Corporate Social Responsibility and the New Kenyan Mining Act;

Does Kenya's Mining Future Look Set to Enhance the Social Welfare of its People?

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Contents

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INTRODUCTION

As the world becomes more globally orientated; corporate entities are taking control of large functions and competences that were once held by centralized governments.[1] Often, this refers to corporations wielding power over those that they work with, or those whose livelihoods and traditional customs are affected by the work that the corporation seeks to achieve. The mining industry is an example of corporations wielding massive power in comparison to the communities around them.[2] The concept of corporate social responsibility (CSR) has evolved towards increased responsibility for such corporations.[3] A major factor in the importance of CSR, and particularly within developing countries, is that often corporations are in the financial position to change the lives of the people they interact with in a way that the government simply cannot.[4] In terms of how corporations operate, where the ends are massive profits for a few individuals, and the means is the destruction of the health and environment of other human beings, it is no longer considered enough for the ends to justify the means.[5]

Developed countries have applied legislation and public monitoring systems for many years, which ensure the goals of CSR are met. Africa is finally starting to attempt to create

[1] "Of the 100 largest economies in the world, 51 are corporations while only 49 are States". Stephen Tuly (ed) *International Corporate Legal Responsibility* (2012) 13. Adefolake O Adeyeye *Corporate Social Responsibility of Multinational Corporations in Developing Countries* (2012) 15-6.
[2] Janine Howard *Half-Hearted Regulation: Corporate Social Responsibility in the Mining Industry* (2014) 1.
[3] Adeyeye op cit note 1 at 15. Ilias Bantekas *Corporate Social Responsibility in International Law* (2004) 310.
[4] The private sector is "seen as a way to plug the governance gaps created by weak, corrupt, or under-resourced governments that fail to adequately provide social services". Richard Kwasi Boso, Sam K Afrane & Daniel K B Inkoom *Motivations for Providing CSR-Mediated Initiatives in Mining Communities of Ghana: A Multiple-Case Study* (2017) 3. Even within developed countries, governmental capacity to solve social problems has been reduced by changing market factors and ideals. Myria W Allen and Christopher A Craig *Rethinking Corporate Social Responsibility in the Age of Climate Change: A Communication Perspective* (2016) 5.
[5] "The concept of CSR is underpinned by the idea that corporations can no longer act as isolated economic entities operating in detachment from broader society. Traditional views about competitiveness, survival and profitability are being swept away". Edwin N Kimani *Corporate Social Responsibility, Technology Transfer and Impact Benefit Programs; Understanding Clauses 44 and 45 of the Mining Bill 2014* 2.

legislation which ensures the creation of a sustainable future for their natural resources.[6] One such country is Kenya, which introduced a new Mining Act in 2016 (the Mining Act).[7]

The Kenyan government's vision for the mining industry is to increase the mining sector's contribution towards the GDP from one per cent to ten per cent by the year 2030.[8] With the geographical capacity to do so, the country needs to focus on increasing investment in the mining industry to achieve this vision. Kenya's 2030 vision also includes the promise that the "journey towards prosperity involves the building of a just and cohesive society, that enjoys equitable social development in a clean and secure environment".[9] Examples of countries that have faced similar mineral potential, such as Ghana, demonstrate that mineral wealth alone is unlikely to improve the lives and economy of the country itself; most of the money generated from mining activities is held outside of where the mining takes place, and the nature of mining is such that it has relatively little real job creation.[10] This thesis proposes that the values of the Constitution of Kenya, 2010 (the Constitution) and elements of CSR need to be enforced alongside investor interest to effectively create social welfare from the existing mining potential in Kenya.

This thesis seeks to identify the nature of CSR that has been incorporated into Kenya's latest Mining Act.[11] A general understanding of the elements of CSR will be addressed in Part 2 of this thesis, with a focus on five factors identified by Howard.[12] An understanding of voluntary and mandatory applications of CSR initiatives seeks to provide information as to the pros and cons of CSR enforcement mechanisms within Kenyan legislation. Without effective enforcement mechanisms, Kenyan citizens may not be assured the provision of social welfare in relation to mining activities and the use of Kenya's natural resources. A discussion of general international law's perceptions and adoption of CSR principles will enable a perspective of where Kenya stands in relation to global society.

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[6] Kinnari Bhatt *The 2011 Guinean Mining Code: Reducing Risks and Promoting Social Benefit in Africa* (2013) 257.
[7] The Mining Act 12 of 2016.
[8] *Kenya Mining Act: Industry Seeks Clarity* (12-3 November 2018) http://www.miningbaraza.com/Mining-industry-seeks-clarity.
[9] *Launching of Kenya Vision 2030* Speech by His Excellency Hon. Mwai Kibaki, CGH, MP www.planning.go.ke.
[10] Campbell, Bonnie et al 'The Challenges of Development, Mining Codes in Africa and Corporate Responsibility' from Elizabeth Bastida et al (eds) *International and Comparative Mineral Law and Policy* (2005) 810-11.
[11] Mining Act supra note 7.
[12] Howard op cit note 2.

Part 3 this thesis seeks to focus its examination towards the Constitution and the Mining Act in relation to how Kenyan legislation incorporates Howard's five factors of CSR, namely; integrated sustainable decision-making, stakeholder engagement, community investment, transparency, and accountability.[13] Towards this end, this thesis shall address the relevant provisions of each legal document, to establish what type of CSR is envisaged in Kenya, and whether this is sufficient to guarantee the social welfare of the Kenyan people.

With the premise that the social welfare of the Kenyan people will be enhanced and protected through the provision of CSR principles, this thesis will examine the potential problems that the Mining Act[14] may incur for the people of Kenya. Given the Kenyan governments aim to increase the economic prosperity of the country, and the societal expectation of corporations maximize their profits, an examination of what the Mineral Act's[15] CSR provisions mean for investor potential will then be examined.

[13] Howard op cit note 2.
[14] Mining Act supra note 7.
[15] Ibid.

2 THE CONCEPT OF CSR

A study by Dahlsrud which analysed 37 different definitions of CSR demonstrates that there is no single universal definition of CSR.[16] While there is no absolute consensus on the precise definition of CSR, the principles behind it can be said to be agreed upon; CSR addresses the social impact that corporations have on their surrounding environments and communities.[17] These impacts are not considered if a corporation has the sole mandate of profit maximization.[18] As a broad assessment of the different theories, "CSR has typically been understood as policies and practices that business people employ to be sure that society, or stakeholders, other than business owners, are considered and protected in their strategies and operations".[19]

The basic reasoning behind CSR can be defined as; attempting to ensure entities, both governmental and private, make a positive impact on society rather than a negative impact.[20] The majority of CSR models focus on concepts of "social ethics, profit motive, governance, cultural freedom, safety and health, accountability, transparency, and competitiveness which are proposed to have overlapping functions".[21] While CSR models focus on the elements described, most CSR models typically focus on profit maximization as the primary goal of a corporation.[22] Friedman argues that the basis of a free society is that a corporation only has "one social responsibility…to use its resources and engage in activities designed to increase its profits".[23] Friedman's point of view is based on the argument that it is neither appropriate, nor possible, to hold corporations responsible for additional social goals, due to the fact that corporations are not individuals, and especially that they are not elected individuals.[24]

[16] For example; "Corporate social responsibility can be defined as a principle stating that corporations should be accountable for the effects of any of their actions on their community and environment", "We define corporate social responsibility broadly to be about extending the immediate interest from oneself to include one's fellow citizens and the society one is living in and is a part of today, acting with respect for the future generation and nature", and "CSR is generally seen as the business contribution to sustainable development, which has been defined as development that meets the needs of the present without compromising the ability of future generations to meet their own needs, and is generally understood as focussing on how to achieve the integration of economic, environmental and social imperatives". A Dahlsrud *How Corporate Social Responsibility is Defined: An Analysis of 37 Definitions* (2008) 11-2.

[17] op cit note 1 at

op cit note 1 at

[19] Archie B Carroll *Carroll's Pyramid of CSR: Taking Another Look* (2016) 2.

[20] Dyann Ross *A Research-Informed Model for Corporate Social Responsibility: Towards Accountability to Impacted Stakeholders* (2017) 2.

[21] Najeb Masoud *How to Win the Battle of Ideas in Corporate Social Responsibility: The International Pyramid Model of CSR* (2017) 18.

[22] Masoud op cit note 21.

[23] Milton Friedman *The Social Responsibility of Business is to Increase its Profits* (1970) 1 and 6.

[24] Friedman op cit note 23 at 1 and 3.

Regardless of whether Friedman's view is the correct approach to take towards CSR principles as a whole, the importance of corporations creating profit to benefit society has been recognised in "virtually all economic systems of the world".[25] It may be deemed a societal expectation that corporations ensure the maximization of profit so that they may continue to exist, and therefore contribute to society.[26] Further, economic prosperity has been included as an element in the definition of sustainable development.[27]

Sustainable development is a key factor underlying the concept of CSR.[28] What exactly the term sustainable development requires of a corporation creates a great deal of uncertainty in practical application.[29] While there may be multiple definitions of what it means, the definition proposed by the World Commission on Environment and Development (WCED) has recently "emerged as the dominant one".[30] The definition proposed by the WCED states the following; "sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs".[31] The WCED elaborates that the basic needs of a society should be an "overriding priority".[32] Basic needs are stated to include both fundamental basic needs such as "food, clothing, [and] shelter"[33] and provides the "opportunity to satisfy…aspirations for a better life".[34] The WCED further elaborates that the second element of sustainable development encompasses the idea that development must be limited to the "environment's ability to meet [both] present and future needs".[35] Referencing the work of Elkington as well as the WCED, Bansal identifies the three key elements of sustainable development as "environmental integrity, economic prosperity, and social equity".[36] Basal further elaborates that each element by itself is essential to the concept of sustainable development, and each element by itself is simultaneously insufficient to achieve the goal of sustainable development.[37]

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[25] Carroll op cit note 19 at 3.
[26] Carroll op cit note 19 at 3.
[27] Pratima Bansal *Evolving Sustainably: A Longitudinal Study of Corporate Sustainable Development* (2005) at 198.
[28] Howard describes the importance of sustainable development encompassed in the element of integrated, sustainable decision-making, as will be discussed in Part 2.1. Howard op cit note 2 at 15
[29] Bansal op cit note 27 at 202.
[30] Bansal op cit note 27 at 198.
[31] WCED *Our Common Future* (1987) 41.
[32] WCED op cit note 31.
[33] WCED op cit note 31.
[34] WCED op cit note 31 at 42.
[35] WCED op cit note 31.
[36] Bansal op cit note 27.
[37] Bansal op cit note 27.

