, thus requiring positive action. Community investment, as a feature of CSR is mostly voluntarily motivated and self-regulated,[115] because it is embedded in the older notion of 'strategic philanthropy.'[116] It is thus also vulnerable to criticism that it functions as a smokescreen.[117] In Namibia, the NEEEF will likely require businesses above a certain size to devote at least 1% of after-tax profits to community investment.[118] It also promotes the idea that good corporate citizenship requires social investment in communities,[119] which is particularly important for businesses that derive their income from communities or community resources.[120]

South Africa, Namibia and Zambia do not uniformly prescribe the required percentage or value of a company's CSR contribution: contributions are entirely voluntary in nature. South

[109] NEEEF, *Sector Specific Charters*.
[110] NEEEF, *Ownership*.
[111] NEEEF, *Ownership*.
[112] In particular women, youth and people with disabilities.
[113] The levy will amount to 1.5% of a company's gross wage bill and will be payable by companies above a certain size.
[114] NEEEF, *Human Resources and Skills Development*.
[115] Kerr, Janda & Pitts (above n 7) 496.
[116] Strategic philanthropy involves voluntary donations to communities without any real engagement with the difficulties they face or how the company's core business principles may be contributing to those difficulties. Kerr, Janda & Pitts (above n 7) 499; R. Hamann, *Corporate social responsibility, and its implications for governance: the case of mining in South Africa* (Paper submitted to the Oikos PhD summer academy, St Gallen, Switzerland) (2003) 7.
[117] ENCA, 'Lonmin donates land for housing' *ENCA,* 29 October 2013; J. Motsomane, 'Anglo American donates refuse truck' *Rise 'n Shine*, 5 July 2013; Anglo American South Africa, 'Anglo American's Chairman Fund donates much required funds to Wits' "Agrincourt Unit"' *Anglo American Press Releases,* 2013.
[118] NEEEF, *Community Investment*.
[119] NEEEF, *Community Investment*.
[120] NEEEF, *Community Investment*.

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Africa, however, formalises the amount to be invested by stipulating the amount that companies should commit in the SLP.[121] In South Africa, the investment required from a company in respect of a SLP endures while the mine operates as it ceases only once the closure certificate is issued.[122] The Amended Charter requires that there be a *meaningful contribution* towards developing mining communities.[123] To contribute meaningfully to communities, mining companies must conduct assessments in collaboration with those communities to decide where to direct funding.

Namibia imposes no legal requirements on mining companies to assist communities to become self-sufficient, although companies may take the initiative on their own.[124]The NEEEF, however, aims to promote community investment by requiring an investment of 1% of after-tax profits

Zambia affords little legal regulation in terms of community development, which results in a 'hit-and-run' style of CSR: the projects are usually disjointed and once-off in nature, without any form of monitoring and evaluation.[125] This makes it difficult for the community to be self-sufficient when the mines close their operations in a particular area. However, mining companies are required to compensate the surrounding communities and incur costs for rehabilitation and clean-up measures.[126] Neither Namibia nor Zambia prescribe or restrict the nature or endurance of the community investment.

While environmental protection measures are introduced more readily through CSR initiatives, it seems that socio-economic improvement initiatives are more complicated to implement properly. The mechanisms to ensure this kind of CSR activities are nascent at best, with South Africa's framework providing more detailed mechanisms than Namibia and Zambia. A crucial aspect of decision-making involving socio-economic considerations is how stakeholders are considered. This is dealt with next.

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[121] MPRDA/regs 46(e).
[122] MPRDA/reg 43.
[123] CGP paragraph 2.6.
[124] For example, Roshkor, a joint venture between two mining companies, founded the town of Rosh Pinah, and continue to manage it.
[125] W. Mayondi, *Mining and Corporate Social Responsibility in Zambia: A case study of Barrick Gold Mine* (unpublished Masters of Development Studies thesis, Victoria University of Wellington, School of Geography, Environment and Earth Studies, 2014).
[126] MMDA, s 115 and 116.

