

**30 May 2013**

**LEGAL AUDIT REPORT – IMPLEMENTATION OF  
THE EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE IN ZAMBIA**

**For and on behalf of  
ZAMBIA EXTRACTIVE INDUSTRIES  
TRANSPARENCY INITIATIVE**

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**LEGAL AUDIT REPORT ON IMPLEMENTATION OF  
THE EXTRACTIVE INDUSTRY TRANSPARENCY INITIATIVE IN ZAMBIA**

**PART I : INTRODUCTION AND SCOPE**

**1. DEFINITIONS**

“**Auditor General**” means the auditor general appointed under the Constitution of Zambia.

“**Bank of Zambia Act**” means the Bank of Zambia Act No 43 of 1996.

“**Commissioner General**” means the Commissioner General of ZRA as appointed under the Zambia Revenue Act.

“**Competition Act**” means the Competition and Consumer Protection Act No. 24 of 2010.

“**Companies Act**” means the Companies Act Chapter 388 of the Laws of Zambia.

“**Customs and Excise Act**” means the Customs and Excise Act Chapter 322 of the Laws of Zambia.

“**Councils**” means all city, municipal and district councils established under the Local Government Act.

“**EITI**” means the Extractive Industries Transparency Initiative.

“**Electronic Communications Act**” means the Electronic Communication and Transactions Act No. 21 of 2009.

“**Environmental Act**” means the Environmental Management Act No 12 of 2011.

“**Forests Act**” means the Forests Act Chapter 199 of the Laws of Zambia.

“**Government**” means the Government of the Republic of Zambia.

“**Income Tax Act**” means the Income Tax Act Chapter 323 of Laws of Zambia.

“**Lands Act**” means the Lands Act Chapter 184 of the Laws of Zambia.

“**Legal Audit**” means the exercise undertaken by the Legal Consultant pursuant to the ToRs including reviewing the existing legislation and administrative policies, undertaking comparative studies, and providing recommendations and practical solutions towards the implementation of the Project.

“**Legal Audit Report**” means this audit report.

“**Legal Consultant**” means Charles Mkokweza engaged to undertake the Legal Audit.

“**Local Government Act**” the Local Government Act Chapter 281 of the Laws of Zambia.

“**Mines and Minerals Act**” means the Mines and Minerals Development Act No 7 of 2008<sup>1</sup>.

“**Mines Department**” means the Department of Mines under the MoM as established under the Mines and Minerals Act consisting mainly of the Director of Mines, the Director of Mine Safety and the Director of Geological Survey.

“**Mining Companies**” means the companies that have been issued mining rights or non-mining rights under the Mines and Minerals Act or other companies operating in Zambia with significant interest in such companies.

“**Minister of Environment**” means the Minister responsible for the environment and natural resources.

“**Minister of Finance**” means the Minister responsible for finance and national planning.

“**Minister of Mines**” means the minister responsible for mines and minerals development under the Mines Act.

“**MoF**” means the Ministry of Finance and National Planning.

“**MoM**” means the Ministry of Mines, Energy and Water Development.

“**MoM Charter**” means the Client Service Charter issued by MoM and dated February 2009.

“**NAPSA**” means the National Pension Scheme Authority established under the National Pension Act.

“**National Pension Act**” means the National Pension Scheme Act No 40 of 1996.

“**National Road Fund Act**” means the National Road Fund Act No 13 of 2002.

“**NRFA**” means the National Road Fund Agency established under the National Road Fund Act.

“**Personal Levy Act**” means the Personal Levy Act Chapter 329 of the Laws of Zambia.

“**Petroleum Act**” means the Petroleum (Exploration and Production) Act No of 10 2008.

“**Project**” means the implementation of EITI in Zambia.

“**Property Transfer Tax Act**” means the Property Transfer Tax Act Chapter 340 of the Laws of Zambia.

“**Public Audit Act**” means the Public Audit Act Chapter 378 of the Laws of Zambia.

“**Public Finance Act**” means the Public Finance Act No 15 of 2004.

“**Rating Act**” means the Rating Act No. 12 of 1997.

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<sup>1</sup> Please note that the Mines and Minerals Act is currently under review and may be amended to result in a variation of the impact of the Act on the Project.

“**ToRs**” means the terms of Reference set out in **Annexure 1**.

“**Value Added Tax Act**” means the Value Added Tax Act Chapter 331 of the Laws of Zambia.

“**Water Resources Act**” means the Water Resources Management Act No. 21 of 2011.

“**WCCB**” means the Workers Compensation Control Board established under the Workers Compensation Act.

“**Workers Compensation Act**” means the Workers Compensation Act No. 10 of 1999.

“**Zambia Revenue Act**” means the Zambia Revenue Authority Act Chapter 321 of the Laws of Zambia.

“**ZCCM-IH**” means the Zambia Consolidated Copper Mines Investments Holdings PLC.

“**ZEC**” means the Zambia EITI Council.

“**Zambia Development Agency Act**” means the Zambia Development Agency Act No 11 of 2006.

“**ZEITI**” means the Project.

“**ZEMA**” means the Zambia Environmental Management Authority established under the Environmental Act.

“**ZES**” means the ZEITI secretariat currently based at the MoM.

“**ZRA**” means the Zambia Revenue Authority established under the Zambia Revenue Act.

“**ZRA Code of Ethics**” means the Zambia Revenue Authority Code of Ethics issued by ZRA.

## 2. INTRODUCTION

### 2.1 What is EITI

EITI is postulated as the global standard for promoting transparency and accountability in countries rich in oil, gas or mineral resources. The key idea behind EITI is that entities or companies involved in the extractive industries (mainly the mining sector<sup>2</sup> for the purposes of implementing the Project in Zambia) are subjected to a process of publicising what they pay to the state while the state is obliged to disclose what it receives from such companies.

### 2.2 Objectives of EITI

As a concept, the key objectives of EITI include the following:

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<sup>2</sup> Following positive preliminary indications for prospects of oil reserves in Zambia and the promulgation of new legislation to this effect a review of proposed legislation to regulate petroleum exploration is set out in Annexure II

- (a) strengthening governance;
- (b) enhancing transparency and accountability in the extractive industries;
- (c) increase the participation of civil society in key sector decisions; and
- (d) address the negative public perception of the industries and Government.

### 2.3 **Benefits of EITI**

The project will invariably result in many benefits to the country and it is hoped that some of these would include:

- (a) improve governance;
- (b) improve revenue collection;
- (c) provide forum for collaboration amongst civil society, Government and extractive industries;
- (d) improve sovereign and corporate rating leading to increased investment;
- (e) reduce risk of conflict;
- (f) encourage an equitable balance between the developmental needs of the country and the postulated investment climate for the country; and
- (g) encourage the public to engage in informed debate about what it takes to exploit the resources of the country, the benefits derived and how those benefits are utilised.

### 2.4 **What EITI is not**

EITI has been confused by many commentators to be intended to be the complete and comprehensive solution for addressing the common misalignments in expectations between the community, Government and the Mining Companies. EITI is not a panacea or silver bullet for addressing all the issues surrounding revenue distribution or sharing from the extractive industries. It is simply one of the key building blocks the others being:

- (a) strengthening weak institutional capacities;
- (b) improving management of the revenue collection system; and
- (c) efficient allocation of revenue to public projects.

### 2.5 **Purpose and Scope of Legal Audit**

- 2.5.1 ZEC has engaged the Legal Consultant to conduct the Legal Audit and produce a Legal Audit Report with respect to the implementation of the Project. The main objective of the Legal Audit is to ensure that the implementation of the Project in Zambia complies with the laws of Zambia as set out more comprehensively in the ToRs.



2.5.2 Specifically, the Legal Audit Report covers the following areas as part of the process for identifying issues that might impact the implementation of the Project in Zambia:

- (a) legislative review with respect to the laws of Zambia;
- (b) comparative implementation review of EITI in selected jurisdictions;
- (c) proposed framework for implementing the Project; and
- (d) practical issues that may impact implementation of the Project.