The concept of CSR may also differ over geographical regions and the context in which it is applied, especially between developed and developing countries.[38] Acknowledging that developing countries may require different perspectives of CSR, and that the mining industry specifically may have its own set of criteria, this thesis focuses on the five key elements of CSR established by Howard.[39] Part 2 of this thesis has three purposes: (i) to explain the concept of CSR in respect of the five key factors identified below, (ii) to discuss the distinction and significance of voluntary versus mandatory CSR, and (iii) to give a brief overview of international practices of CSR. Using the criteria identified by Howard provides a practical way to assess the Mining Act's inclusion of CSR. The conclusions drawn at the end of this thesis, as to whether the mining industry of Kenya appears ready to enhance the social welfare of Kenyan citizens, will be based on the inclusion of CSR concepts within the Mining Act. The discussion of the merits of voluntary or mandated CSR will be used to guide a conclusion on whether the Mining Act provides sufficient protection, and whether any gaps within the law may be fulfilled by voluntary initiatives.

2.1. The Five Factors Informing CSR

In the assessment of whether the Mineral Act incorporates the principles of CSR, this thesis will use the five key factors identified by Howard, namely: integrated, sustainable decision-making, stakeholder engagement, community investment, transparency, and accountability.[40]

Integrated sustainable decision-making is a key component to ensuring a balance is struck between the competing factors involved in mining activities.[41] These competing factors are informed by the fact that the mining industry affects; communities, the environment, the economy, and the overall future growth of a country, which includes the resources available for future generations once mining activities have ceased.[42] To satisfy this requirement the Mining Act will have to require a mining corporation to make sustainability a priority in decision-making, and further "integrate social and environmental concerns into their decision-

[38] Carroll op cit note 19 at 7. Additionally, Tilt concludes that more research focusing on CSR in developing countries is required to properly assess the social and environmental benefits CSR may provide. Carol A Tilt *Corporate Social Responsibility Research: the Importance of Context* (2016) 7.
[39] Howard op cit note 2 at 3. Howard's paper focuses on an examination of the South African mining industry and recently established South African mineral legislation.
Howard op cit note 2 at 13
[41] Howard op cit note 2 at 9.
[42] "The present generation holds the earth in trust for the next generation. We are transient caretakers who are holding the earth's natural resources for generations yet to come." Elmarie Van der Schyff *Stewardship Doctrines of Public Trust: Has the Eagle of Public Trust Landed on South African Soil?* (2013) 4.

making processes".[43] Integration in this sense will require a corporation to consider concerns prior to the decision having been made.[44]

Stakeholder engagement can be defined as meaningful engagement with those who are affected by the decisions of the mine, and incorporating those concerns in the decision-making process.[45] For example, it is not true engagement for a company to notify a community about what is about to occur on their land, if that notification is done in a language that they do not understand.[46] Engagement requires a sincere commitment to taking the concerns and queries of the stakeholders into consideration when making a decision, especially allowing "direct input of stakeholders where the outcome of a decision will affect them".[47] If a company merely takes representations from the community, and then proceeds with their original decision without justifying or explaining why they have not given due consideration to the concerns raised, then the community will feel unheard or feel that their opinions have been disregarded.[48] In assessment of the Mining Act and stakeholder engagement this thesis will address what the Act envisages as stakeholders, and the level of input they are given in participating in decisions which will affect them, either directly or indirectly.

Community investment looks at the level of investment a mining corporation spends on the community impacted by its activities.[49] While traditionally a purely voluntary aspect, legislation may necessitate community investment by mandating the mining corporation submit plans prior to being granted a mining right.[50] The assessment of this criteria in relation to the Mining Act will examine what social and labour plans are required by mining corporations prior to the granting of any mineral right, and what procedures are set in place to ensure the stated criteria are met.

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[43] Howard op cit note 2 at 15.
[44] Howard op cit note 2 at 15. Howard relies on the article by Kerr, Janda, & Pitts. Michael Kerr, Richard Janda & Chip Pitts *Corporate Social Responsibility: A Legal Analysis* (2009) 106.
[45] Howard op cit note 2 at 20. Howard references Preston & Sapienza when stating the idea of stakeholder engagement has gained popularity in recent years. Lee E Preston & Harry J Sapienza *Stakeholder Management and Corporate Performance* (1990) 361. Out of 37 definitions of CSR, 29 reference stakeholder engagement. Dahlsrud op cit note 16 at 7-11.
[46] Howard op cit note 2 at 20.
[47] Howard op cit note 2 at 20.
[48] Howard op cit note 2 at 20. This lack of communication may create an atmosphere of distrust and animosity towards the entity involved. Abdul Jelil Abukari and Ibn Kailan Abdul-Hamid *Corporate Social Responsibility Reporting in the Telecommunication Sector in Ghana* (2018) 8.
[49] Howard op cit note 2 at 20.
[50] Howard op cit note 2 at 22. Howard references Kerr in support of the traditional view is voluntary. Kerr op cit note 44 at 496.

Transparency is vital to accountability and stakeholder engagement.[51] Only with effective monitoring can those who need to be held accountable be established.[52] Transparency means that corporations need to expose both the positive and negative information about their activities, and the affects thereof.[53] Transparency necessitates that the public must be informed, including in circumstances where officials themselves are the ones that need to be held accountable.[54] Encouraging transparency can help to manage expectations, which in turn reduces social tensions and provides greater stability for the nation in question.[55] It has been demonstrated that transparency leads to greater trust in the government from citizens, resulting in a more popular government, and a greater voter turnout.[56]

Transparency additionally sets the framework for producing better monitoring. Access to information creates incentives for those adversely affected to get more involved.[57] A balance must be struck on what information is made available, both for the protection of the right to privacy, and the prevention of an information overload. An overload of information can prevent the realisation of transparency, by allowing vital information to be missed or go unnoticed.[58]

Transparency and effective access to information additionally impacts economic development, because it enables an answer to the question; what are mines realistically bringing into the country? When people know the truth of what revenue the mining industry realistically brings in, they can then start to focus on what else will bring in revenue and how to preserve those sections which already do.[59] For real transparency, each step of a company's actions should be openly shared, including where contacts are changed after initial agreements are made with the government.[60] In the determination of how transparent the Mineral Act requires mining corporations to be, this thesis will look at; what aspects of access to information are included within the Mining Act, what monitoring procedures are in place to ensure compliance, and how accessible the information is to all interested parties.

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[51] Howard op cite note 2 at 23.
[52] Howard op cit note 2 at 24.
[53] Howard op cit note 2 at 23.
[54] Macartan Humphreys, Jeffrey D Sachs & Joseph E Stiglitz 'Future Directions for the Management of Natural Resources' in Macartan Humphreys, Jeffrey D Sachs, & Joseph E Stiglitz (eds) *Escaping the Resource Curse* (2007) 328-29.
Terry Lynn 'Ensuring Fairness the Case for a Transparent Fiscal Social Contract' in Macartan Humphreys, Jeffrey D Sachs, & Joseph E Stiglitz (eds) *Escaping the Resource Curse* (2007)278-79
op cit note 54 at 328-29.
[57] Karl op cit note 55 at 278-79.
[58] Humphreys op cit note 54 at 332-33.
[59] Karl op cit note 55 at 278.
[60] Joseph E Stiglitz 'What is the Role of the State?' in Macartan Humphreys, Jeffrey D Sachs, & Joseph E Stiglitz (eds) *Escaping the Resource Curse* (2007) 44-5.

Accountability is the most important principle of CSR, and the least often encountered in practice.[61] To hold any person or entity accountable, there must be mechanisms in place to do so, and there must be procedures and checks in place to ensure that those mechanisms are used. Where such mechanisms are lacking, corruption, conflict and the violation of human rights may result.[62]

Knowing the difficulties surrounding the implementation of accountability, legislators of new mining laws should consider how they are going to ensure that this does not occur under their leadership and guidance. Where corporations can determine the content of their own obligations, there shall be no standard to hold them accountable, and no outside mechanisms to do so.[63] Drafters should also be aware of "political pollution"[64] and therefore include sections which will minimise this risk. Ensuring that new laws have stipulated sanctions in place for the mechanisms ensuring the social welfare of the country and its people, will at least give the people an opportunity to enforce their rights. The Mining Act will be assessed on its incorporation of accountability by looking at whether mining corporations, specifically their decision-makers and right holders, are held accountable for the criteria discussed above, namely; the level of integration of stakeholders in decision-making, the impact on the community and environment, and their transparency.

2.2. The Enforceability of CSR: Voluntary vs Mandatory

Depending on which rationale behind CSR is applied, CSR may be considered voluntary or mandatory, or a combination of both.[65] In example; Howard states CSR is typically defined as companies acting outside of legally mandated requirements,[66] while Carroll's conception of CSR is determined by societal expectations of corporations.[67] In addressing arguments against including CSR principles within legislation Bhatt states that, "by arguing that environmental and social regulations are time-consuming and expensive corporations send the underlying

[61] Howard op cit note 2 at 24.
[62] Jane Ezirigwe *Human Rights and Property Rights in Natural Resources Development* (2017) 206-7.
[63] Howard op cit note 2 at 24 and 26. Howard references Kerr , Janda & Pitts when stating that accountability incorporates decision-makers being held accountable for "the failure to meet standards of ethical conduct, whether self-proclaimed or imposed". Kerr op cit note 44 at 417
[64] Political pollution is a term used to describe where politicians are involved in mining corporations and therefore use their power to avoid the enforcement of mechanisms which would minimize their profit. Howard op cit note 2 at 26.
[65] Carroll op cit note 19 at 2. op cit note 10 at
[66] Howard op cit note 2 at 12-3.
[67] Such expectations include both mandatory and voluntary expectations. Carroll op cit note 19 at 2.

message that the citizens in developing countries deserve less protection of human rights than those in more developed countries".[68] For this thesis the importance of the discussion of voluntary and mandatory CSR relates to the impact that the choice will have on the enforceability of factors which will enable social upliftment within Kenya due to the mining industries impact.

Where CSR is voluntary, legislation would not mandate the incorporation of CSR criteria as discussed above.[69] CSR initiatives may, or may not, then be undertaken by the corporation of their own accord.[70] By contrast, where CSR is mandatory, there are formal procedures and mechanisms requiring the implementation of CSR within legislation.[71] These requirements are enforced by the law and failure to comply should result in penalties.