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B. Stakeholder Engagement

CSR attempts to elevate a corporation's business practice to a higher ethical standard.[127] This necessitates meaningful corporate engagement with stakeholders beyond their shareholders,[128] incorporating their concerns into the corporation's decision-making process. Two interlinked issues are: identifying the relevant stakeholders as well as what engagement with them entails.-

Broadly, stakeholders are 'all those who are affected by or who can affect a corporation – financially or non-financially.'[129] *Primary* stakeholders, such as shareholders, employees and communities, enjoy a direct interest in the business; *secondary* stakeholders, such as competitors, special and public interest groups, by contrast, have an indirect interest in the business.[130] Stakeholders can also be *internal*, such as employees, or *external*, such as communities.[131] Given the potentially devastating impact of mining operations on mining communities,[132] local communities must necessarily be regarded as an important stakeholder within the context of CSR.

Stakeholders may be relevant or 'definitive',[133] thus enjoying high priority when[134] (i) they are able to exercise some power in its relationship with the company; (ii) their relationship with the company is legitimate or socially desirable; and/or (iii) their claim on the company is urgent (i.e. time-sensitive and important).[135] The greater the number of attributes a particular stakeholder possesses, however, the more priority its claims will tend to hold for a company's managers.[136]

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[127] See above n 7 on the difficulty of defining CSR.
[128] L. Preston L & H. Sapienza, 'Stakeholder Management and Corporate Performance' (1990) 19 Journal of Behavioural Economics 361 at 361; Dahlsrud (above n 7) 7 – 11.
[129] Kerr, Janda & Pitts (above n 7) 160.
[130] R. Mullerat, *International Corporate Social Responsibility: The Role of Corporations in the Economic Order of the 21st Century* (2010) 228.
[131] King Code (above n 25) 2.
[132] For example, Aquila Steel SA (Pty) Ltd has recently come under the spotlight for destroying a sacred cultural and historical site near Thabazimbi. See T. Davies, 'Mining – coming to a protected area near you' *Groundup* (6 July 2015) available at <http://groundup.org.za/ article/mining-coming-protected-area-near-you_3094>.
[133] R Mitchell, B Agle & D Wood, 'Toward a theory of Stakeholder identification and salience: defining the principle of who and what really counts' (1997) 22 *Academy of Management Review* 853 at 878.
[134] ibid at 865.
[135] ibid at 868.
[136] This concept is referred to as "Salience" by Mitchell, Agle & Wood (n 133).

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Mining communities are deeply stratified according to labour skill levels. There are many instances of the discriminate implementation of community investment, serving higher skill-level employees of a mine better than those at lower skill levels.[137] Clarity is thus required on the meaning of 'mining communities': a broad understanding, which would include labourers on temporary contracts[138] and the families of mine workers would significantly impact the assessment of compliance with this component of CSR.

For South Africa, the King III report regards communities as external stakeholders, but stakeholders nonetheless.[139] Neither Namibia, nor Zambia clearly defines their relevant stakeholders.[140] There is no legal imperative for stakeholder engagement in Namibia nor do mechanisms exist to ensure meaningful engagement. Zambia generally requires community involvement only in a few situations, for example, where the resettlement of local communities is a possibility, a dialogue with the relevant traditional leaders must be initiated.[141]

South Africa's regulated CSR context requires companies to engage with stakeholders in the context of CSR. Whenever an application is made for a prospecting right, mining right or mining permit, consultation with all interested and affected parties is required.[142] Furthermore, where mining will take place on land occupied by a community, the Minister may impose any conditions necessary to promote the interests of that community.[143] By contrast, no regulations govern the extent of community involvement required in Namibia. Stakeholder engagement, particularly in respect of communities, is accordingly not regulated.