**PART II : EXECUTIVE SUMMARY****1. INTRODUCTION****1.1 The EITI Concept**

1.1.1 EITI is postulated as the global standard for promoting transparency and accountability in countries rich in oil, gas or mineral resources.

1.1.2 The key idea behind EITI is that entities or companies involved in the extractive industries (mainly the mining sector for the purposes of implementing the Project in Zambia) are subjected to a process of publicising what they pay to the state while the state is obliged to disclose what it receives from such companies.

**1.2 Scope of Legal Audit**

1.2.1 The Legal Audit Report has been prepared for and on behalf of ZEC and on the basis of the scope delimited by the ToRs which mainly focus on Mining Companies.

1.2.2 The task of the Legal Consultant did not include the review of all legislation for the purposes of undertaking any legislative amendments but only for the purposes of identifying possible amendments to key legislation to facilitate the implementation of EITI in Zambia.

1.2.3 The Legal Audit was based on information publicly available and information supplied by ZES. The Legal Consultant did not consider any other documents or information.

1.2.4 The scope may be divided principally into four sections:

1.2.4.1 Review of existing legislation and policies;

1.2.4.2 Comparative study of selected EITI implementing countries;

1.2.4.3 Framework for implementing EITI in Zambia; and

1.2.4.4 Practical issues that might impact implementation of EITI in Zambia.

**2. LEGISLATIVE AND POLICY REVIEW****2.1 Objective**

2.1.1 The main objective of the task of reviewing existing legislation and policies was to identify possible impediments against the implementation of EITI in Zambia.

2.1.2 To achieve this objective the methodology adopted was to measure the impact of groups or classes of statutes and policies initially and to categorise them accordingly. Three categories were recognised for this purpose:

2.1.2.1 Critical Legislation and Policy;

2.1.2.2 Important Legislation and Policy;

2.1.2.3 Relevant Legislation and Policy;

## 2.2 **Critical Legislation and Policies**

2.2.1 This is the class of legislation and policies that was discovered to contain express restrictions against disclosure of financial information administratively collected as a direct impediment to the introduction of EITI in Zambia.

2.2.2 The following statutes and policies make up this category of statutes:

2.2.2.1 Mines and Minerals Act;

2.2.2.2 Companies Act;

2.2.2.3 Income Tax Act;

2.2.2.4 Customs and Excise Act;

2.2.2.5 Value Added Tax Act;

2.2.2.6 Property Transfer Tax Act;

2.2.2.7 Environmental Act;

2.2.2.8 National Pension Act;

2.2.2.9 Workers Compensation Act;

2.2.2.10 Local Government Act;

2.2.2.11 Rating Act;

2.2.2.12 Personal Levy Act;

2.2.2.13 Lands Act;

2.2.2.14 Water Resources Act;

2.2.2.15 National Road Fund Act;

2.2.2.16 Competition Act;

2.2.2.17 ZRA Code of Ethics; and

2.2.2.18 MoM Charter.

## 2.3 **Important Legislation**

2.3.1 This category is mainly made up of legislation and policies that have indirect impediments against the implementation of EITI in Zambia.

2.3.2 The candidates for this category include:

2.3.2.1 Public Audit Act;

2.3.2.2 Zambia Revenue Authority Act;

2.3.2.3 Electronic Communications Act;

2.3.2.4 Bank of Zambia Act; and

2.3.2.5 Zambia Development Agency Act.

## 2.4 **Relevant Legislation**

2.4.1 This category consists of legislation that does not necessarily impede against the implementation of EITI in Zambia but generally set out provisions that may impact EITI either because such legislation is designed with policy similar to EITI or because once EITI is supported by statute such legislation may provide impediments.

2.4.2 This category is made up of the following statutes:

2.4.2.1 Petroleum Act;

2.4.2.2 Forests Act; and

2.4.2.3 Public Finance Act.

## 3. **COMPARATIVE STUDY**

### 3.1 **General**

3.1.1 The main objective of this section is to capture some lessons learnt by jurisdictions in Sub-Saharan Africa that have implemented EITI.

3.1.2 The implementation of EITI was analysed under a ‘desk study’ with respect to two jurisdictions namely Liberia and Ghana.

### 3.2 **Liberia**

3.2.1 For the purposes of certainty of policy and effectiveness of enforcement in preference to simplicity and convenience of implementation Liberia elected to go the route of special stand-alone legislation for the implementation of EITI.

3.2.2 Some important aspects such as alternative methods for dispute resolution were left out in the special legislation making it more difficult to amend as it could only be undertaken by parliament. This is an important lesson for Zambia to learn for the purpose of ensuring that the general policy for EITI is as robust as possible from the outset.

### 3.3 **Ghana**

- 3.3.1 Ghana chose to implement EITI without reliance on specific legislation and it was considered that the existing legal framework permitted the introduction of EITI thereby saving the country from substantial cost and increase in bureaucracy.
- 3.3.2 The downside, however, was that EITI policy has been unwieldy and sometimes ineffective in certain respects because of the absence of specific legislation and the threat of sanctions.

## 4. **FRAMEWORK FOR IMPLEMENTATION OF EITI IN ZAMBIA**

### 4.1 **Options**

- 4.1.1 After considering the legislative and policy review and the comparative study at least four options for implementing EITI in Zambia were identified:
  - 4.1.1.1 Voluntary Compliance Option;
  - 4.1.1.2 Subsidiary Law Option;
  - 4.1.1.3 Amendment Law Option; and
  - 4.1.1.4 New Law Option.

### 4.2 **Voluntary Compliance Option**

- 4.2.1 Voluntary Compliance Option mirrors the Ghana experience under which no law is introduced to facilitate the implementation of EITI in Zambia.
- 4.2.2 Unlike Ghana Zambia's existing statutes as can be noted above do not facilitate, but impede the introduction of EITI. This option was also not feasible on account of the lessons learnt under the Ghana experience.

### 4.3 **Subsidiary Law Option**

- 4.3.1 Under this Option an administrative functionary, as opposed to Parliament, would simply pass subsidiary legislation under a piece of legislation to introduce EITI.
- 4.3.2 Because some of the highlighted impediments are contained in primary legislation, however, it was considered that such an option is not workable as it may not override primary legislation.

### 4.4 **Amendment Law Option**

- 4.4.1 This option is closer to the Ghana experience which assumes that an environment may be created by making amendments to primary legislation to allow for the implementation of EITI without the need for a special statute.

4.4.2 The shortcoming of this option is that policy implementation may be difficult as the EITI policy is unlikely to be the core function of any of the statutes currently in force and conflicts may arise when dealing with multiplicity of ministerial portfolios.

#### 4.5 **New Law Option**

4.5.1 The New Law Option is principally the Liberia experience which requires the promulgation of new and special legislation for the purposes of implementing EITI in Zambia.

4.5.2 This is the recommended option under the Legal Audit Report because it appears to address most of the shortcomings that the other options are subject to. While having more advantages over all other options, however, the New Law Option is not exempt from its own shortcomings as can be noted from the Liberia experience and the consideration of the practical problems referred to below.

### 5. **PRACTICAL ISSUES**

The implementation of EITI in Zambia using the New Law Option is subject to a number of practical problems which are addressed in detail in Section D of this Legal Audit Report (*Practical Issues and Implementation of EITI*).

**PART III : LEGAL AUDIT REPORT****SECTION A : LEGISLATIVE REVIEW****1. INTRODUCTION**

- 1.1 In this section the focus is on the legislative provisions governing both administrative bodies and private bodies which may impede not only on their ability to share information with the public but also to share such information about third parties in their possession under the Project.
- 1.2 The section, apart from legislative provisions, also reviews internal policies, especially of administrative bodies, that may also act as a barrier to disclosure under the Project.