Voluntary CSR may be implemented by corporations following soft law, which are guiding materials, "such as codes of conduct".[72] Soft laws do not have legally binding status, and therefore have to be voluntarily undertaken.[73] Due to the voluntary nature of soft laws, the benefits include; the flexibility that corporations have to apply what actions they deem necessary, and the fact that the non-threatening nature of soft law may make them more attractive to implement.[74] Voluntary codes can play an important role in guiding industries towards ways of operating that ensure that they comply with human rights standards. This is particularly because the formation of these codes includes civil society, which legitimizes the code by including the viewpoints of those who are not direct stakeholders.[75] Voluntary initiatives further have the capacity to enhance performance in that they can be implemented without the delays of the bureaucratic process.[76] This type of adherence takes the administrative burden away from government and can therefore save costs.[77] However, because of the voluntary nature of these initiatives their unenforceability may undermine the effectiveness of CSR, particularly in terms of accountability and enforcement.[78]

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[68] Bhatt op cit note 6 at 257.
[69] Specifically; integrated, sustainable decision-making, stakeholder engagement, community investment, transparency, and accountability.
[70] Tully op cit note 1 at 49.
[71] Bhaskar Chatterjee and Nayan Mitra *CSR Should Contribute to the National Agenda in Emerging Economies – the 'Chatterjee Model'* (2017) International Journal of Corporate Social Responsibility vol 2, Issue 1.
[72] Tully op cit note 1 at 49.
[73] Tully op cit note 1 at 49.
Flexibilityin this sense Tully op cit note 1 at
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In the extraction industry, excessive governmental control, or a fully mandatory system, has proven ineffectual due to the lack of resources to govern such a system.[79] Within the mining industry, experience has shown that State intervention coupled with insufficient public scrutiny leads to; the endangerment of natural resources, increased poverty, and the compromise of sustainable development.[80] At the same time, the importance of domestic regulation in the extractive industry has been emphasised through research into the nature of what has been coined the resource curse.[81] The hazards of mining are preventable, and the necessary safeguards to ensure environmental protection as well as the health and safety of the population and mining labourers can be incorporated in national legislation and regulations.[82] As societies in developed countries become more aware, mainly due to factors of globalization, there has been increasing pressure, specifically as regards disclosure requirements, for mandated regulations which may be legally enforceable against corporations.[83]

An example of a voluntary initiative is the The UN Global Compact (the Compact), which is "the world's largest corporate sustainability initiative".[84] The Compact has been a means for propelling CSR into the spotlight.[85] The Compact is a "strategic policy initiative"[86] that aims to create a movement towards responsible business through a commitment to the principles of CSR.[87] The mission of the Compact is to get corporations "to align strategies and operations with universal principles on human rights, labour, environment and anti-corruption, and take actions that advance societal goals".[88] Corporations voluntarily sign up to participate in the Compact and there are no enforceable regulations in place, however, continued membership demonstrates a corporation's commitment to sustainable development, and a lack of compliance with the principles may lead to the corporations removal from the Compact.[89] Of the 10 listed Kenyan corporations, not a single mining corporation has listed themselves on

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79 Ezirigwe op cit note 62 ay 205. Campbell op cit note 10 at 813.

80 Campbell op cit note 10 at 812. Refer to Part 2 for the definition of sustainable development.

81 This is a situation where countries rich in natural resources have a high population of underprivileged people. Ezirigwe op cit note 62 at 207 and 212.

82 Campbell op cit note 10 at 809.

83 Bantekas op cit note 3 at 327.

op cit note 1 at

86 *The UN Global Compact and the OECD Guidelines for Multinational Enterprises: Complementarity and Distinctions* (December 2012) www.unglobalcompact.org.

op cit note 1 atThe Compact deals with the following themes; "a) sound environmental management; b) the precautionary approach fitted to industry needs; c) cleaner production, recycling, and use of renewable resources through technological innovation, and the sharing of such innovation, and d) public disclosure and consultation with stakeholders". Bantekas op cite note 3 at 335.

88 www.unglobalcompact.org.

89 www.unglobalcompact.org.

the Compact.[90] While not conclusive, this may be indicative of the attitude of corporations towards voluntary principles of CSR within Kenya.

Voluntary philanthropic initiatives are most often initiated by corporations not out of any moral duty, but rather to enhance their reputation.[91] A study of the Ghanaian experience concluded that corporations “report on their CSR activities in an attempt to elicit legitimacy from the society” which surrounds them.[92] Corporations may face loss of profits due to a reduction in sales and share prices, and may face difficulties in attracting investors when their reputation is ruined due to public exposure of the negative consequences a corporation has had on its surrounding environment and community.[93] It appears that for voluntary initiatives to be enforced there must be a societal force propelling corporations to take on activities they are not lawfully required to. In developed countries, citizens are much more aware of environmental factors than in developing countries and may even refuse to work for a company with a record of negative impacts.[94] Developing countries do not have the awareness or the capacity to act in the same way as developing countries which could compel a corporation to change.[95]

Where CSR initiatives are voluntary, NGO’s may be best placed to propel change when consumers and the workforce are not able to.[96] The problem with relying on the capacity of NGO’s to propel corporations to take on initiatives for societal upliftment, is that it would rely on NGO’s having the capacity to do so within the region the corporation operates. There are a lack of studies on the role that NGO’s play within developing countries,[97] and without sufficient evidence to support the role that NGO’s play within developing countries, it cannot be conclusively stated that this will provide an enforceable system of CSR. Due to the drastic consequences that the mining industry can have on people’s lives, and the fact that a mining corporation’s reputation may not affect their direct profits, is would be wise to assume that purely voluntary CSR would not be recommended for the assurance of social welfare.[98]

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[90] Out of 35 listed corporations with mining licences in 2015. www.hapakenya.com/2015/02/23/list-of-companies-with-mining-licenses-in-kenya, www.unglobalcompact.org.
[91] Carroll op cit note 19 at 4.
[92] Abukari op cit note 34 at 3.
[93] Bantekas op cit note 3 at 340.
[94] Tibebe Sirak Asfaw, Vida Botes & Lulu G Mengesha *The Role of NGOs in Corporate Environmental Responsibility Practice: Evidence From Ethiopia* (2017) 1.
[95] Developing countries have a high employment rate, which would propel a person to continue working despite the negative consequences the corporation may have, merely to obtain the income. Asfaw op cite 94 at 1.
[96] Asfaw op cit note 94 at 4.
[97] Asfaw op cit note 94 at 2.
[98] Demonstrated by an example of a gold mining corporation in Tanzania, where multiple deaths and no accountability were the result of voluntary initiatives in terms of labour and social concerns. Bantekas op cit note 3 at 345.

2.3International Law and CSR

The traditional international law view on social responsibility is that it falls under the responsibility of the SState to ensure corporations comply with socially responsible behaviour.[99] While there is the suggestion by Jagers that corporations operating outside of their borders comply with international law,[100] Tully states that “international law does not impose any obligation upon States to regulate corporations”.[101] Due to the nature of corporations, they have the resources to spread themselves over several countries and continents, enabling them to evade national laws.[102] The awareness of this evasion has led to a greater need for international laws in these areas.[103] Soft laws or non-binding mechanisms, exist, which may then form part of national law through the incorporation of those principles within domestic legislation.[104] International law as a whole is the most useful when viewed as guidelines. Not enforceable, but highly recommended. The nature of international law is such that it should encourage States to create binding laws within its own territories,[105]

Corporations may be held responsible both when they have a direct connection to the violation of a human right, and when they have a close enough proximity as to warrant sufficient power and influence over the situation or people involved.[106] The degree of responsibility is calculated by looking at both the relationship between the corporation and the government, and between the corporation and the communities that they affect, balanced with “legitimate corporate interests”.[107]

The OECD Guidelines for Multinational Enterprises (the Guidelines) are recommended guidelines for SStates to follow towards multinational corporations, [108]The Guidelines, along with the Compact described in Part 2.2, “are two of the foremost voluntary initiatives that promote corporate responsibility and sustainable business practices”.[109] “providing voluntary

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[99] Tully op cit note 1 at 33 and 40.
[100] N Jagers *Corporate Human Rights Obligations: In Search of Accountability* (2002) 166-72. Tully op cit note 1 at 45.
[101] Tully op cit note 1 at 45.
[102] Tully op cit note 1 at 40.
[103] Tully op cit note 1 at 40.
[104] Tully op cit note 1 at 49.
[105] The experience gained by multiple countries coming together, with multiple stakeholder involvement, means that a country does not have to make the mistakes themselves, we can learn from our neighbours. “Non-binding instruments can over time form the basis for instruments which have legal authority.” Tully op cit note 1 at 49.
[106] Tully op cit note 1 at 17.
[107] Mainly the corporate interest in creating profit for its shareholders. Tully op cit note 1 at 18.
[108] Tully op cit note 1 at 53.
[109] The UN Global Compact op cit note 86.

principles and standards for responsible business conduct”[110] consistent with “internationally recognized standards” of responsible business.[111] It is notThe OECD corporate governance principles encourage member States to take legal action where available to prevent the derogation of stakeholder rights.[112] enterprises R bySsuch standards into The strength of the Guidelines is further emphasised by the participation of 44 States “whose territories are home to almost 90 per cent of foreign direct investment”. [113] The Guidelines include the encouragement towards the establishment by SStates of “normative measures such as laws, legislation and standards”.[114] The principles contained within these guidelines adhere to the principles of CSR described aboveinP2.[115] These principles encourage corporations to conduct themselves in such a way so as to keep in mind the goal of sustainable development, a goal which cannot be attained without the principles of management and protection of the environment.[116]

In 2002 the World Summit on Sustainable Development summit concluded that the private sector has “a duty to contribute to the evolution of equitable and sustainable communities and societies”. [117] The international community has “recognized that good governance and a truly sustainable economy require the effective involvement of the public, be it as voters, consumers or shareholders”.[118] Multi-National corporations specifically are in a unique position of power and privilege to be able to develop new technologies to counter negative effects on the environment.[119] It has been emphasised by the UN Committee on Economic, Social and Cultural Rights, that where private contributors are in a position to provide assistance to help a country fulfil its obligations towards ensuring economic, social and cultural rights, those private entities have an obligation to do so.[120]

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[110] Adeyeye op cit note 1 at 14.
[111] The UN Global Compact op cit note 86.
[112] Bantekas op cit note 3 at 339.
[113] The UN Global Compact op cit note 86.
[114] Adeyeye op cit note 1 at 15.
[115] Such as sustainable development, employee training, transparency (disclosure- including social, environmental and risk reporting), adequate and timely discussions with communities environmentally affected by corporation’s practices. Tully op cit note 1 at 134.
[116] Adeyeye op cit note 1 at 14. Refer to Part 2 for the definition of sustainable development.
[117] Tully op cit note 1 at 328-29.
[118] *Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters prepared under the Aarhus Convention* Foreword.
[119] Bantekas op cit note 3 at 335.
[120] Bantekas op cit note 3 at 316.