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[137] C.H. Feinstein *An Economic History of South Africa: Conquest, Discrimination, and Developlent* (2005) 167-168.
[138] ibid 64.
[139] King Code (above n 25) 2.
[140] In South Africa, the HLCS specifies that mine workers are stakeholders, while the surrounding community is excluded. In Namibia, the EIA Regulations require an applicant (in the context of an ECC) to consult with interested and affect parties. The EIA Regulations define "interested and affected parties" as any person, group of persons or organisation interested in or affected by an activity and any organ of state that may have jurisdiction over any aspect of the activity.
[141] Traditional leaders are known as "Chiefs" or "Headmen" in the Zambian context. Zambian Environmental Protection Regulations, 1997, reg 7(2) read with item 12(a). Also, MMDA, s 25(4)(c).
[142] MPRDA, s10 read with s16, 22 and 27. "Community" is defined in the MPRDA as "a group of historically disadvantaged persons with interest or rights in a particular area of land on which the members have or exercise communal rights in terms of an agreement, custom or law".
[143] MPRDA ss17(4)(A) and s23(2A).

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Howard argues that engagement with communities must go beyond factoring in the company's perception of what a community needs,[144] and must afford communities the opportunity to voice their legitimate interests and expectations.[145] Meaningful engagement is, therefore, a prerequisite for stakeholder engagement in the context of CSR.[146] Ensuring that consultation with communities is meaningful presents the greatest difficulty in the context of stakeholder engagement.[147] In many instances, the level of community engagement is artificial and relevant information regarding the intricacies of the mining operation, particularly those pertinent to the community, are withheld.[148]

South Africa encourages 'meaningful' engagement where stakeholder participation is required: the Housing and Living Conditions Standard for the Minerals Industry ("HLCS") e.g. requires hostels to be democratised. Management must consult with employees/residents on all decisions regarding accommodation; this imperative presupposes that employees are informed/educated to make considered choices.[149] Furthermore, the CGP requires mining companies to make an 'effort' to engage with communities. In this context, 'effort' is evidenced through a pattern of and a plan for consultation.[150]

C. Ownership, State Participation and Local Shareholding

The mineral-resource dependency of the studied jurisdictions implies that mining activities are an important source of wealth. Various mechanisms are employed to balance the distribution of financial benefits. Taxation and royalty schemes are beyond our scope; below we focus on ownership and state participation schemes, local shareholding and community investment requirements.

Countries may choose to employ state equity participation models ("equity"), whereby a state-owned company is given a percentage of the shares of the mining entity, affording the

[144] Above n 1 at 46.
[145] Above n 1 at 46.
[146] Above n 1 at 46.
[147] R. Davis, 'Mining's alternative summit: Painting a different picture of Africa's most conflicted industry' *Daily Maverick* (12 February 2015). Available at <http://www.dailymaverick.co.za/article/2015-02-12-minings-alternative-summit-painting-a-different-picture-of-africas-most-conflicted-industry/>.
[148] See, for example, some of the litigation initiated by the Centre for Environmental Rights against mining companies and governmental institutions, in an attempt to obtain access to relevant information – available at <http://cer.org.za/programmes/transparency/litigation>.
[149] HLCS principle 2.1 c.
[150] CGP 14.

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state access to dividends.[151] Insofar as state participation, equity and ownership in mining operations is concerned, the South African and Namibian states need not have an equity stake in mining activities.[152] Calls for nationalisation of the mines remain politically contested in both countries.[153] Though both governments have quashed any notions that nationalisation will be implemented, a fixation with the issue in popular media may harm investor confidence.[154] In Zambia, mining enterprises were nationalised in the 1970s, but this was reversed in 1990, to attract the foreign investment needed to recapitalize the mining industry. In the pursuant privatization process,[155] approximately 90% of mining equity was returned to private hands. The state-owned ZCCM Investments Holdings (ZCCM-IH) maintains an equity stake of between 10 and 20% in most of the large mines in Zambia.