**2. REVIEW OF EXISTING LAWS****2.1 Categories of Legislation**

- 2.1.1 The legislative review has been categorised into three classes of legislation that may impact the introduction of EITI under the Project:
- 2.1.1.1 Critical Legislation;
- 2.1.1.2 Important Legislation
- 2.1.1.3 Relevant Legislation

**Table 1. Taxonomy of Legislation**

<b>Critical Legislation</b>	<b>Important Legislation</b>	<b>Relevant Legislation</b>
<b>Mines and Minerals Act</b>	Public Audit Act	Public Finance Act
<b>Companies Act</b>	Zambia Revenue Authority Act	Petroleum Act
<b>Income Tax Act</b>	Electronic Communications Act	Forestry Act
<b>Customs and Excise Act</b>	Bank of Zambia Act	
<b>Value Added Tax Act</b>	Zambia Development Agency Act	
<b>Property Transfer Tax Act</b>		
<b>Environmental Act</b>		
<b>National Pension Act</b>		
<b>Workers Compensation Act</b>		
<b>Local Government Act</b>		
<b>Rating Act</b>		
<b>Personal Levy Act</b>		
<b>Lands Act</b>		
<b>Water Resources Act</b>		
<b>National Road Fund Act</b>		
<b>Competition Act</b>		

- 2.1.2 The category referred to as ‘Critical Legislation’ relates to the review and analysis of vital provisions in the Zambian legal framework that will require amendment or interfacing with the objectives of the Project in order for EITI to be successfully implemented in Zambia.

- 2.1.3 The category of legislation referred to as ‘Important Legislation’ does not constitute laws directly related to payments by Mining Companies to Government but consists of such laws as may nevertheless have impact on the communication and transmission of information relating to the payments. The review and analysis of this category of legislation is set out in **Annexure II**.
- 2.1.4 In the category of legislation referred to as ‘Relevant Legislation’, only the legislation that is deemed relevant but neither critical nor important to the implementation of EITI in Zambia, is reviewed and analysed in **Annexure III**.

## 2.2 Critical Legislation

### 2.2.1 Mines and Minerals Act

2.2.1.1 The Mines and Minerals Act is the key statute for the regulation of the mining sector in Zambia. The general import of the Mines and Minerals Act is to promote an open and transparent relationship in terms of information exchange between licence holders and the Mines Department as the overall regulator.

2.2.1.2 In terms of Government revenue, the Mines and Minerals Act establishes at least three forms of income streams for the Government payable by Mining Companies:

- (a) mineral royalties (“**Mineral Royalties**”);
- (b) annual licence fees (“**Annual Mining Charges**”); and
- (c) application and other one-off fees (“**Mining Fees**”).

2.2.1.3 Only the Annual Mining Charges and the Mining Fees are collected and administered by the Mines Department. The Mineral Royalties are collected and administered in accordance with the provisions of the Income Tax Act as discussed below.

2.2.1.4 The Mines and Minerals Act also establishes and regulates the Environmental Protection Fund (“**EPF**”)<sup>3</sup> which effectively is an assurance scheme for the performance by Mining Companies of their obligations under their respective Environmental Management Plans (“**EMPs**”). The EMP is a mandatory supporting document to an application for a mining right<sup>4</sup> and one of its prescribed contents includes a plan by the Mining Company as to how it will eliminate or minimise adverse effects on the environment arising from its operations<sup>5</sup>. A key requirement under the Mines and Minerals Act is the obligation on the applicant for a mining right to make one or more cash deposits (“**EPF Payments**”) for securing the performance of the EMP<sup>6</sup>.

2.2.1.5 The Mines and Minerals Act is therefore only restricted to administering the Annual Mining Charges, the Mining Fees and the EPF Payments.

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<sup>3</sup> s. 122 Mines and Minerals Act

<sup>4</sup> parts III (*Large Scale Mining Operations*) and IX (*Safety Health and Environmental Protection*) Mines and Minerals and Minerals Act

<sup>5</sup> See further discussion of EMP under the Environmental Act

<sup>6</sup> s.116 Mines and Minerals Act



- 2.2.1.6 Further, the Mines and Minerals Act requires a holder of a large scale mining licence to maintain at the holder's office, *inter alia*, accurate financial records of the operations in the mining area and such other books of accounts and financial records as the Director of Mines may require<sup>7</sup>.
- 2.2.1.7 The Mines Act, however, does not allow automatic access to the public or third parties with respect to information supplied to, or kept by, the Mines Department from a license holder. It specifically prohibits the disclosure of information furnished to the Minister of Mines or the Mines Department or any authorised officer for so long as the mining or non-mining right is in force<sup>8</sup>.
- 2.2.1.8 Further, it may be difficult to reconcile the prohibition of disclosure under the Mines and Minerals Act with any independent requirement from the Mines and Minerals Act to disclose to, and disseminate information by, an entity established under the Project if a member or officer of the Mines Department also sits on a panel of such EITI disclosing entity.
- 2.2.1.9 In light of these shortcomings it may not be possible for the Mines Act, in its current form, to facilitate the implementation of the Project or EITI in Zambia or to allow for the publication of the information with respect to the records maintained under the Mines Act.
- 2.2.2 Companies Act
- 2.2.2.1 All entities, other than individuals, are required to be incorporated<sup>9</sup> in Zambia in order to hold a mining right under the Mines and Minerals Act<sup>10</sup>. This means, effectively, that virtually all companies holding mining rights in Zambia are incorporated and regulated under the Companies Act.
- 2.2.2.2 Mining Companies are likely to generate the following type of fees payable to the Companies Registry (the "**Companies Registry**") a governmental agency<sup>11</sup> established under the Companies Act (the "**Company Fees**"):
- (a) incorporation fees;
  - (b) share capital increase fees (could be as high as 2.5% of the share capital increase);
  - (c) registration fees for registrable collateral and other company charges; and
  - (d) filing fees for lodgements under continuing obligations.

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<sup>7</sup> s.30 Mines and Minerals Act

<sup>8</sup> s.151 Mines and Minerals Act

<sup>9</sup> Under the Mines and Minerals Act there is, nevertheless, sufficient scope to argue that a company that is not incorporated in Zambia qualifies to hold a mining right if it has established an office in Zambia (see section 7 (2) (b) (iii) Mines and Minerals Act)

<sup>10</sup> s.7 Mines and Minerals Act

<sup>11</sup> Operated by the Patent and Companies Registry Agency established under the Patents and Companies Registration Agency Act No 15 of 2010

- 2.2.2.3 Company Fees are unlikely to be specifically captured under EITI as payments from Mining Companies to the Government unless a deliberate policy is implemented to isolate Company Fees payable by Mining Companies under the Companies Act.
- 2.2.2.4 Further, and like the Mines and Minerals Act, the Companies Act requires all companies registered pursuant to its provisions to maintain financial records in a prescribed manner<sup>12</sup>. In addition all companies registered as public companies (i.e. companies that have shares that can generally be publicly traded without restriction) are also required to file with the Companies Registry their respective audited financial statements together with their annual returns at least within 1 month after the date of the annual general meeting<sup>13</sup>.
- 2.2.2.5 Unlike the Mines and Minerals Act, however, there is no restriction on disclosure of information maintained under the Companies Act including that which goes beyond recording financial information relating to Company Fees. It is possible, therefore, to collate this information from the Companies Registry and compile a report under the auspices of ZEITI without necessarily making a direct requisition on the Mining Companies. The complication, however, is that the obligation to file the financial statements is only on public companies while most mining project companies are private companies.
- 2.2.2.6 More critically, however, private companies may argue that they have no additional obligations to file financial statements with any other institution as the Companies Act appears to make it clear that its provisions are sacrosanct unless a contrary provision is contained in special legislation relating to companies carrying on the business of banking, insurance or any other business<sup>14</sup>. This provision could, therefore, stand as an indirect barrier against the introduction of EITI in Zambia.
- 2.2.3 Income Tax Act
- 2.2.3.1 The Income Tax Act is the primary legislation regulating the collection of revenue by the Government from the Mining Companies mainly in the following forms (the “**Income Taxes**”):
- (a) corporation tax (which is the normal tax currently at 30% for Mining Companies);
  - (b) variable profit tax (which attempts to capture windfalls at 15% for Mining Companies);
  - (c) withholding tax on dividends (at 0% for Mining Companies);
  - (d) withholding tax on interest (at 15% for Mining Companies); and
  - (e) withholding tax on management and consultancy fees (at 15% for Mining Companies).