Internationally corporations have formed codes of conduct for their specific industry.[121] The corporations are private and voluntary initiatives, but they are nevertheless a way for consumers and employees to hold specific corporations to account.[122] This is a way to create uniformity, and to ensure the highest standard is adhered to. Typically codes of conduct address concerns relating to the environment, labour concerns, consumer protection and anti-corruption, but they also address ethical problems found in societies in which the industries operate.[123] Codes of conduct "have also been criticized on the basis that the document may be internally unknown and the principles are too impractical or fail to provide guidance".[124] Despite this criticism of codes of conduct, a mining industryI code of conduct could make it easier for employees and consumers to react to the corporations activities more timeously. Additionally, governments may be able to establish which corporations would be more willing, at least on the face of it, to participate in voluntary CSR practices to enhance social welfare.

Part 2 has given a general outline of what the concept of CSR contains, and acknowledged that a fundamental priority of corporations is maximization of profits. As this thesis focuses on the elements of CSR laid out by Howard,[125] an analysis of integrated sustainable decision-making, stakeholder engagement, community investment, transparency and accountability, has laid the foundation for the assessment of Kenyan law in terms of its incorporation of CSR. While CSR may be considered voluntary by some theorists, the dangers of purely voluntary CSR have been discussed specifically in terms of the mining industry in developing countries and the effectiveness of ensuring the social and environmental welfare of citizens. A short look at international law has demonstrated that while there is no mandate implied by international law as to what each State should do to protect its citizens, it has been acknowledged that corporations should be held accountable for the protection and welfare of the people affected by their actions. With the knowledge set out in Part 2, Part 3 will focus on what aspects of Howard's[126] principles of CSR are present within Kenyan law. The voluntary nature of a code of conduct makes enforcement reliant on "uncertain public opinion and corporate goodwill".[127]The UN Global Compact's second principal states "that signatories

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[121] Bantekas op cit note 3 at 322. Examples of codes of conducts can be found in the tea, toy, sport, and textile industries. Tully op cit note at 285-86.
[122] A Code of Conduct will only be legally enforceable through domestic legislation incorporating the code via acceptance to adhere to the code. Bantekas op cit note 3 at 323.
[123] Bantekas op cit note 3 at 323.
[124] Tully op cit note 1 at 57.
[125] Howard op cit note 2.
[126] Howard op ct note 2.
[127] Tully p 57.

make sure that they are not complicit in human rights abuses”.[128] The Guidelines are informed by an annual review of the practices, and it includes an opportunity for multiple viewpoints to be included in the formation of its principles.129 The reviews of participating States promotes an “effective observance by enterprises of the principles and standards contained in the Guidelines” in addition to possibly transforming into customary international law through the general use by States.130

3KENYA’S L

The Constitution is the supreme law of the land and therefore all , including legislation use, and responsibilities, of natural resources.[131] The Mining Act specifically gives effect to articles of the Constitution deal with land, natural resources, property policy and regulation, and obligations in respect of the environment The Mining Act further stipulates that any term or condition within a mineral agreement which is inconsistent with the Constitution shall be considered null and void, and therefore will hold no weight, further emphasising the importance of the Constitution in the interpretation of the Mining Act.[132] The Mining Act can therefore be interpreted to promote the values and principles enshrined in the Constitution.[133]

Part 3 will examine Kenyan’s laws in a four-part review. Part 3 will; (i) examine the specific constitutional principles relevant to CSR as determined by the criteria set out in Part 2, (ii) discuss the mandated elements of CSR within the Mining Act, (iii) address potential problems the choice of law in terms of CSR enforcement may present to Kenyan citizens, and (iv) set out potential problems the Mining Act might pose to investors in terms of its choice of CSR related laws. Discussion of the Constitution and the Mining Act in relation to CSR is vital to determine whether Kenyan mining legislation will provide sufficient social and environmental protection and engagement to justify a conclusion that the mining industry may enhance the social welfare of Kenyan citizens.

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[128] Tully p 232. Complicity is defined by Tully as having three degrees; direct, beneficial, and silent complicity. Both direct and beneficial involve the corporation’s awareness, while silent merely ignores the abuses but does not participate in them or gain from them. The Compact does not distinguish between these degrees of complicity, and therefore it can be read to be an encouragement to not only not participate in human rights abuses, but to take active steps to prevent and amend them when they are noticed.
[129] Tully p 54. http://www.oecd.org/about/membersandpartners/.
[130] Tully p 55. READ ft 322.
[131] Constitution of Kenya, 2010 article 2(1).
[132] Mining Act supra note 7 section 121(1).
[133] The Mining Act refers to articles 60, 62(1)(f), 66(2), 69 and 77 of the Constitution of Kenya, 2010. Mining Act supra note 7.

3.1 The Constitution

3.1.1 Integrated, Sustainable Decision-Making

To examine the guidance supplied and mandated by the Constitution towards integrated, sustainable decision-making within the mining industry, a discussion of the use and ownership of Kenya's natural resources is necessary. Sustainable development is a national value and governance principle that should inform all interpretation and enactment of the Constitution and legislation.[134] The Constitution stipulates that all "land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable"accordance with the principles of sustainability, productivity, transparency and protection of vulnerable ecological areas.[135]

All land, and all minerals and oil owned by Kenya collectively as a nation.[136] The Kenyan courts have interpreted the relevant constitutional principles and stated that the relevant mining authority is placed in a position of trust to oversee the execution of mineral rights as a trustee for the Kenyan people.[137]

The State has a constitutional obligation to ensure the sustainable exploitation, management and conservation of Kenya's natural resources and the equitable sharing thereof.[138] The Constitution provides "every person has the right to a clean and healthy environment"[139] including the right to have the environment protected for the benefit of future generations.[140] Further, the State has an obligation to eliminate processes and activities that are likely to endanger the environment.[141] The Kenyan courts have affirmed that as trustee of Kenya's natural resources, the State has an obligation to ensure those resources are sustainably used, managed, and conserved.[142]

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[134] Constitution supra note 134 articles 10(1) and (2)(d). The Constitution does not provide a definition of sustainable development, and therefore the definition in Part 2 will be used in terms of reference to sustainable development within the Constitution.
[135] Ibid article 60.
[136] Ibid articles 61(1) and 62(f).
[137] *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 Others* Environment and Land Case 195 of 2014 27.
[138] Constitution supra note 134 article 69(1)(a).
[139] Ibid article 42(1).
[140] Ibid article 42(1)(a).
[141] Ibid article 69(1)(g).
[142] *Friends of Lake Turkana Trust v Attorney General & 2 Others* Environment and Land Case 825 of 2012 16-7.

3.1.2 Stakeholder Engagement

Public participation is a national value and a principle that should inform all interpretation and enactment of Kenyan law.[143] As such the Kenyan courts have confirmed that any legislation or activity which does not consider the constitutional value of participation may be invalidated.[144] The Constitution specifically mandates the State to "facilitate public participation and involvement in the legislative and other business of Parliament and its committees".[145] Within Kenyan county's, the State is again obligated to "facilitate public participation and involvement in the legislative and other business of the assembly and its committees".[146] Within all aspects of public finance public participation is mandated.[147] The State is further obliged to encourage public participation in terms of protecting its environment.[148]

In determining the legitimacy of a coal mining project, the Kenyan court elaborated on what constitutes public involvement in terms of meeting the constitutional mandate. The court stated the level and degree of public participation would be dependent on the specific circumstances of each case, based on the importance of the issue at hand and the affect that the outcome of such a project would have.[149] The court further stated that while the views expressed by the public do not have to be followed, they do have to be considered in good faith.[150] In the determination of whether there has been sufficient participation, the court supplied various factors that could be examined, such as; good faith, the subject matter at hand, timeframes, quality of engagement, and how many people were reached.[151]

In determining who should be included in the required participation, Kenyan courts appear to be inclusive. In a case examined by the court to determine whether mining activities were legally taking place on ancestral land, the court stated that the interest in the land could be varied, and that the important factor to consider was not merely who held title to such land.[152] The court further emphasised the importance of the local people, stating that investors

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[143] Constitution supra note 134 articles 10(1) and 10(2)(a).
[144] *Peter Makau Musyoka & 19 Others (Mui Coal Basin Local Community) v Permanent Secretary Ministry of Energy & 14 Others* Constitutional Petition 305 of 2012.
[145] Constitution supra note 134 article 118(1)(b).
[146] Ibid article 196(1)(b).
[147] Ibid article 201(a).
[148] Ibid article 69(1)(d).
[149] *Musyoka* case supra note 148.
[150] Ibid at 6.
[151] Ibid.
[152] *Solomon Mulwa Mulyunga & 8 Others v Athi River Mining & 9 Others* Petition 168B of 2011 4.

should recognise the supremacy of the rights of the community, especially towards land and the protection of their environment.[153]

3.1.3 Community Investment

Under the Constitution, eperson has inherent dignity, and the right to have that respected and protected[154] Every Kenyan has the right to fair labour practices, which include fair remuneration and reasonable working conditions.[155] fair and reasonable labour practices may be interpreted to include the protection of human dignity. The State is further constitutionally mandated to ensure "that investments in property benefit local communities and their economies".[156] The Constitution provides that every person has the right to health care services, adequate housing, reasonable standard of sanitation, and access to clean and safe water in adequate quantities.[157]

3.1.4 Transparency

The Constitution stipulates that transparency is a national value and governing principle.[158] The Constitution further grants every Kenyan citizen the right of access to information held by the State, or any other person, where that information is required for the protection of a right or fundamental freedom.[159] Not only does a citizen have a right to acquire this information, but the State is obliged to publish and publicise[160] any important information affecting the nation.[161] The Kenyan courts have emphasised the obligation on the State to fulfil the right to information in terms of projects which may pose a risk to the environment.[162] The courts have further emphasised that access to information is essential for effective public participation to take place.[163]

[153] Ibid at 4.
[154] Constitution supra note 134 article 28.
[155] Ibid article 41.
[156] Ibid article 66(2).
[157] Ibid article 43.
[158] Ibid articles 10(1) and 10(2)(c).
[159] Ibid article 35(1)(b).
[160] The use of both publish and publicise under article 35 makes it clear that, not only is the State required to make the information available to the public, but it must further make the public aware of that information.
[161] Constitution supra note 134 article 35.
[162] *Lake Turkana* case supra note 146 at 14.
[163] "It is the view of this Court that access to environmental information is therefore a prerequisite to effective public participation in decision-making and to monitoring governmental and private sector activities on the environment" Ibid.

3.1.5 Community Investment

Accountability is foremost a national value and governing principal of all Kenyan law.[164] The Constitution stipulates that legislation must be enacted to ensure full realisation of the rights and adherence to the obligations stated above.[165] The State may therefore be held accountable to produce legislation, and to ensure it meets the requirements in terms of the management and sustainable extraction of natural resources. Kenya has recently enacted a revised Mineral Act in an attempt to provide realisation of these rights.[166] The Constitution deems any person, applying any law or policy decision, bound by the national values and governance principles discussed above.[167] The fact that the Constitution broadens the binding nature of the enshrined values and principles to include any person, could indicate that decision-makers responsible for the acts of corporations which are in contravention of these values may be held responsible in the application of Kenyan law.