Another benefit-sharing mechanism is local shareholding obligations. In fulfilment of its transformational goals, the South African Mining Charter requires all mining companies holding mining or prospecting rights to be 26% owned by historically disadvantaged South Africans (HDSAs).[156] Mining companies must also implement a procurement progression plan, ensuring that it sources goods and services from companies held by historically disadvantaged South Africans.[157] In terms of local shareholding, Zambia has the strictest approach, by generally limiting the granting of rights to prospect or mine to its citizens, or companies incorporated in Zambia.[158] The nature of the shareholding requirements are informed by the type of licence sought.[159] Holders of mining rights must also give preference to Zambian products and services, including the employment of Zambian citizens.[160]

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[151] Natural Resource Governance Institute, 'Oil, gas and mining fiscal terms' available at <http://www.resourcegovernance.org/training/resource_center/backgrounders/oil-gas-and-mining-fiscal-terms>.
[152] E.g. Namibia: the Foreign Investment Act 27 of 1990, s 3.
[153] K. Sosibo, 'EFF straightens out its mines nationalisation policy' *Mail and Guardian,* 9 October 2013; Namibian Sun 'US experts fear Namibia mineral nationalisation' *Namibian Sun*, 15 December 2013 available at <https://www.namibiansun.com/government/us-expert-fears-namibia-mineral-nationalisation.60489>.
[154] Oxford Business Group (above n 19) 106. See C. Benjamin, 'Nationalisation of mines won't happen, says Shabangu' *Mail and Guardian,* 5 February 2013 available at <http://mg.co.za/article/2013-02-05-mines-nationalisation-is-done-says-shabangu>.
[155] ICMM (above n 54).
[156] Mining Charter para2.1.
[157] MPRDA/reg 46 (c).
[158] MMDA, s7(2)-(3)
[158] MMDA, s 13.
[158] MPMA, s 50(b).
[159] MMDA, s7(2)-(3).
[160] MMDA, s 13.

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Namibia generally has no legal requirements in terms of local shareholding. However, mineral license generally condition that the holder must give preference to the employment of Namibian citizens. Similar to Zambia, Namibian citizens who possess appropriate qualifications, expertise and experience for purposes of the mining operations[161] are eligible. While not yet in place, the NEEEF aims to address transformation by facilitating a more representative ownership scheme and focusing efforts on skills and training development.

Given the wealth generated by mining activities, benefit-sharing in the context of the extractives sector necessarily means a better distribution of resources between stakeholders. Again, it is clear that South Africa has the highest level of regulation, Zambia is more moderately regulated and Namibia has opted instead for a mostly voluntary approach. None of the jurisdictions have opted for a nationalisation model; the earlier Zambian experiment with nationalisation being reversed after twenty years. Instead, local shareholding is used to prevent the monopolisation of mining activities.

D. Transparency and Accountability

As features of CSR, accountability and transparency go hand in hand.[162] Corporations are increasingly expected to disclose information about their business practices and their compliance with legal obligations; even if such disclosures do not cast them in a positive light.[163] Such transparency ensures that other elements of CSR are properly implemented,[164] and so regulated reporting methods are widely endorsed.[165] However, disclosure of information is still largely voluntary, especially in relation to social and environmental information.[166]

Several considerations may explain corporations' willingness to disclose information voluntarily. First, companies' disclosure of information about interrelated economic, social and environmental issues may be self-interested: the disclosure legitimises and sustains economic and political arrangements, institutions and ideologies which support their

[161] MPMA, s 50(b).
[162] Institute of Social and Ethical Accountability, *Accountability*, *AA1000 Framework Overview* (1999) 8.
[163] Above n 1 at 12.
[164] KPMG & United Nations Environment Project (UNEP), *Carrots and Sticks for Starters: Current Trends and Approaches in Voluntary and Mandatory Standards for Sustainability Reporting* (2006) 7.
[165] Kerr, Janda & Pitts (above n 7) 241-2.
[166] C. Deegan, 'Introduction: The legitimising effect of social and environmental disclosures – a theoretical foundation' (2002) Accounting, Auditing & Accountability Journal 282 at 290.