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<sup>12</sup> part VIII (*Accounts, Audit and Annual Returns*) Companies Act

<sup>13</sup> s. 184 Companies Act

<sup>14</sup> s.399 Companies Act

- 2.2.3.2 The Income Taxes constitute the primary form of payments by the Mining Companies to the Government. The ZRA established under the Zambia Revenue Act is the agency prescribed under the Income Tax Act to collect and administer the Income Taxes.
- 2.2.3.3 The Income Tax Act also regulates another form of tax known as pay as you earn (“**Employee Tax**”) collectable and payable by employers including Mining Companies to Government by withholding a portion of the income paid by the Mining Companies to its employees currently assessed at a generic rate of 35%.
- 2.2.3.4 In addition to the Income Taxes, ZRA also collects and administers Mineral Royalties payable by Mining Companies to the Government imposed at 6% of the value of the mineral, metal or gemstone in question pursuant to the Mines and Minerals Act. The Mines and Minerals Act defaults to the Income Tax for the collection and administration of the Mineral Royalties.
- 2.2.3.5 The payment by Mining Companies of each of the Income Tax, Employee Tax and Mineral Royalties is required to be supported by the filing by the concerned Mining Company with ZRA of prescribed form of returns respectively.
- 2.2.3.6 Under section 8 of the Income Tax Act, officers of ZRA are required to preserve and aid in preserving secrecy concerning the affairs of any person including Mining Companies under the Income Tax Act. The following are the prescribed three exceptions to this statutory requirement:
- (a) the duty to ensure secrecy may be waived in order to disclose information to an authorised officer of a country with which Zambia has a double taxation agreement;
  - (b) information may be disclosed to the Minister of Finance, the Auditor-General and public officers authorised by the Minister of Finance; and
  - (c) information may be disclosed under the Anti-Corruption Commission Act Chapter 91 of the Laws of Zambia (the “**Anti-Corruption Act**”) in relation to prosecution of cases under that Act.
- 2.2.3.7 Unless the information is provided to ZEITI directly by the Mining Companies under the Project, ZRA is not authorised to disclose information relating to payments made by Mining Companies to the Government in the form of Income Taxes, Mineral Royalties and Employee Taxes. This is a clear impediment to the implementation of EITI in Zambia despite the discretion of the Minister of Finance to waive the restriction as explained above (it is not clear whether dissemination to the public is permitted even if the Minister of Finance allows the disclosure of the information to public officers).
- 2.2.4 Customs and Excise Act
- 2.2.4.1 Another key form of taxation that operations of Mining Companies are subject is the imposition of various rates of import duties on machinery and equipment (the “**Import Duties**”) under the Customs and Excise Act. The Import Duties are collected and administered by ZRA and the actual importation can be done directly by the Mining Company or through a third party supplier or agent.

- 2.2.4.2 The payment by Mining Companies of Import Duties is required to be supported by the filing by the concerned Mining Company with ZRA of prescribed form of returns.
- 2.2.4.3 To capture the actual contribution of Mining Companies through ZRA in the form of Import Duties under ZEITI, therefore, a strict rule may have to be made under the Customs and Excise Act to ensure that all imports by or on behalf of Mining Companies be accordingly disclosed in the appropriate administrative forms.
- 2.2.4.4 More problematic, however, are the provisions under the Customs and Excise Act that proscribe ZRA officers from disclosing any information relating to any person if such information is acquired during the performance of their duties<sup>15</sup>. Such information can only be disclosed by ZRA officials:
- (a) if the consent of the Commissioner General is obtained; or
  - (b) pursuant to a court order; and
  - (c) under the provisions of the Anti-Corruption Act.
- 2.2.4.5 As is the case with the Income Tax Act, the statutory restrictions provide an impediment to the implementation of the Project to the extent that even if the information is supplied with the consent of the Commissioner General it is not clear in those circumstances whether such information can be disseminated to the public under the EITI process.
- 2.2.5 Value Added Tax Act
- 2.2.5.1 Value added tax (“**VAT**”) is a form of indirect tax collected and imposed by ZRA under the Value Added Tax Act. VAT is primarily a tax on consumption generally imposed at the standard rate of 16% and is collected on importation of goods (“**Import VAT**”) or on the sale of goods or services by a VAT registered supplier (“**Domestic VAT**”).
- 2.2.5.2 Import VAT is collected and administered in the same way as Import Duties under the Customs and Excise Act as crossed referenced by the Value Added Tax Act and therefore subject to the same restrictions on disclosure and dissemination as Import Duties under the Customs and Excise Act as discussed above.
- 2.2.5.3 The payment by Mining Companies of each of the Import VAT and the Domestic VAT is required to be supported by the filing by the concerned Mining Company with ZRA of prescribed form of returns.
- 2.2.5.4 There appears to be no specific prohibition on disclosure of information under Value Added Tax Act. It appears, however, that only the Commissioner-General is granted express power to obtain any information and access relevant records in pursuit of his/her functions under the Value Added Tax Act, which s/he is under no obligation, or even authorised, to provide to another party<sup>16</sup>. It could, therefore, amount to an indirect impediment to the implementation of the Project if both the Mining Companies and the Government do not volunteer information of the payments or receipts.

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<sup>15</sup> s.175 Customs and Excise Act

<sup>16</sup> s.37 Value Added Tax Act

## 2.2.6 Property Transfer Tax Act

2.2.6.1 Property transfer tax (“**Property Transfer Tax**”) is collected and administered by ZRA pursuant to the Property Transfer Tax Act. It is generally an impost on any transfer of property in the form of land or shares by a company registered under the Companies Act and levied at 5% of the realisable value of the property in question. Further, Property Transfer Tax is also levied at 10% of the realisable value of a mining right on transfer.

2.2.6.2 To access their mining rights, Mining Companies normally require surface rights usually in the form of land and any acquisition or disposal of such land will attract Property Transfer Tax unless land is acquired directly from the Government at alienation.

2.2.6.3 Similarly, any transfer of shares in a Mining Company, whether or not a product of merger activity, will attract Property Transfer Tax. Property Transfer Tax on transfer of land, shares or mining rights is administered in the same way as the taxes administered under the Income Tax Act.

2.2.6.4 Unlike the Income Tax Act, the Property Transfer Act does not contain any express prohibitions against disclosure. It is surmised, however, that the absence of any allowance for the disclosure of information obtained under the Property Transfer Tax Act by implication renders such information confidential and any disclosure amenable to legal challenge. Thus, express provision would have to be made thereunder for the disclosure of information under EITI for the purposes of its report.

2.2.6.5 In addition, if EITI would rely on ZRA as a source of information on Property Transfer Tax the process for administering Property Transfer Tax under the Property Transfer Tax Act will be required to be amended in order to capture this form of tax as a payment by Mining Companies to Government.

## 2.2.7 Environmental Management Act<sup>17</sup>

2.2.7.1 As discussed above<sup>18</sup> every application for a mining right is required to be accompanied by an EMP under the Mines and Minerals Act which is principally expected to include the following<sup>19</sup>:

- (a) proposals for prevention of pollution;
- (b) treatment of waste;
- (c) protection and reclamation of land and water resources; and
- (d) eliminating or minimising adverse effects on the environment arising from operations.