Any person may approach a Kenyan court for redress in the protection of any right granted by the Constitution.[168] A person may do so on their own behalf, on behalf of a group, or on behalf of the public interest.[169] The Constitution makes special provision for any person who is unsatisfied with the administration and monitoring of the right to a clean and healthy environment to approach a court directly to ensure the upholding of this right.[170] In this regard "an applicant does not have to demonstrate that any person has incurred loss or suffered injury".[171] Each person is constitutionally required to cooperate with the State and other people to ensure the ecologically sustainable development and use of Kenya's natural resources.[172] Lack of such cooperation could then find any individual accountable for their actions.

The Constitution stipulates that "the general rules of international law "[173] as well as "any treaty or convention ratified by Kenya shall form part of the law of Kenya".[174]

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[164] Constitution supra note 134 articles 10(1) and 10(2)(c).
[165] Ibid articles 68 and 72.
[166] Mining Act supra note 7.
[167] Article 10(1) stipulates; "State organs, State officers, public officers and all persons". Stated values and principles include; participation of the people, transparency and accountability, and sustainable development. Constitution supra note 134 articles 10(1)(b)(c).
[168] Ibid article 22(1).
[169] Ibid article 22(2)(b)(c).
[170] Where the right "has been, is being or is likely to be, denied, violated, infringed or threatened". Ibid article 70(1).
[171] Ibid article 70(3).
[172] Ibid article 69(2).
[173] Ibid article 2(5).
[174] Ibid article 2(6).

International law can therefore be nationally enforced within Kenyan courts.[175] However, in an analysis of court decisions following the enactment of the Constitution, Oduor describes the confusion regarding the wording of the Constitution as regards its incorporation of international law.[176] While there is no doubt as to the desire for international law to be considered within the courts, the precise nature of international laws, and the dominance of those laws over domestic legislation is questionable.[177] Odour argues for the amendment of the Constitution to clarify international laws position within Kenyan legislation, and states that until such time formal amendment takes place, courts will have the freedom to interpret which international laws are included and the weight that they carry in relation to domestic legislation.[178] How applicable international laws are towards holding government and corporations accountable may therefore only be determined as they are addressed by the courts. With this uncertainty in mind, Part 3.2 will now address the domestic legislation of Kenya, for an assessment of what Kenyans may be assured of in terms of their right to the concepts of CSR addressed in Part 2.

3.2 The Mining Act: Legal Requirements Pertaining to Identified Factors of CSR

The Mining Act regulates the acquisition of legal entitlements to carry out mining and the various activities necessary and auxiliary to mining.[179] While the Mining Act does not specifically mandate CSR as a requirement in the granting of rights, it does contain several provisions which fall under the criteria of CSR as established in Part 2.[180] There are two of are particularly important to examine in relation to the concept of CSR within Kenya's mining sector; first, prospecting permits and licences, and second, mining permits and licences.[181] The examination of the procedures regarding the granting of these rights, along with general provisions of the Mining Act will be examined in Part 3.2 to establish what elements of CSR, as set out in Part 2, exist in the granting of mineral rights within the Mining Act. Part 3.3 will then address potential problems to the enforcement of CSR within the Mining Act in terms of the elements of CSR. Based on the interest Kenya has in attracting investors to meet its goals

[175] "(5) The general rules of international law shall form part of the law of Kenya. (6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution." Ibid article 2(5)(6).
[176] Maurice Oduor *The Status of International Law in Kenya* (2014).
[177] Oduor op cit note 180 at 102-3 and 112-19.
[178] Oduor op cit note 180 at 124-25.
[179] Mining Act supra note 7.
[180] Ibid.
[181] The difference and relevance of a permit versus a licence is the scale of the mining operation. A permit relates to small scale mining, and a licence relates to large-scale mining. Mining Act supra note 7 section 4.

of increasing the mineral wealth of the country, Part 3.4 will address problems that potential investors could face because of the choice of law pertaining to CSR.[182]

3.2.1 Integrated, Sustainable, Decision-Making

does [183] reare however placed on the holders of prospecting permits, which include taking“”“any”

Despite the lack of specific environmental requirements in respect of prospecting permits, those who receive a mining right of any kind under the Act are still required to adhere to all Kenyan environmental law contained outside of the Mining Act.[184] Additional emphasis on the granting of a mineral licence is made by the absolute denial of a licence to be issued without the prior obtainment of an environmental impact assessment licence and an approved environmental management plan.[185]

In an application for a mining permit, the applicant is not required to submit an environmental plan.[186] They are required, however, to take all measures necessary to protect and restore the environment.[187] The applicant is obliged to adhere to a plan of which the Cabinet Secretary has approved, setting out how the mining operations will be undertaken. The details of what this plan should include are not specified within the Mining Act.[188] The only specified environmental consideration in the granting of a mining permit relates to an agreed-upon method of disposing of waste products, and the prohibition of certain equipment and chemicals.[189]

The Mining Act mandates that the holders of both permits and licences are required to ensure the rehabilitation of the land to its original state, or as close to is as reasonably possible upon the completion of mining operations.[190] The Cabinet Secretary may not grant a prospecting or mining licence unless plans have been submitted for approval relating to “site

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[182] Refer to Part 1 for a reminder of the Kenyan government’s vision.
[183] Mining Act supra note 7 section 129(2).
[184] Ibid section 176(1).
[185] Ibid section 176(2). The need to obtain an approved environmental impact report is emphasised throughout the Mining Act prescription towards prospecting licence. Specifically, within sections; 78(d), 86(3)(c), 101 (2)(i), 103(c), 106(i), and 109(c).
[186] Ibid section 136(2).
[187] Ibid section 140(c).
[188] Ibid section 140(a).
[189] Ibid section 140(f)(g).
[190] Ibid section 179(d).

mitigation and rehabilitation or mine-closure".[191] According to the Mining Act, the Cabinet Secretary may prescribe regulations for the applicant to fulfil in this regard. [192] To date there are no available published regulations specifically dealing with rehabilitation, but regulations have been published regarding licence and permit applications.[193] These regulations mandate that prior to the granting of any rights under the Mineral Act, the applicant must comply with all requirements and guidelines prescribed by the Environmental Management and Coordination Act.[194]

The Environmental Management and Coordination Act of 1999 states that the Director-General has three months to approve or reject an application for an environmental impact assessment licence[195]f the applicant has not received communication after such time, then they may continue with their project without official approval.[196] The condition that an approved licence must be obtained prior to the granting of a mineral licence ensures that the applicant may not start their project if they have not received positive feedback. It also ensures that the time frame, stipulated in the Mining Act, for the Cabinet Secretary to approve or reject an application is not too short to ensure the environmental protection of an obtained environmental assessment licence.[197]

While there is no direct mandate within the Mining Act dictating the criteria in which an environmental assessment licence may be granted, there are applicable regulations mandating that all applications for permits and licences need to comply with all regulations and guidelines of the Environmental Management and Coordination Act. [198] The Environmental (Impact Assessment and Audit) Regulations, 2003 indicate several factors which may be considered when conducting an environmental impact assessment.[199] These factors include sustainability issues in terms of; soil fertility, wildlife, forestation, and wetlands,[200] and the effect on the current usage of the land and the continued potential for land

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[191] Ibid section 180(1).
[192] Ibid section 180(2).
[193] The Mining (Licence and Permit) Regulations, 2017.
[194] Ibid section 13.
[195] Environmental Management and Co-ordination Act, 1999 section 58(8).
[196] Ibid sections 58(8)(9). Despite the stated section of the Environmental Management Act, the requirement for an approved environmental impact assessment to be granted prior to any activity which might harm the environment taking place, or any licence being granted for such an activity is re-affirmed within the Environmental (Impact Assessment and Audit) Regulations, 2003 section 4.
[197] Mining Act supra note 7 section 33(2)(a)(b), stipulates that the Cabinet-Secretary has 90 days to approve or reject an application for a prospecting or reconnaissance licence, and 120 days for a mining licence.
[198]Regulations supra note 199 section 13.
[199] Regulation supra note 202 at schedule 2 section 11.
[200] Regulations supra note 202 at schedule 2 section 1(b).

usage.[201] The use and quality of water sources are stated as "important aspects to consider" within the stated regulations.[202] Importantly for the purpose of assessing integrated, sustainable decision-making, the regulations go further than stating natural resources in the provided guidelines of what issues to consider within an environmental assessment. The regulations include the suggestion that social issues may be included in the assessment of a project, such as; the economic impact, disruption of social cohesion, and the effect on human health and culture.[203] The regulations further stipulate that there should be public participation by those affected by the project in question, in so far as allowing those affected to have their views expressed.[204]

The Mining Act further stipulates that the Director of Mines is responsible for advising on the development of policy to ensure sustainable mining of natural resources, and to ensure mining operations consider local and community values.[205] Unfortunately, the process of determining what exactly constitutes the community values is not prescribed.

3.2.2 Stakeholder Engagement

In terms of interested stakeholders and the rights they are given within the Mining Act, the Mining Act includes the interests of the land owner, lawful occupier, local government and the community or its authorities.[206] In terms of the rights that these parties have in respect of engagement in the process of granting mineral rights, the Mineral Act merely mandates the right to be informed via publication of the application in a widely circulated newspaper and the Government Gazette.[207] Consultation is only a requirement where a community has been disturbed in their use of the land and they have opted to be relocated rather than to be compensated for their loss of land rights.[208] In this case, the Cabinet Secretary must ensure that

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[201] Ibid schedule 2 section 4.
[202] Ibid schedule 2 section 5.
[203] Ibid schedule 2 sections 2(a)-(f).
[204] Ibid sections 17(1)(2).
[205] The Mining Act supra note 7 section 20(1)(o).
[206] Ibid section 34(1).
[207] Ibid sections 34(2)(3).
[208] In this case the Cabinet Secretary is required to give notice to the community itself, not the authority it vests under. As community is defined in the Mining Act under s 4 as '(a) a group of people living around an exploration and mining operations area; or (b) a group of people who may be displaced from land intended for exploration and mining operations' this would mean that the Cabinet Secretary is required under the Mining Act to ensure that the actual group of people in question is informed of the application. To what extent they are informed, in terms of the consequences of the application is not prescribed, and therefore has the potential of becoming a mere formality. Ibid section 153(8).

the community members who wish to do so are resituated onto suitable land, given their needs and cultural values.[209]