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business[167] or combats threats to a company's legitimacy.[168] Moreover, companies might be pressured by stakeholders to disclose information[169] through, for example, workers' strikes and violence, which cause profit losses.[170]

Accountability means different things to different interest groups.[171] The EITI is a useful example of the manner in which accountability and transparency are already incentivized in the extractives sector. It presents a means to promote open and accountable management of natural resources.[172] The EITI tools focus on tracing the flow of money in sectors such as fuel and resources; not the legal mechanisms that must be in place to achieve transparency and accountability within particular jurisdictions; nor the political, economic and social factors that lead governments to sign and comply with the EITI.[173]

The Institute of Social and Ethical Accountability's AA1000 standard for accounting defines accountability broadly: companies must 'justify the acts, omissions, risks and dependencies for which [they are] responsible to people with a legitimate interest.'[174] For them, accountability entails (i) *transparency*, in a company's duty to account to stakeholders such as communities, employees and shareholders; *responsiveness*, in taking responsibility for acts and omissions, decision-making processes and the outcomes of decisions; and (iii) *compliance* with established standards of organisational policies and practices.

South Africa has adopted a fairly robust approach towards transparency, incorporated in its mining legislation. Failure to comply with any mandatory provision relating to transparency

[167] J. Guthrie & L. Parker, 'Corporate Social Disclosure Practice: A Comparative International Analysis' (1990) Advances in Public Interest Accounting 159-176 as cited in S. van der Laan, 'The Role of Theory in Explaining Motivation for Corporate Social Disclosures: Voluntary Disclosures vs "Solicited' Disclosures"' (2009) Australasian Accounting and Business Finance Journal 15 at 17.
[168] W. Laufer, 'Social Accountability and Corporate Greenwashing' (2003) 43 Journal of Business Ethics 253 at 253.
[169] J. Husillos & M. Alvarez-Gil, 'A Stakeholder-Theory Approach to Environmental Disclosures by Small and Medium Enterprises (SMEs)' (2008) Spanish Accounting Review 125 at 130; H. Jenkins & N. Yakovleva, 'Corporate social responsibility in the mining industry: Exploring trends in social and environmental disclosure' (2006) Journal of Cleaner Production 271 at 273.
[170] The mineworker strikes that occurred at the Lonmin mine in 2012 resulted in a R504 million loss over 42 days. M. Sibanyoni, 'Lonmin lost R504m in the 42-day strike' *The Sowetan*, 20 September 2012; K. Caldwell, 'Lonmin shares drop 4% as striking workers handed ultimatum' *Investment Week,* 20 August 2012; P. Cripps & H. Williams, 'Lonmin mine disruption continues' *The Independent*, 20 August 2012.
[171] Clapp & Utting (above n14) 17.
[172] See definitions of "Extractive Industries" and "Transparency" available at <https://eiti.org/glossary >.
[173] S. Rao, 'Helpdesk Research Report: Signature and Compliance with the Extractive Industries Transparency Initiative (EITI)' 10 August 2012 available at < http://www.gsdrc.org/docs/open/HDQ1176.pdf>.
[174] Institute of Social and Ethical Accountability (above n 162) 8.

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results in the cancellation of a mining right as this is specifically provided for by the MPRDA and regulations.[175] The transparency requirements in Zambia are primarily regulated within the domain of company law[176] and through compliance with its EITI subscription.[177] Namibia has no legal framework in place to give effect to issues of transparency.[178]

In each of the three jurisdictions, accountability is affected through internal appeal or review procedures in respect of grievances relating to mineral rights.[179] The government agencies in each jurisdiction generally can adjudicate on appeals of decisions regarding mineral rights[180] and are accountable in the exercise of these powers.[181] However, there are no specific tools in Namibia or Zambia to ensure accountability in respect of processes relating to CSR. South Africa, by contrast, has specific annual reporting mechanisms in place, to ensure compliance with SLPs.[182] Furnishing of inaccurate or misleading information will invoke the Minister's prerogative to cancel or suspend the permit or right, subject to the right-holder being afforded a chance to rectify the breach.[183]

Among the studied jurisdictions, a disparity in approaches is apparent in terms of the tools used to monitor and report on social responsibility and community investment by mining companies. Particularly the reporting requirement relating to social investment is not uniform. South Africa's reporting procedures are comparatively clear and must show compliance with the licensing and SLP requirements.[184] In Zambia, authorised officers may access records of mining operations to ascertain whether conditions attached to mineral rights are being observed. Zambia's annual reporting requirements only focus on environmental harm. Namibia has no legal requirements necessitating production of information relating to human rights, detrimental environmental and social effects of business.