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<sup>17</sup> The Environmental Act repealed and replaced the previous Environmental Protection and Pollution Control Act and placed additional management and cost burden on Mining Companies in the form of fee contributions to ZEMA and in the form of more stringent continuing obligations

<sup>18</sup> See discussion under Mines and Minerals Act

<sup>19</sup> e.g. parts III (*Large Scale Mining Operations*) and IX (*Safety Health and Environmental Protection*) Mines and Minerals Act

2.2.7.2 Invariably, therefore, a Mining Company would have to comply with the requirements of the Environmental Act which prescribes for various processes and licences attracting an assortment of both one-off and continuous fees (“**Environmental License Fees**”). The Environmental Act also establishes the ZEMA which is the regulator and supervisor of the policy on environment in Zambia.

2.2.7.3 The Environmental Act provides for at least two types of funds in terms of revenue collected by ZEMA that may be of interest to EITI. In the first place there is what can be termed the internal administrative ZEMA fund (the “**ZEMA Fund**”) established under the Environmental Act<sup>20</sup>. Payments out of the ZEMA Fund may cover operational expenditure of ZEMA including salaries, board allowances and other current and capital expenditure and the following payments must be made into the ZEMA Fund:

- (a) Parliamentary appropriations for ZEMA;
- (b) borrowings for current and capital expenditure; and
- (c) Environmental License Fees.

2.2.7.4 Secondly, the Environmental Act establishes the Environmental Fund (the “**Environmental Fund**”) for the purposes of generally funding remedial exercises as well as research activities in environmental management<sup>21</sup>. In this respect the following payments may be made into the Environmental Fund (the “**EF Payments**”):

- (a) Parliamentary appropriations;
- (b) levies from industry or developers determined to have adverse effect on the environment<sup>22</sup>;
- (c) voluntary contributions;
- (c) grants;
- (e) interest on invested monies; and
- (f) any other prescribed payments.

2.2.7.5 Mining Companies, as part of industries or facilities and activities covered under the EPF discussed in relation to Mines and Minerals Act in 2.2.1 above, are exempted from contributing to the Environmental Fund<sup>23</sup>. Further the Environmental Fund Payments do not appear to include the Environmental Licences Fees which are required to go instead into the ZEMA Fund.

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<sup>20</sup> para.7 First Schedule to the Environmental Act

<sup>21</sup> s.95 Environmental Act

<sup>22</sup> These could include environmental performance bonds

<sup>23</sup> Ibid

- 2.2.7.6 ZEMA has the obligation to cause to be kept proper books of accounts and other records relating to both the ZEMA Fund and Environmental Fund and cause to be prepared annual report for the ZEMA Fund and an annual statement of income and expenditure for the Environmental Fund (the “**Reports**”) both of which are required to be laid before the National Assembly<sup>24</sup>.
- 2.2.7.7 It appears that the Reports to the National Assembly by the Minister of Environment are not automatically accessible to the public as it is only laid before the National Assembly and there is no requirement that it be published in the Gazette. This may impede the implementation of EITI to the extent that there is no express access to Reports documenting the Environmental License Fees and any other fees or levies paid to ZEMA as and when required under the Project.
- 2.2.7.8 The Environmental Act provides for the establishment by ZEMA of a public registry of environmental information including a list of applications for licences or approvals made as well as a list of licences and approvals issued<sup>25</sup>. The Environmental Act further provides for public participation in decision making on environmental issues against policy<sup>26</sup>. These channels do not, however, appear to extend to disclosure and accountability for the Environmental Licence Fees and other levies.
- 2.2.7.9 Most critically for the purposes of EITI, however, the key concern is the prohibition of publication of, or disclosure of, information obtained under the Environmental Act to unauthorised persons without the consent of ZEMA<sup>27</sup>. This effectively means that access to information relating to the Environmental Licence Fees or the ZEMA Fund with respect to the Environmental Licence Fees payable by Mining Companies will not be allowed without the consent of ZEMA. Both ZEMA and the Mining Companies will ideally be required to disclose and account for the Environmental Licence Fees received or paid, as the case may be, under EITI.
- 2.2.8 National Pension Scheme Act
- 2.2.8.1 The National Pension Act establishes the National Pension Scheme to which compulsory pension contributions are made by employers and employees at prescribed rates (the “**National Pension Contributions**”) with the employer being also given the statutory obligation to account for both the employer and the employee contributions to a Government agency known as the NAPSA also established under the National Pension Act.
- 2.2.8.2 The main objective for NAPSA is to use the funds raised from the National Pension Contributions to reduce the cost to Government by funding a social safety net on retirement of employees of the Mining Companies.

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<sup>24</sup> para.10 of the First Schedule to the Environmental Act and s.100 Environmental Act, respectively

<sup>25</sup> s.90 Environmental Act

<sup>26</sup> s.91 Environmental Act

<sup>27</sup> para.5 First Schedule to the Environmental Act

- 2.2.8.3 As a key employer, the Mining Companies make significant contributions in National Pension Contributions to NAPSA which require to be captured under EITI. If information on the National Pension Contribution will be sourced from NAPSA under EITI then this form of payment should be specifically captured as a payment to Government by Mining Companies.
- 2.2.8.4 The National Pension Act allows NAPSA to appoint inspectors who are empowered to inspect any book, register, account, receipt or any document relating to contributions, and to ensure that records are kept in accordance with the National Pension Act.
- 2.2.8.5 Critically, however, there is a general prohibition under the National Pension Act against any person involved in the administration of NAPSA with the respect to the publishing or disclosing to any unauthorised person, otherwise than in the course of his duties, the contents of any documents, communication or information whatsoever, which relates to, and which has come to his knowledge in the course of his duties under the National Pension Act<sup>28</sup>.
- 2.2.9 Workers Compensation Act
- 2.2.9.1 The Workers Compensation Act establishes the Workers Compensation Fund (the “**Workers Compensation Fund**”) in to which a each employer liable for assessment (which includes virtually all Mining Companies) contributes assessed amounts on a periodic basis within a financial year without deduction from the employees emoluments (the “**Workers Compensation Contribution**”)<sup>29</sup>.
- 2.2.9.2 The statutory agency established under the Workers Compensation Act to administer the Workers Compensation Fund is known as the WCCB. One of the functions of the WCCB is to provide rehabilitation or pension support to employees who leave employment due to impairments arising from the work place.
- 2.2.9.3 As a significant payment to Government by Mining Companies the Workers Compensation Contribution should be captured under EITI. The complication is that any person in the exercise of any powers conferred or in the performance of any duties imposed by or under the Workers Compensation Act and who in the process acquires information relating to the financial affairs of any other person, firm or business is prohibited from disclosing such information to any other person, except<sup>30</sup>:
- (a) to a Court of law or to any person who by law is vested with the power to compel the disclosure of such information; or
  - (b) to the WCCB or to any person acting in the execution of the Workers Compensation Act in so far as such information may be necessary for the execution of the Workers Compensation Act.

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<sup>28</sup> para. 10 First Schedule (*Administration*) National Pension Act

<sup>29</sup> part X (Assessments) Workers Compensation Act

<sup>30</sup> s.19 Workers Compensation Act



## 2.2.10 Local Government Act

2.2.10.1 The Local Government Act is the primary instrument that Government uses in decentralising some of its functions to the local or municipality level of government. The decentralised functions of Government are performed by Councils and all Councils are established under the Local Government Act by declaration.

2.2.10.2 The Local Government Act sets out, among other functions, the management of Council revenues and expenditures. The Councils have statutory powers to impose levies, charge fees, issue licences or permits at a fee, or provide services within a local area at a fee (the “**Council Taxes**”)<sup>31</sup>. A number of Mining Companies are the main contributors of such Council Taxes which may require capturing under EITI.

2.2.10.3 All persons employed by a Council are, however, prohibited from publishing or disclosing to any person the contents of any document, communication or information which relates to and which has come to their knowledge in the course of their duties under the Local Government Act unless<sup>32</sup>:

- (a) they obtain consent in writing from or on behalf of the Council concerned; or
- (b) such publication or disclosure is made in the course of their duties.

## 2.2.11 Rating Act

2.2.11.1 The Rating Act provides for the declaration of rateable areas, assessment of rateable property and the levying of property rates with respect to various classes of property within a Council area (the “**Property Rates**”). The Rating Act also establishes the Councils created under the Local Government Act as the Rating Authorities for the Property Rates.