When an application for a prospecting or mineral right is received, the Cabinet Secretary is mandated to give written notice of the pending application to the land owner or lawful occupant, the community, and the county Government.[210] Notice of the application and the area of land that it shall affect must be published in a newspaper and the national Gazette as well as in the offices of the county Government.[211] Any person may validly object within a specified amount of days,[212] and that objection will be heard and considered by the Cabinet Secretary through the Mineral Rights Board.[213] However, the response to this objection appears to be at the discretion of the Cabinet Secretary, as no requirements in respect of an explanation for the decision, or qualifications relative thereto, are prescribed by the Mining Act. Prior to the recommendation that a mineral right should be granted, the Mineral Board may require the applicant to inform additional persons affected by the mining right, but it does not appear that the approval of any such affected persons is required.[214]

Express consent, from the lawful owner of private land affected by the mining right, is a requirement for the granting of a right, although that consent shall not be unreasonably withheld, and what defines unreasonable is not defined.[215] Where the land affected by the right is community land, consent is a necessary requirement, although not from the actual community members themselves. Instead, consent must be sought from an authority legally obliged to manage and administer such community land, or where the land is unregistered permission is to be obtained from the National Land Commission.[216] The regulations specify that the consent of community leaders will not be sufficient to satisfy the community consent requirement.[217] The regulations further stipulate that prior full and proper disclosure take place in good faith for the prescribed consultation with the landowners to be valid. This is limited to relevant information, and there is no stipulation as to what such relevant information may be.[218]

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[209] Ibid section 153(8).
[210] Ibid section 34(1).
[211] Ibid section 34(2)(3).
[212] 21 days for a prospecting right, and 42 days for a mining right. Ibid sections 34(4)(a)(b).
[213] Ibid section 34.
[214] The section stipulates "any other person in the opinion of the Cabinet Secretary would otherwise be affected by the grant of a mineral right". Ibid section 36(2)(h).
[215] Ibid section 37(1).
[216] Ibid section 38.
[217] Regulations supra note 199 section 23(5).
[218] Ibid sections 23(4)(b)(c).

3.2.3 Community Investment

Demonstrating the Mining Act's desire for all mining entities to operate in conformity, existing holders of large scale mining licences were granted eighteen months from the enactment of the Mining Act and relevant regulations to amend their plans in respect of their mining operations to ensure compliance with the Mining Act.[219] The amendments must take into account the Mining Act's requirements in terms of employment, health and safety, environmental management and community investment.[220]

Applications for prospecting and mining permit do not require applicants to submit any plans regarding local training or employment, and there are no requirements to engage in social upliftment initiatives.[221]

An applicant may be granted a prospecting licence the Cabinet Secretary has received plans relating to the employment and training of Kenyans an environmental rehabilitation plan[222] In terms of CSR principles, the Mining Act therefore mandates some aspects of community investment and sustainable decision-making in terms of the environment and the treatment of citizens.

a mining licence, an applicant needs to comply with the same basic requirements as those required for a prospecting licence.[223] However, additionally, the environmental plan must be submitted to the National Environmental Management Authority. Proof of approval from this department is a requirement, and therefore the acceptance of environmental plan is not left to the Cabinet Secretary's sole discretion. Further, the application is required to include plans for the applicant's proposed socially responsible investments for the local community.[224]

The Mining Act makes allowance for community development, or at least a plan for community development to be in place where the mining right relates to large scale mining.[225] The Cabinet Secretary does have the power to include conditions of community development in terms of any mineral right granted in accordance with the Mining Act, but there are no requirements prescribed for when the Cabinet Secretary should enforce this discretion.[226] The

[219] Mining Act supra note 7 section 225(5). The Mining Act was enacted on 27 of May, 2016.
[220] Ibid section 225(5).
[221] Ibid sections 129(2) and 136(2).
[222] Ibid sections 72(3)(c)(e) and 78(c)(d).
[223] Ibid section 101.
[224] Ibid sections 101(2)(j) and 103(g).
[225] Ibid section 117(2)(j).
[226] Ibid section 42.

holder of any mineral right is obliged to give preference in terms of employment to local community members and Kenyan citizens.[227] The Mining (Employment and Training) Regulations, 2017 stipulate that holders of mineral licences and rights should submit an "employment, training and succession plan" for the Cabinet Secretary's approval.[228] The aim of the regulations, and hence the plan to be approved, is to promote job creation within the mining industry and develop local capacity within the mining industry.[229] The holders of all mineral rights are further obliged to give preference to the local community and Kenyan citizenry goods, services and corporations, in carrying out their operations and dealings.[230]

The holders of mining rights in terms of large-scale mining operations are obliged to go a lot further in terms of their community involvement.[231] These right holders are required to provide training and capacity building for the benefit of employees, including working towards eliminating all non-Kenyans in technical positions within a timeframe established by the Cabinet Minister.[232] The holder of such a right is further required to establish a link with the universities in terms of research and environmental factors.[233] Where it is necessary, the holders of large-scale mining rights are also required to undertake socially responsible investments for the community, as well as enter a community development agreement where the regulations mandate it.[234]

In the context of large-scale mining rights, the Cabinet Secretary has no discretion to award a right unless (i) rehabilitation plans have been submitted for approval,[235] and (ii) a bond or other type of financial security has been obtained that is sufficient to ensure the rehabilitation of the land used in relation to the right granted.[236] Environmental restoration is therefore mandated within the Mining Act, and while there have been no specific regulations released by the Cabinet Secretary as yet, the Mining Act does mandate that upon completion of the project, the land "shall be restored to its original status or to an acceptable and reasonable condition as close as possible to its original state".[237]

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[227] Ibid section 47(1).
[228] The Mining (Employment and Training) Regulations, 2017 section 6.
[229] Ibid sections 3(a)(b).
[230] Mining Act supra note 7 section 50.
[231] Ibid section 47(2).
[232] Ibid sections 47(2)(a)(b)(c)(d).
[233] Ibid section 47(2)(e).
[234] Ibid sections 47(2)(f)(g) and 109(i). The regulations provide no clarity as to what the rights holders obligations are in this regard. Regulations supra note 199.
[235] Mining Act supra note 7 section 180(1).
[236] Ibid section 181.
[237] Ibid section 179(d).

An application for a mineral licence must include a plan for local employment and training, as well as a plan for socially responsible investment within the community in which its operations are situated.[238] The Cabinet Secretary may only grant an application for a mining licence where he is satisfied that the plan for community development is socially responsible.[239] What responsible means in this regard is not defined in the Mining Act or regulations,[240] and therefore there is a large amount of discretion left to the Cabinet Secretary in each case.

The application for a mining licence received from a holder of a prospecting licence shall be granted when the applicant has found minerals on the land and complies with the provisions of the Mining Act.[241] This provision demonstrates the importance of clarity within the Mining Act regarding what is required of an applicant in terms of community development. The wording of this section could result in an application for a licence being granted with inadequate protection of the community, merely because the applicant technically has complied with their requirements as directly stated under the Mining Act.

The Mining Act stipulates that all mining operations are subject to the Occupational Health and Safety Act, 2007.[242] The purpose of the Occupational Health and Safety Act is to "secure the safety, health and welfare of persons at work"[243] and to protect people placed in a situation of risk, in terms of their health and safety, "arising out of, or in connection with, the activities of persons at work".[244] A general duty is placed onto the person physically in control of the workplace to ensure a safe and healthy environment for the people within a workplace,[245] specifically ensuring that provision is made for relevant training.[246] Risk assessments are mandated in the specific duties within the Occupational Health and Safety Act which result in the positive obligation to implement preventative and protective measures in terms of the use of "all chemicals, machinery, equipment, tools and process".[247] Where the workplace is "likely to emit, poisonous, harmful, injurious or offensive substances, into the atmosphere" there is an obligation to "use the best practicable means to – (a) prevent such emissions into the

[238] Ibid section 101(g)(i).
[239] Ibid section 103.
upra note 199 sections
[241] The Mining Act supra note 7 section 104.
[242] Ibid section 178(1).
[243] Occupational Safety and Health Act, 2007 section 3(2)(a).
[244] Ibid section 3(2)(b).
[245] "'Occupier' means the person or persons in actual occupation of a workplace, whether as the owner or not and includes an employer". Ibid section 2.
[246] Ibid section 6(2)(c).
[247] Ibid section 6(3).

atmosphere; and (b) render harmless and inoffensive the substances which may be emitted".[248] The Mining Act requires the Cabinet Secretary to make additional requirements in terms of the safe and proper treatment of labourers and the conditions to which they are exposed to while carrying out mining operations.[249]

3.2.4 Transparency

The Mining Act requires that a registry of all mining rights be established and maintained, and that this will be a public document that is accessible in accordance with the regulations.[250] The Mining Act stipulates that, subject to article 35 of the Constitution, which recognises the right to access information, all mineral agreements should be made public.[251] The Cabinet Secretary is made personally liable for ensuring access to information, specifically including mineral agreements, but this obligation is stated as a responsibility to ensure access to information under the Mining Act in totality.[252]

In terms of the Mining Act the holder of a reconnaissance, retention, prospecting or mineral licence is required to keep records of its mining operations and related activities, finances and other records prescribed by the Cabinet Secretary and to send those records to the appropriate office. [253] Whether those records will form part of the public registry appears to be up to the discretion of the Cabinet Secretary. There shall also be a register for mineral dealer permits containing "details of each application, grant, assignment, transfer, notice, surrender, suspension and cancellation of a mineral right".[254] The Mining Act prescribes that this registry shall be deemed a public document, open for any interested person to view on the payment of a fee.[255]

The Mining (Licence and Permit) Regulations, stipulate that any person may "(a) access the non-confidential information on mineral rights and dealings in minerals through the Cadastre; and (b) obtain hard copies of any non-confidential information contained in the

[248] Ibid sections 19(1)(a)(b).
[249] The Mining Act supra note 7 section 178(2). While no regulations specifically related to health and safety have been published as of yet, the Mining (Employment and Training) Regulations section 6(5) stipulate that licence holders "shall comply with the relevant labour, employment, social security and any regulations made under such laws of Kenya". Regulations supra note 234.
[250] The Mining Act supra note 7 section 191. Regulations supra note 199.
[251] The Mining Act supra note 7 section 119(1).
[252] Ibid section 119(2).
[253] Ibid sections 69, 79, 90, and 110.
[254] Ibid section 192(1).
[255] Ibid section 192(4).