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[175] MPRDA, s 47, MPRDA/reg 42 and 45 read with Mining Charter.
[176] Companies Act 1 of 2000, s193 and 195.
[177] Above n 69.
[178] G. Hopwood, "Namibia's New Frontiers: Transparency and Accountability in Extractive Industry Exploitation" in G. Hopwood (ed), *Anti-Corruption Research Programme* (2013) 5.
[179] Each of the three jurisdictions evidences a preference for arbitration or other non-litigious approaches. E.g. South Africa: MPRDA ss 50(2)(a) and 54; Zambia: MMDA, s 131; Namibia: Minerals Act, ss 108 and 109(1).
[180] E.g. South Africa: in terms of the MPRDA, s 47 internal review mechanisms in terms of s 96 must be exhausted prior to pursuing other avenues of review; Namibia: MPMA, s 110; Zambia: MMDA, s 152.
[181] E.g. Constitution NAM, art 18.
[182] MPRDA/reg 45; the Mining Charter, paragraph 2.9.
[183] MPRDA, s 47(3), (4).
[184] Above n 182.

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Transparency and accountability are necessary features of CSR. South Africa and Zambia have mechanisms requiring the production of reports that must be provided to the state. The extent of Namibia's reporting requirements are not relevant to CSR. Despite the varying degrees in respect of these requirements, all three jurisdictions could require more of companies to ensure transparent and accountable processes; especially to ensure that any community stakeholder engagement is, in fact, meaningful.

V. INSIGHTS AND CONCLUSIONS

Despite superficial similarities, the three jurisdictions yield different approaches to benefit sharing in relation to CSR. On a CSR spectrum ranging from greatest to least interventionist, South Africa has adopted the strictest regulatory framework, relative to Namibia and Zambia. Namibia, by contrast, has the least interventions in respect of CSR.

South Africa's legal framework for implementing CSR is detailed: considerations of sustainability must be integrated into the decision-making process by mining companies. EIAs are imperative for the granting of rights, as are detailed SLPs. Reporting requirements create the possibility for compliance with CSR goals provided the processes are duly followed. South Africa also has the most extensive stakeholder engagement requirements, and in certain circumstances has tried to implement mechanisms to ensure meaningful engagement. Applicants for mining rights and permits must engage with interested and affected parties. A mining right or permit can be cancelled or suspended where companies fail to comply with transparency and accountability requirements.

Zambia's legal system is less restrictive and prescriptive than South Africa in terms of the indicators. However, it is more restrictive in respect of the extent of foreign interest that is permitted. The legal environment clearly favours the awarding of rights to Zambian individuals and companies. Mining companies are under no legal obligation to consider sustainability issues within the context of CSR decision-making processes; but a central agency must ensure the sustainable use of the country's resources. The extent to which Zambian mining companies are required to consider social issues is also voluntary, although good social investment practices are prevalent. Beyond the duties of transparency laid down in company law, though, there is no particular provision to ensure transparency in the mining

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context. Mining companies are only required to report annually on environmental aspects of their operations.

Namibia currently has the least restrictive legal environment in terms of obligations imposed on mining companies. Apart from the voluntary commitment to sustainability in the Uranium industry, there are no legal obligations on mining companies to incorporate sustainability considerations into the decision-making process. The introduction of the NEEEF is, however, a positive step towards the realisation of CSR. While no sanctions are imposed against companies that do not actively implement CSR, the failure to do so will hinder efforts to tender for government business or apply for certain licenses. There are no legal imperatives which further the goals of transparency or accountability, and no reporting mechanisms are in place in respect of human rights, the environment and social goals.