2.2.11.2 The properties in question involve occupied land. To access and exploit their mining rights Mining Companies invariably require tracts of land which, sometimes, could be quite extensive in size. Such tracts of lands are the ones subject to Property Rates.

2.2.11.3 The Rating Act provides for the valuation rolls, the basis upon which the Property Rates are assessed, to be available for inspection at the offices of the Council by a leaseholder/occupier of any rateable property in the valuation roll and who is allowed to raise objections to entries against the property concerned heard by an independent tribunal. Even members of the public are allowed to inspect the valuation roll from the Council offices before its advertisement in the Gazette.

2.2.11.4 Although the Rating Act provides a transparent process for the assessment and imposition of Property Rates in the interest of rate payers there are no similar provisions regulating transparency and accountability for the paid Property Rates by the Councils. This is considering the fact that there are indications that Property Rates paid by Mining Companies particularly in mining areas constitute some of the single most significant independent source of revenue for the Councils.

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<sup>31</sup> part VII (Functions) Local Government Act

<sup>32</sup> s.103 Local Government Act

2.2.11.5 Further, the Rating Act contains no provisions on confidentiality or restrictions on disclosure pertaining to revenue from Property Rates, nor does any provision exist for official access to such information. By extension, however, it would appear that the provisions of the Local Government Act restricting disclosure<sup>33</sup> also apply to the Councils in performing the rating function under the Rating Act<sup>34</sup>.

## 2.2.12 Personal Levy Act

2.2.12.1 The Personal Levy Act provides for the assessment and imposition of personal levies against persons of apparent adult age for an amount that may not exceed ZMW15 (the “**Personal Levies**”). The Councils created under the Local Government Act are established as levy authorities to assess and collect Personal Levies under the Personal Levy Act.

2.2.12.2 Although the Personal Levies are assessable and imposed against individuals, the provisions of the Personal Levy Act permit the Councils to collect Personal Levies through employers by means of deductions from wages. In most instances both employers and employees are not aware of the obligation on the employee to pay Personal Levies to the extent that employers effectively suffer the cost of paying the Personal Levies to maintain work place harmony and which could translate in to huge cumulative cost particularly for Mining Companies which are labour capital intensive.

2.2.12.3 The Personal Levy Act prohibits disclosure of information by any person employed to carry out the provisions of the Personal Levy Act<sup>35</sup>. The officers of the Councils are required to preserve secrecy with regard to all matters that may come to their knowledge in the performance of their duties. Apart from the levy payer concerned and his lawful representative, no other person has access to any records in the possession or custody of the Council.

## 2.2.13 Lands Act

2.2.13.1 The Lands Act does not contain any substantial impediment to the implementation of EITI in Zambia. As discussed under the Rating Act above access to mining rights would usually require traversing land either belonging to the mining right holder or a third party as a distinct right from the mining right.

2.2.13.2 As land owners Mining Companies may be required to pay what is known as ground rent to the Government under the Lands Act (“**Land Rents**”)<sup>36</sup>. Depending on the extent of land required by a Mining Company as well as the fluidity of the rate of payment of Land Rents, Land Rents could constitute a significant contribution to the Government required to be captured under EITI.

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<sup>33</sup> See discussion on Local Government Act above

<sup>34</sup> s.62(4) Local Government Act recognizes that a Council may be conferred with other functions under another written law

<sup>35</sup> s.19 Personal Levy Act

<sup>36</sup> s.11 Lands Act

2.2.13.3 The Lands Act also establishes the Land Development Fund which consists of among others fifty percent of the Land Rents collected from all land and the proceeds therefrom are to be used to open up new areas for development<sup>37</sup>.

2.2.13.4 The only accountability for the management of the Land Development Fund is for the Minister responsible for Lands to provide for the statement of income and expenditure and to present an annual statement of the income and expenditure before the National Assembly<sup>38</sup>.

2.2.13.5 This form of accountability may not enhance the implementation of EITI as the process only supports disclosure and accountability to the National Assembly.

#### 2.2.14 Water Resources Management Act

2.2.14.1 The Water Resources Act was enacted in April, 2011 and came into force on 1 October, 2012. The Water Resources Act establishes the Water Resources Management Authority (“WRMA”) and defines its functions and powers to include the management, development, conservation, protection and preservation of the water resource and its ecosystems.

2.2.14.2 As it is the case with surface rights or land discussed above a Mining Company is invariably likely to encounter water during the development and operation of a mine and will in that regard be regulated under the Water Resources Act. Water for mining development or operation is usually a by product of mining, a catalyst for mining or processing of the mine product or a consumable commodity for the mine community.

2.2.14.3 Critically, it is an offence under the Water Resources Act for any person, including a Mining Company, to use water from any water source without a permit<sup>39</sup>. The term ‘use’ is defined quite widely as follows under the Water Resources Act:

- (a) abstraction, obstruction or diversion of water;
- (b) storing water;
- (c) discharge of materials or substances into water;
- (d) dewatering of a mine, quarry or any land;
- (e) altering the bed, banks, course or characteristics of a water resource; any
- (f) prescribed activity of a kind relating to water.

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<sup>37</sup> ss.16 and 18 Lands Act

<sup>38</sup> s.19 Lands Act

<sup>39</sup> s.163 Water Resources Act

2.2.14.4 According to the Water Resources Act, a person holding a mining right and who requires the use of water for mining purposes must submit an application to the Director of Mines setting out the volumes of water required, nature of proposed use and such other information as may be required. The Director of Mines will then process the application in conjunction with WRMA using the approval structure under the Water Resources Act which process will trigger a set of fees including application fees, water usage fees, and renewal fees (the “**Water Fees**”) payable by the concerned Mining Company through WRMA.

2.2.14.5 The Water Resources Act prescribes a pricing strategy for the Water Fees which requires the Water Fees to incorporate the following principles<sup>40</sup>:

- (a) recover the reasonable costs related to the management of the water resource;
- (b) recover the cost of the administration of the licence and permit system;
- (c) recover the cost of administration relating to the processing of data and information;
- (d) providing a reasonable rate of return upon any investment relating to water;
- (e) reflect the source from which the water has been used;
- (f) reflect the purpose for which the water will be used;
- (g) take into account:
  - (i) the costs involved in the construction of any water works or dam works;
  - (ii) any investments made for the conservation of water resources;
  - (iii) the strategic importance of the use of the water applied in for in the national interest;
  - (iv) any investment made that benefits the local community; and
  - (v) any de-watering activities that need to be done, under any other law, for mining and industrial purposes.

2.2.14.6 The Water Resources Act prescribes for at least two types of funds. Under the first type WRMA is required to retain in a fund managed by it all the revenue from Water Fees paid to WRMA which will be applied by WRMA in meeting the costs of administering its functions under the Water Resources Act (the “**Internal Fund**”)<sup>41</sup>. The Water Resources Act also establishes another fund of the second type namely the Water Development Trust Fund to be managed independently by a set of trustees and which does not necessarily source its revenue from the Water Fees (the “**Independent Fund**”)<sup>42</sup>.

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<sup>40</sup> s.150 Water Resources Act

<sup>41</sup> s.154 Water Resources Act

<sup>42</sup> s.155 Water Resources Act

2.2.14.7 The distinction between the Internal Fund and the Independent Fund (the “**Funds**”) is, therefore, that the moneys in the latter are mandated under the Water Resources Act to be used for the development, conservation and management of water resources. Both Funds will, therefore, be of concern to EITI but more so the Internal Fund. This is because the Internal Fund will source its revenue from Water Fees some of which will be directly payable by Mining Companies while the Independent Fund may only source its revenue from the following:

- (a) Parliamentary appropriations;
- (b) donations, grants, bequests etc.; and
- (c) any other prescribed payments.