Cadastre upon the payment of a prescribed fee".[256] The regulations stipulate that the Cadastre shall be an online source of information, accessible through the Ministry of Mining website.[257]

3.2.5 Accountability

To assess the level of accountability the Mining Act introduces towards mineral right holders, powers of inspection are of paramount importance. The Cabinet Secretary may designate public officers to inspect the mine.[258] The Mining Act does not mandate the Secretary to do so, nor does it specify the proportion of officers available for inspection per number of existing mines, or how often they should be mandated to carry out such inspection.[259] The Cabinet Secretary, and any public officer he nominates, has wide powers to carry out the necessary functions to protect the social and environmental rights of the Kenyan people.[260]

Furthermore, the Mining Act makes provision for a suitably qualified police officer to make an arrest, on reasonable grounds but without a warrant, of anyone that he determines has contravened the Mining Act.[261] Section 204 of the Mining Act states that anyone who obstructs or hinders a right holder from an authorised activity under the Mining Act is liable to face imprisonment, a minimum fine of five million shillings, or both.[262]

The failure to allow the Cabinet Secretary, or duly authorised public officer, access to mining records, is subject to a penalty and possible imprisonment.[263] Disregard of the obligation to keep records, or the deliberate falsification of such records, is similarly subject to a penalty and imprisonment.[264]

The Mining Act makes provision for personal liability for all who are complicit in an offence under the Mining Act to ensure that the directors and principal parties involved may be held personally liable.[265] The Mining Act further provides that where an offence is committed which the Mining Act does not specify a penalty, the person who commits such an

[256] Regulations, supra note 199 sections 4(5)(a)(b).
[257] Regulations supra note 199 sections 4(1)(3).
[258] Ibid section 196.
[259] Ibid section 196(1).
[260] Ibid section 197(1).
[261] Ibid section 199.
[262] Ibid sections 204(a)(b)(c).
[263] The penalties state up to 3 years imprisonment, a fine of not less than one million shillings, or both. Ibid sections 205(1)(e) and 205(2)(a)(b)(c).
[264] Ibid section 206.
[265] Ibid sections 212-13.

offence, may be subject to imprisonment, a fine, or both.[266] This means that if there is sufficient will on the part of the authorised personal, mining corporations and right holders may be held personally accountable through the threat of imprisonment for failure to secure the social and environmental rights protected under the Mining Act. In addition to the threat of imprisonment and financial penalties, the court is entitled to revoke the mining rights of the convicted holder altogether.[267] This is a discretion that is left open to the courts, or the Cabinet Secretary and his delegates to enforce. The provision is nevertheless made for the authorisation of such an order, and therefore, the court has the power to revoke a mining right due to insufficient human and environmental protection.

The for a prospecting licencefurther demonstratethe financial and technical capacity to carry out the operations and has the relevant industry experience to do so.[268] The Cabinet Secretary has the opportunity and the power at this point to assess the applicant's reputation within the industry and the results of their previous prospecting endeavours. Therefore, where applicants have left land rehabilitated or failed to train local people, the Cabinet Secretary would be empowered to refuse to grant a prospecting licence on that basis.[269] The Mining Act is not specific on whether the applicant must disclose previous failings in terms of previous involvement in mining activates, and therefore, while the Cabinet Secretary may be empowered by the Mining Act to refuse to grant a prospecting licence in light of this information, whether he will have the necessary information available to him to make an informed decision in this regard is not certain. If the Cabinet Secretary were to avail himself of this empowering provision to this extent, there would be a greater level of accountability in terms of holding corporations responsible for their actions.

The Mining Act states that the holders of prospecting and mining permits and licences are required to adhere to international standards of good practice and any such prescribed guidelines.[270] The Director of Mines is held responsible for ensuring that the Cabinet Secretary is advised on the development of international policy so as to ensure compliance with such

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[266] Ibid section 215.
[267] Ibid section 216. The Cabinet Secretary or public officer may apply to the court to revoke these rights through section 200 of the Mining Act.
[268] Ibid sections 72(1)(d) and 72(3)(b).
[269] This does not mean that the Cabinet Secretary will use this power to its full effect, but given the Constitutional obligations placed on the government and individuals, it should at least be considered unreasonable not to.
[270] The Mining Act supra note 7 sections 67(1)(n), 77(1)(i) and 109(h).

standards and conventions relating to the sustainable development of mineral resources.[271] The holders of mining rights may therefore be held accountable to international standards, if they can be established.[272]

3.3 Potential Problems with the Mining Act for the Enforcement of CSR

Having identified Kenya provides constitutional rights to protect the values of CSR in Part 3.1, it can be concluded that the Constitution provides rights which should ensure the protection of social welfare to the Kenya people. Despite the lack of a direct mandate to include CSR in the process of obtaining and using mineral rights under the Mining Act, Part 3.2 identified aspects of the Mining Act which fall under each element of CSR identified in Part 2. A description of the consequences of the choice of law above, identifying dangers to the enforcement of the identified elements of CSR will now be described in Part 3.3.

3.3.1 Integrated, Sustainable, Decision-Making

In terms of prospecting permits, the Mining Act only mandates sustainable decision-making in terms of environmental protection and transparency.[273] The requirement that an environmental impact licence must have been approvedprior to the granting of any licence is a positive step towards protecting the environment and ensuring environmentally sustainable decision-making.[274]

The suggestion to include social issues in the consideration of the granting of an environmental assessment licence[275] may suggests that the communities should be allowed to participate in whether such a licence may be granted based on potential negative social consequences. The fact that this is merely a suggestion does not clarify if this would be the case however. That public views of those affected by a project should be allowed to be expressed is a positive inclusion in the regulations, however determining who is affected by such a decision is not specified.[276]

[271] Ibid section 20(o). The Mining Act does not provide a definition of sustainable development, the definition provided in Part 2 will be assumed for the purposes of this thesis.
[272] There are no specific guidelines prescribed by Kenyan policies as of yet, but a general comment on internationally prescribed guidelines can be referenced in Part 2.3 of this thesis.
[273] The Mining Act supra note 7 sections 133(b)(c).
[274] Ibid section 176(2). The need to obtain an approved environmental impact report is emphasised throughout the Mining Act. Specifically, within sections; s 78(d), 86(3)(c), 101 (2)(i), 103(c), 106(i), and 109(c).
[275] Regulations supra note 202 schedule 2 sections 2(a)-(f).
[276] Ibid sections 17(1)(2).

The level of integration, in terms of mining operations recognising and respecting local and community values is unclear as there are no guidelines prescribed by the Mining Act in terms of what should be included in updated policy.[277]

3.3.2 Stakeholder Engagement

In merely providing for interested stakeholders to be informed via a widely circulated newspaper and the Government Gazette,[278] the Mining Act does not provide for effective communication to any illiterate or possibly rural parties, potentially leaving these groups without any knowledge in mining applications prior to the rights being granted. While any person or community may object to an application,[279] without prescribed guidelines as to what views the Cabinet Secretary may disregard,[280] it will be hard to determine whether there has been sufficient engagement. The guidelines provided by the regulations in respect of landowner consent,[281] help to ensure that at least the land owners and lawful occupiers will be fully informed of any mineral rights to be granted over their land, but it does not provide for further affected parties.

3.3.3 Community Investment

The Mining Act appears to focus on large-scale mining in terms of community investment obligations. In terms of small scale mining rights, the Mining Act provides no serious consideration towards any community investment.[282] The Mining Act does however mandate at least the concept of community investment in respect of the granting of mining licences, when it refers to the inclusion of plans for social investment which must be submitted by the applicant,[283] and the training and employment criteria.[284] What social investment is considered as is not defined within the Mining Act however, and therefore is left open to interpretation.

3.3.4 Transparency

Upon attempting to access the Mining Cadastre through the Ministry of Mining in Kenya's official website it becomes clear that although it is the mandated form of communication,

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[277] The Mining Act supra note 7 section 20(1)(o).
[278] Ibid sections 34(2)(3).
[279] Ibid section 34(4).
[280] Ibid section 34(5).
[281] Regulations supra 179 sections 23(4)(b)(c).
[282] The Mining Act supra note 7 sections 129(2) and 136(2).
[283] Ibid sections 101(2)(j) and 103(g).
[284] Ibid section 47(1).

public access is not provided for. Only registered users may gain access to such information, and to become a registered user, one must be either in possession of or applying for a mining right.[285] A vital part of transparency is accessibility, and with the cite offering no communication on the matter it is difficult to determine how useful it shall be.[286]

3.3.5 Accountability

The Mining Act's failure to create a mandate on the number of public officers required in proportion to existing mining operations could cause a problem for effective monitoring of mining activities.[287] However, should the Cabinet Secretary decide to designate enough efficient and effective public officers, the mining industry in Kenya could be well monitored and in line with the objectives of responsible mining to which the Constitution and the Mining Act aspire.

That the Mining Act's provides for arrest of any person contravening the Mining Act is a good enforcement mechanism if applied correctly, especially if there are insufficient public officers appointed.[288] However, the section of the Mining Act which imposes penalties against anyone hindering a mineral right holder's activities could pose potential problems for the interests of CSR.[289] First, it could potentially prohibit communities or persons forming peaceful protests that would result in the delay of the exercise of a right. Second, and of most concern, it carries with it a heavier sentence than that for any of the mineral right holders in the face of blatant disregard of the provisions of the Mining Act.[290] This brings into question the real objectives of the Mining Act, and questions the seriousness of the response of authorities towards non-commitment or disregard for social and environmental protection obligations within it, especially considering the general nature of such obligations.

While penalties are identified in the Mining Act for lack of record keeping and a failure to disclose such records,[291] it is concerning that the penalties that the perpetrators may be subject to in this regard are not as harsh in terms of prison time as a person could potentially

[285] https://portal.miningcadastre.go.ke.
[286] No communication in this regard relates to attempts to contact the Ministry through the official contact details provided on the cite, which have received no response. https://portal.miningcadastre.go.ke.
[287] The Mining Act supra note 7 section 196.
[288] Ibid section 199.
[289] Ibid section 204.
[290] Ibid sections 215, 202, 203, 205(2).
[291] Ibid section s205-6.

face for interfering with a right holder, as stated above.[292] Furthermore, in terms of monetary value, the amounts may be nominal in relation to general large-scale mining operational costs.

It is concerning that falsification of records, as well as a refusal to keep them altogether, is deemed a lesser offence than refusing to hand over records at all. Added to this, the Mining Act goes on to criminalise the distribution of classified information other than in specific official capacities.[293] The Mining Act does not clarify what classified information in this regard would entail, or why it is necessary for this offence to justify imprisonment. In terms of creating an open, transparent, and accountable mining industry, it seems contradictory to disable a potential whistle blower from coming forth with information that would be pertinent for the public, with the threat of harsh penalties and imprisonment.[294]

3.4 Potential Problems with the Mining Act for Investors

An assessment of investor interest is important to the idea of social welfare of Kenyan citizens, in terms of what the government seeks to gain from the exploitation of Kenya's mineral resources.[295] Looking at the laws that have been addressed in Part 3.2, and what they mean for investor potential will provide clarity on whether Kenya may gain the investors it seeks to grow their economy. The benefits that the country seeks to gain in terms of that economic growth may only be achieved if the laws provided attract investors.