What lessons are to be learned from a side-by-side comparison of three geographically proximate, resource-dependent jurisdictions with very different approaches to encouraging responsible business practices in their mining sectors? Two points stand out:

The first is that prevalence of an elaborate legal framework (such as South Africa's) for implementing CSR is not essential for ensuring responsible business practices in the mining sector. Zambian companies voluntarily contribute, heavily, towards education, health, sport and infrastructure sectors. However, voluntary mechanisms alone are insufficient to ensure that the ideals of CSR are realised; particularly where criticism of CSR generally is that it is used as a smokescreen by companies. One of the gaps in the Namibian and Zambian legal system is that there is no obligation placed on mining companies to ensure that communities become self-sufficient. This has significant implications for the communities that remain behind once a mining operation terminates. Lack of legal provision may be one problem; but implementation is another. While South Africa has legislated to promote engagement between the miner and the communities relating to sustainable livelihoods, the difficulty is the enforcement of these requirements.

A second point is that determining benefit-sharing in the extractives sector is interlinked with investors' concerns. The CSR obligations in the jurisdictions studied aim to ensure a more equitable distribution of the benefits shared by mining companies, the state and society. The extent to which these obligations may hinder investment into the extractives sector is

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important, however, given the nature of investments required: long-term commitments with high financial risk.[185] An overly onerous legal regime may deter foreign investment – investment which is necessary for the continued development of the mining industry and consequently, the respective economies of South Africa, Namibia and Zambia.[186] Factors such as political stability, infrastructure, labour laws and mineral tenure security, supported by regulatory frameworks, shape investor confidence.[187] The expectations and obligations created by CSR, however, may undermine investor confidence. The extent of investment, required and the financial risk inherent to mining activities necessitate a careful balancing act to ensure that the costs of mining activities are not solely borne by investors.[188]

The Fraser Institute's annual ranking of countries according to favourability of the investment environment for mining and exploration[189] is insightful when juxtaposed with the knowledge gained by comparing the CSR initiatives in the jurisdictions studied. The ranking report does not specifically address CSR. Instead, it concerns the certainty of a regulatory regime, environmental regulations and the need for community development/socio-economic agreements, i.e. factors that overlap with CSR. Interestingly, South Africa performed particularly poorly in respect of its regulatory certainty,[190] taxation regime,[191] uncertainty regarding land claims[192] and socio-economic and community development agreements.[193] Apart from socio-economic and community development agreements, where Zambia also performed poorly, Namibia and Zambia scored relatively well in all of these categories. Generally, both Zambia and Namibia far outranked South Africa in terms of its ability to attract, and not deter, investment.[194] The only category in which South Africa managed to obtain the highest points, a shared position with Zambia, is in terms of the 'availability of

[185] J. Runge and J. Shikwati, *Geological Resources and Good Governance in Sub-Saharan Africa: Holistic Approaches to Transparency and Sustainable Development in the Extractive Sector* (2011) 22.
[186] F. Els, 'South Africa Drops Out of Top 10 in Africa for Mining Investment' *Mining.com*, 24 February 2015 available at <http://www.mining.com/ south-africa-drops-out-of-top-10-in-africa-for-mining-investment-25546/>.
[187] Bloomberg News, 'Investors Shun SA's R36 trillion in minerals' 9 October 2014 available at <http://www.iol.co.za/ business/news/investors-shun-sa-s-r36-trillion-in-minerals-1.1762558#.VaPP-_mqqko>.
[188] See, for example, Government of the Republic of South Africa, *Minerals and Mining Policy of South Africa: Green Paper* (1997).
[189] Fraser Institute, *Annual Survey of Mining Companies* (2014) 20.
[190] ibid 71.
[191] ibid 75.
[192] ibid 76.
[193] ibid 79.
[194] ibid 74.

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labour/skills'.[195] The lesson here is most noticeable when looking at the South Africa: it has created a legal system which clearly attempts to engage with and implement CSR meaningfully. However, this required some sacrifice of the political and trading climate. Ethically, introduction of CSR initiatives was the right thing to do. However, plans will have to be devised to deal with the negative impact that these initiatives might have on the investment attractiveness of the country.

In a side-by-side assessment of CSR in South Africa, Namibia and Zambia, there are no "winners" and no "losers". There are simply choices and consequences. This is the greatest lesson of all.

[195] ibid 85.