2.2.14.8 For the purposes of EITI the key concern is the prohibition of publication of, or disclosure of, information obtained under the Water Resources Act to unauthorised persons without the consent of WRMA<sup>43</sup>. This effectively means that access to information relating to the Water Fees or the Internal Fund with respect to the Water Fees payable by Mining Companies will not be allowed without the consent of WRMA. Both WRMA and the Mining Companies will ideally be required to disclose and account for the Water Fees received or paid, as the case may be, under EITI.

## 2.2.15 The National Road Fund Act

2.2.15.1 The National Road Fund Act establishes the **NRFA**<sup>44</sup> whose functions include the administration and management of the National Road Fund<sup>45</sup>.

2.2.15.2 The National Road Fund consists of the following (the “**Road User Charges**”)<sup>46</sup>:

- (a) all fuel levy collected, less the cost of collection which shall not exceed 3 percent, in every fiscal year;
- (b) such percentage of license fees, registration fees and international transit fees payable to the Road Transport and Safety Agency under the Road Traffic Act No 11 of 2002, as may be prescribed;
- (c) such percentage of the weigh bridge charges payable to the Road Development Agency under the Public Roads Act No 12 of 2002 as may be prescribed;
- (d) such percentage of road user levies including tariffs, taxes and tolls as may be prescribed.

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<sup>43</sup> para.7 First Schedule to the Water Resources Act

<sup>44</sup> s.3 National Road Fund Act

<sup>45</sup> s.4 National Road Fund Act

<sup>46</sup> s.16 National Road Fund Act

2.2.15.3 The NRFA is tasked with the function of preparing and publishing audited annual accounts for the National Road Fund<sup>47</sup> but there is a prohibition against the publication of any other information by any person which is not made in the course of such person's duties under the National Road Fund Agency Act<sup>48</sup>. This would, undoubtedly, affect the ability of an EITI specific accountability of NRFA with respect to contributions by Mining Companies in terms of Road User Charges as well as the ability to publish such information under the auspices of EITI.

## 2.2.16 Competition and Consumer Protection Act

2.2.16.1 As currently the most economically active and most significant contributor to the country's gross domestic product the mining sector is also the most active by value in terms of mergers and acquisitions regulated under the Competition Act.

2.2.16.2 In terms of the Competition Act, a merger is said to occur where an enterprise, *directly or indirectly*, acquires or establishes, direct or indirect, control over the whole or part of the business of another enterprise, or when two or more enterprises mutually agree to adopt arrangements for common ownership or control over the whole or part of their respective businesses. Effectively, therefore, a merger may occur where a Mining Company or owner of a Mining Company purchases shares or leases assets in, or acquires an interest in, any shares or assets belonging to another Mining Company or owner of a Mining Company.

2.2.16.3 The Competition Act grants the Competition and Consumer Protection Commission ("CCPC") the authority to review mergers. The power of the CCPC to review mergers is invoked in at least two instances:

- (a) where the merger meets the threshold of ZMW9,000,000 (approximately US\$1,800,000) of the combined turnover or assets, whichever is higher, in Zambia of the merging parties (the "**Threshold**"); or
- (b) where the CCPC on its own volition elects to review a merger on specified grounds stated in the Competition Act.

2.2.16.4 Most mergers involving Mining Companies breach the Threshold and require regulation by CCPC under the Competition Act. An application for merger approval attracts a significant fee (the "**Merger Fee**") which is payable before the application can be processed. A merger that meets the Threshold and which is undertaken without the approval of the CCPC is deemed void<sup>49</sup>. Further, a breach of the foregoing requirements by a Mining Company may attract a fine not exceeding 10% of the company's turnover<sup>50</sup>.

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<sup>47</sup> s.4 National Road Fund Act

<sup>48</sup> s.12 National Road Fund Act

<sup>49</sup> s.26(4) Competition Act

<sup>50</sup> s.37 Competition Act

2.2.16.5 The Merger Fee payable by Mining Companies could be of interest under EITI given the amount of merger and acquisition activity in the mining sector and the quantum of such Merger Fees as a subject of the disclosure and accountability process. The Competition and Consumer Protection Regulations<sup>51</sup> made under the Competition Act prescribe the fee for application for the authorization of a proposed merger to be 0.1% of turnover/assets whichever is higher, with a cap maximum fee of 16,666,667 fee units which translates to ZMW3, 000, 000<sup>52</sup> (approximately US\$600,000).

2.2.16.6 A key concern for the implementation of EITI would be the prohibition of publication of, or disclosure of information concerning the Merger Fee without the consent of CCPC yet the concept under EITI would require both the Mining Company, as payee, and CCPC, as recipient, to disclose the Merger Fee<sup>53</sup>.

### 3. REVIEW OF POLICIES

#### 3.1 General

3.1.1 Despite the scope of influence of internal policies being limited as compared to legislation, the impact of restrictions placed on administrative bodies by internal policy may be as extensive particularly in relation to the implementation of projects such as EITI.

3.1.2 Only two policies were availed for review namely the ZRA Code of Ethics and the MoM Charter in spite of the efforts made to try and obtain more. Although the review is limited in scope in that regard due to the few policies supplied, the review is nevertheless in relation to key institutions for the implementation of the Project namely ZRA and MoM.

#### 3.2 ZRA Code of Ethics

3.2.1 The ZRA Code of Ethics sets out ethical standards for ZRA employees' work-related conduct. This Code applies to all ZRA employees, the governing body of ZRA (the "**Board**") and all authorized representatives and consultants of ZRA. Therefore, when making decisions, ZRA employees are not only required to comply with existing laws and regulations but also the ZRA Code of Ethics.

3.2.2 Although the employees may release official information that would normally be given to any member of the public asking for that information, the ZRA Code of Ethics provides that employees must protect the privacy of all individuals in their official dealings with ZRA, the Board and with its clients. All employees are required to sign a declaration of secrecy on taking up appointment as they have a responsibility to protect information and materials which they acquire in the course of their employment.

3.2.3 The ZRA Code of Ethics further provides that after leaving the authority, employees should avoid situations where knowledge gained at ZRA could lead to breach of confidentiality.

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<sup>51</sup> Competition and Consumer Protection (General) Regulations, Statutory Instrument number 97 of 2011

<sup>52</sup> Reg.21, Second Schedule, Item 4 of Statutory Instrument number 97 of 2011

<sup>53</sup> para.8 First Schedule to Competition Act

- 3.2.4 The ZRA Code of Ethics also provides that wherever there is a potential conflict of interest between ZRA's interest and a personal matter, the employee is under obligation to present all relevant information to a supervisor and disclose a potential conflict of interest promptly, preferably in writing. The supervisor will determine whether a conflict exists or not and advise the employee of the appropriate action.
- 3.2.5 Effectively, the ZRA Code of Ethics may require some modification to accommodate the implementation of EITI in Zambia considering that ZRA is the main administrator of the process for the collection of revenue on behalf of Government.

### 3.3 **MoM Client Service Charter**

- 3.3.1 Employees of the MoM also abide by a client service charter, the MoM Charter, described as a "social pact" between the MoM and its clients, namely Mining Companies, identifies the services and standards to be provided to the latter. One of the core values of the MoM under the MoM Charter includes a pledge not to reveal or disclose privileged information to third parties.
- 3.3.2 The MoM Charter expounds on this by providing that clients have the right to privacy and confidentiality with respect to personal and financial information, written or oral, that they communicate to MoM as part of their requirements and in the course of receiving a service therefrom.
- 3.3.3 The MoM Charter further pledges that the MoM will publish information on its level of compliance with service standards and guarantees made in the Charter in ministerial/departmental annual budget reports.
- 3.3.4 From the foregoing perspective the policy contained in the MoM Charter qualifies as an impediment to the implementation of EITI in Zambia particularly in light of the strong confidentiality pledge. It may, in this respect, require modification.

## 4. **SUMMARY OF KEY ISSUES**

Provided below is a table setting out a summary of the impact that each of the highlighted statutes and policies may have on the implementation of EITI in Zambia.