Corruption and uncertainty are factors that seriously undermine investor interest.[296] Investors want to know what their obligations are so that they can realistically determine whether they will be able to meet those obligations for the duration of their project.[297] Where laws are unclear, or open to subjective bureaucratic determination, investors are unlikely to choose to risk their obligations changing as the project continues.[298] The dependence on the

[292] Ibid section 204.
[293] Ibid section 211.
[294] While KSH 500 thousand may be inconsequential to a large-scale mining company, to an individual Kenyan it would be a financially crippling amount. At the current conversion rate, this would amount to USD 4940.
[295] Refer to Part 1 of his thesis describing the Kenyan government's aim to significantly increase the GDP contribution by the mineral industry.
[296] Where the legal system places large power in the hands of an office bearer or body, especially where that power is discretionary, it opens the doors to corruption. Mirian Kene Omalu & Armando Zamora *Key Issues in Mining Policy: a Brief Comparative Survey on the Reform of Mining Law* (1999) 22 and 37.
[297] Omalu op cit note 302 at 37. Campbell op cit note 10 at 807
[298] As many investments result in failures investors are only likely to invest where the potential rewards can be balanced with the risk, major factors in such a risk assessment are political and economic stability. Martin Kwaku Ayisi *The Legal Character of Mineral Rights Under the New Mining Law of Kenya* (2017) 26.

Cabinet Secretary as the ultimate decision maker for many of the issues involving CSR does not strengthen the stability of the mineral regime; the discretion afforded is likely to create uncertainty and might provide an opportunity for corruption.

The regulations provide no information about the suspension or revocation of a mining right.[299] The failure to provide regulations in this regard makes the law uncertain. This is detrimental both to those seeking to enforce a penalty, as well as to mining corporations whose greatest threat is the risk of losing the right altogether, which would result in losing their investment in its entirety.

The inconsistency between what is required by the Constitution and the Mining Act in terms of access to information and the realities of what kind of information is accessible leaves the Cabinet Secretary's actions open to public scrutiny which could very likely lead to costly and timely arbitration. Such arbitration would put mineral right holders at risk, in terms of the validity of the rights they hold.

Financial assistance for mining corporations in most cases now demands environmental and social protection mechanisms, which make environmental impact assessments, transparent planning, and enforcement mechanisms, crucial aspects to enable investors to risk the capital necessary for a mining operation.[300] The sections of the Mining Act discussed above, which do not require the applicant of a mining permit to submit an environmental plan could be potentially problematic for investors looking for financial assistance.[301] It could cause further problems due to the uncertain nature of what is actually required of the corporation, allowing the corporation to assess its risks and profitability from the outset of the project is an important factor in their ability to assure investors that the project is worth their financial risk, and to determine whether the project has a stable future.

Investors feel a degree of safety if they have real rights in the minerals that they acquire through the process.[302] The types of rights given to them therefore make a large impact on whether they are willing to risk the initial investment. Ayisi argues that under the Mining Act, the mineral right holder possesses a contractual right because the right flows from the Cabinet

[299] Regulations supra note 199 section 28.
[300] Omalu op cit note 302 at 35-6.
[301] In example, "the operational policies of the World Bank as well as other leading institutions would make it impossible to secure a loan without proper environmental assessment and sustainable operations". Bantekas op cit note 3 at 324 and 334.
[302] The type of right granted will determine the States capacity to interfere with the right holder once the right has been granted. Ayisi op cit note 283 at 32.

Secretary's ability to enter into a contract on behalf of the State.[303] Accordingly, the Cabinet Secretary is acting under contractual capacity and not legislative capacity.[304] In this capacity, the State remains owner of the mineral resources, granting the right holder a contractual right and not a real right to the minerals obtained.[305] Obligations placed on the right holder flow from its contractual obligations in terms of the licences or permits granted, further pointing towards the contractual nature of the right.[306] It may be argued that once the minerals have left the land, or been severed, they become property as defined under the Constitution.[307] Ayisi argues that due to the common law doctrine of *proft a prendre*, since the minerals are capable of being owned, once severed from the land, ownership passes to the mineral right holder.[308] As there is no provision within the Mining Act that deals specifically with when ownership of a mineral passes to the right holder, the question will remain as to the status of the right created until such time as the courts make a ruling over the question under the new Mining Act.[309]

An investor's security over the rights they hold lies partially in the dispute mechanisms available. Access to judicial systems is only an advantage where the judiciary is competent and relatively certain.[310] Right holders have the authority to challenge detrimental actions taken by the Cabinet Secretary, in terms of revocation of their rights, in the high courts, as well as at an international level.[311] Where investors lack confidence in local courts, they feel more secure with the option of international tribunals.[312] The option of international arbitration is therefore beneficial for investor confidence.[313]

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[303] Referring to section 32 of the Mining Act which states the Cabinet Secretary capacity to grant, reject or revoke mineral rights. Ayisi op cit note 304 at 33.
[304] Ayisi op cit note 304 at 33.
[305] Ayisi op cit note 304 at 34.
[306] Ayisi op cit note 304 at 34.
[307] Ayisi op cit note 304 at 35.
[308] Ayisi op cit note 304 at 36.
[309] Ayisi op cit note 304 at 36
[310] Where the judicial system is inefficient or corrupt there is no benefit to having access to it as it will increase costs and add delays. Omalu op cit note 302 at 20-1.
[311] Ayisi op cit note 304 at 41.
[312] Ayisi op cit note 304 at 41.
[313] Investors will have this option in disputes relating to Mineral Agreements. The Mining Act supra note 7 section 117(2)(i).

4CONCLUSIONS

This thesis provided a general discussion on the concept of what CSR entails, and showed that while there are multiple definitions of CSR, most definitions focus on responsibilities of corporations towards sustainable social and environmental development. Given that the nature of developing countries may differ in their requirements of CSR, this thesis focused on the five elements outlined by Howard.[314] A brief examination of what it means to have voluntary and mandatory aspects of CSR outlined the dangers of voluntary mechanisms of CSR, especially where the potential exists for a lack of enforcement through mechanisms of civil society. An international perspective of CSR demonstrated that corporations may be held accountable for their impact on society, if the State is inclined to make regulations and policies that may be enforced on a domestic level.

An overview of the Constitution demonstrated that Kenya's supreme law provides for all the identified aspects of CSR to be included in Kenyan legislation. Sustainable use of Kenya's natural resources was shown to be mandated by the Constitution, with the State merely acting as a trustee for the resources of the people. The Constitution further mandated that the profit from the management of Kenya's natural resources should be for the benefit of society. Further, public participation, transparency, and accountability were shown to be fundamental values of the Constitution. The combination of these values demonstrates the commitment of the Constitution to the principles of CSR as set out in this thesis.

The Mining Act was reviewed to determine what aspects of the Kenyan mining law mandate the application of CSR. It was shown that all the elements addressed by Howard[315] are present to some degree within the Mining Act. While the Mining Act significantly provides for the protection of the natural environment, very little is mandated for the protection and enhancement of society, except for general labour safety provisions. Where the Mining Act does provide for community development, the law is unclear and fails to provide specific guidelines. Detailed and specific regulations will be crucial in determining whether effective community development takes place in future mining operations. While the Mining Act provides for public participation, the process as mandated by the Mining Act may mean that local rural communities may not be effectively included in the process. While the Mining Act makes provision for accountability towards mineral right holders with the possibility of

[314] Howard op cit note 2.
[315] Howard op cit note 2.

penalties, including both imprisonment and fines, a mandate to ensure an effective monitoring system is in place is lacking. An important factor in determining whether the Mining Act will succeed or fail in ensuring social welfare, rests on the choice of enforcement mechanisms to ensure compliance with the spirit of the law. Resources and enforcement mechanisms are necessary to ensure such compliance, and where these are lacking, the positive aspects of the law discussed will amount to nought.[316]

The responsibility of a corporation to make a profit was recognised as an integral part of sustainable development, and the problems potential investors may face was discussed in recognition of this responsibility. The lack of clarity, and therefore certainty, within the Mining Act is a potential disincentive for investors. The failure of specific regulations relating to the revocation of rights, and clarity of the type of rights granted within the Mining Act could further prevent potential investor interest. Corporations are not as concerned with what the law is, so much as will it remain stable.[317] While investors will still be interested in Kenya's resources, because they exist,[318] the ability of the law to change may pose a deterrent for long-term investment.

While there is no express recognition of the concept of CSR within the Mining Act, Kenya's mining legislation nevertheless appears to embrace the principles of CSR. Kenya's choice of law demonstrates an understanding of the importance of mandated CSR in ensuring the protection of its people's rights. However, on examination, there are several fundamental problems with the Mining Act and its potential ability to provide for the social welfare of its people. These failures may endanger the protected constitutional rights of the Kenyan people, pose a threat to attracting new investors, and ultimately prevent the growth of Kenya through the responsible use of its natural resources.

If the elements of CSR mandated within the Mining Act are not enforced it could put other sectors, mainly agriculture and tourism at risk, which could have a dramatic impact on Kenya's GPD, regardless of whether the mining industry reaches the goal to increase the mining industry's contribution to 10 per cent.[319] With a correlation between significant mineral

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[316] Bhatt op cite note 6 at 248. Campbell op cit note 10 at 812.
[317] Tully op cit note 1 at 144.
[318] Only 40 per cent of investor decision is based on policy considerations, corporations mainly focused on the abundance of the mineral. Taylor Jackson, and Kenneth P Green *Fraser institute Annual Survey of Mining Companies: 2016*.
[319] Ross supra note 20 at 240.

wealth and violence leading to civil unrest, there is a risk that mismanagement of mineral resources could potentially lead to civil war within Kenya.[320]

It is beyond the scope of this thesis to examine the effectiveness of Kenya’s civil society to ensure potential voluntary aspects of CSR are enforced. Given the potential dangers to social welfare when there is a lack of absolute assurance that civil society will be able to fill this need, the Kenyan government needs to seriously consider the risk of uncertain regulation and enforcement the Mining Act may pose. For the Mining Act to have any realistic achievements in terms of fulfilling the identified elements of CSR, this thesis concludes that the Kenyan authorities must provide the necessary human and technological resources to ensure compliance with the provisions of the Mining Act. A failure to ensure such resources are made available, will endanger the social welfare of Kenyan citizens through the failure to provide for the protection of Kenyan people and their environment.

[320] Ross supra note 20 at 245. Kenya’s instability, and therefore risk potential in this regard, is demonstrated by the violence that elections, and radical views have caused in the recent past. The 2007 elections claimed the lives of 1,100 people, and forced 600,000 from their homes. www.nation.co.ke. In the 2017 elections, News 24 reported on 92 deaths and 86 cases of sexual assault. www.news24.com There have also been mass extremist killings based on religion, such as the mall killings in 2013, which took 67 lives, and the attack on one of the universities in 2015 which claimed 148 lives. www.news24.com.

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