**Table 2. Summary of Legislative Issues**

	<b>Statute/Policy</b>	<b>Regulated Subject Matter</b>	<b>Possible Impediment to EITI</b>
1.	Mines and Minerals Act	Mineral Royalties, Annual Mining Charges, Mining Fees and EPF Payments	No automatic access to records maintained by the Mines Department
2.	Companies Act	Company Fees	No policy to report fees paid and no obligation on private companies to file financial statements
3.	Income Tax Act	Income Taxes, Employee Tax and Mineral Royalties	Statutory obligation on ZRA to maintain secrecy
4.	Customs and Excise Act	Import Duties	Prohibition against disclosure of information
5.	Value Added Tax Act	Normal VAT and Import VAT	No clear policy on disclosure of information
6.	Property Transfer Tax Act	Property Transfer Tax	Statutory obligation on ZRA to maintain secrecy
7.	Environmental Protection Act	Environmental Licence Fees	No clear policy on disclosure of information
8.	National Pension Scheme Act	National Pension Contribution	Prohibition against disclosure of information
9.	Workers Compensation Act	Workers Compensation Contribution	Prohibition against disclosure of information
10.	Local Government Act	Council Taxes	Prohibition against disclosure of information
11.	Rating Act	Property Rates	No clear policy on disclosure of information
12.	Personal Levy Act	Personal Levies	Prohibition against disclosure of information
13.	Lands Act	Land Rents	No clear policy on disclosure of information
14.	National Road Fund Act	Road User Charges	Prohibition against disclosure of information
15.	Public Audit Act	Public Receipts and Expenditure	Parallel process to EITI and Standard for public audit may become standard for EITI
16.	Zambia Revenue Authority Act	ZRA	Prohibition against disclosure of information
17.	Electronic Communications Act	Electronic Communications and Data Storage	Prohibition against disclosure of information
18.	Bank of Zambia Act	Receipts by ZCCM-IH	Omission from ambit of EITI
19.	ZRA Code of Ethics	Interaction with clients	Prohibition against disclosure of information
20.	MoM Client Service Charter	Interaction with clients	Prohibition against disclosure of information

**SECTION B : COMPARATIVE LEGISLATIVE REVIEW****1. INTRODUCTION****1.1 Countries Initially Selected**

1.1.1 Under the ToRs<sup>54</sup> three countries were selected for a comparative study namely Liberia, Ghana and Nigeria.

1.1.2 This was mainly for the purpose of assessing the approach taken by each of these countries with respect to the legal framework adopted for the implementation of EITI and the successes scored as well as the challenges encountered as a direct effect of adopting such approach.

**1.2 Amendment to ToRs**

1.2.1 Due to timing, resource and logistical constraints ZEC modified the ToRs in this respect and recommended as follows:

- (a) only two of the EITI candidate and compliant countries be studied namely, Liberia and Ghana;
- (b) the study be limited to a desk study.

1.2.2 The comparative study for the Project was therefore undertaken on the basis of the amended ToRs.

**2. LIBERIA EXPERIENCE****2.1 The Approach**

2.1.1 Although all Candidate<sup>55</sup> and Compliant<sup>56</sup> countries broadly pursue similar objectives, country-specific variations will inevitably give rise to differences in the form and process of implementation of EITI. Liberia has distinctively decided to put in place a sufficiently comprehensive specific piece of legislation for the implementation of EITI known as Liberia Extractive Industry Transparency Initiative Act of 2009 (“**LEITI Act**”).

2.1.2 The Preamble to the LEITI Act places the implementation of EITI within the context of Liberia’s history of civil war and resource exploitation, thereby justifying more rigorous measures by which to ensure compliance:

“**WHEREAS**, the exploitation of Liberia’s forest and mineral resources for many decades has not had adequate or meaningful beneficial impact on the national economy or the livelihood of Liberians, but has led to deprivations and conflict due largely to the lack of transparency and accountability in the operations and regulation of logging, mining, oil and related companies and the persistence of opportunism in the award and performance of concessions/ licenses for exploitation of these resources;

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<sup>54</sup> See **Annexure I**

<sup>55</sup> Countries that have met the four sign-up indicators in the EITI rules to the satisfaction of the EITI Board

<sup>56</sup> Countries that have achieved validation within two years of achieving Candidate Status

**WHEREAS**, the government and people of Liberia recognize the potential positive contribution that forest and mineral resources can make to economic and social development of the Country, and have agreed to realize these potentials through improved resource governance that encompasses and fully implements the Principles and Criteria of the international Extractive Industries Transparency Initiative (EITI).”

## 2.2 Pre-implementation challenges and proposed remedies

- 2.2.1 One of the main challenges that almost any country will face in implementing EITI is the number of legal obstacles to obtaining information on payments made to the Government by the sector concerned. Amending relevant existing legislation would be an important first-step in this regard, but parliamentary protocol may delay the process and provides no guarantee those requisite amendments will be passed. Moreover, amendment cannot guarantee that all “problematic” legislation will be identified for the purposes of averting any future conflicts, nor can it guard against the risk of future enactment or amendment that would run counter to EITI’s aims.
- 2.2.2 Liberia overcame similar challenges posed by confidentiality clauses in its taxation laws by enacting legislation mandating the Liberia Extractive Industry Transparency Initiative (“**LEITI**”) to exercise all its powers and functions, notwithstanding any law to the contrary under an EITI specific LEITI Act.<sup>57</sup>
- 2.2.3 To enhance the ability to overcome some of the legal challenges highlighted above, the LEITI Act establishes LEITI as an autonomous statutory agency with important legal powers including the following<sup>58</sup>:
- (a) right to sue and be sued;
  - (b) capacity to enter into contracts and acquire, hold and alienate movable or immovable property by whatever lawful means, provided the same is done for and in the discharge of its statutory functions, as provided in the LEITI Act;
  - (c) power to establish counterpart and technical relationships with similar and other agencies, institutions and organizations in Liberia and abroad, as may be necessary for the effective discharge of its functions; and
  - (d) power to encourage, facilitate, perform and/or require the doing or performance of whatever is necessary or expedient for the effective discharge of any and all of its functions and the achievement of its objectives.
- 2.2.4 The LEITI Act further prescribes the powers and composition of the Multi-stakeholder Steering Group (“**MSG**”), LEITI’s “tripartite” governing body made up of representatives from the Government of Liberia (“**GoL**”), civil society and the private sector. This serves to ensure consistently equal representation of all three groups, which is crucial to the effective functioning of the MSG<sup>59</sup>.

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<sup>57</sup> Before this, President Sirleaf-Johnson had initially issued an Executive Order, valid for one year, mandating LEITI to obtain all necessary information for the production of its first report.

<sup>58</sup> s.2.1 LEITI Act

<sup>59</sup> s.6.4 LEITI Act

### 2.3 Post-implementation challenges and proposed remedies

- 2.3.1 The certainty of legislation, however, carries with it the disadvantage of rendering flexibility and adaptation more difficult in the face of Parliamentary constraints on legislative amendments. In this regard, the LEITI Act importantly provides a balance between comprehensively defining LEITI's obligations and functions under the Act while according it the broad discretion to determine how best to exercise them.
- 2.3.2 As an example of this balancing exercise, the LEITI Act obligates the MSG to adopt measures and take necessary actions to achieve LEITI's mandate and objectives, including but not limited to, determining sanctions for non-compliance by any company or government agency. This enables LEITI to subsequently adopt more flexible subsidiary regulations defining the precise sanctions to be imposed on offending parties. Amendments thereto would be much simpler to effect since the regulations can be revoked in writing by the MSG.
- 2.3.3 Liberia further seeks to strike a balance between overly stringent and overly accommodative enforcement strategies through a Regime of Progressive Sanctions (“RPS”)<sup>60</sup> for addressing non-compliance with LEITI disclosure and reporting obligations. The RPS is applied to the private sector and government bodies in a sequential order of increasing magnitude as follows:

**Table 3. Progressive Sanctions under LEITI**

Private sector	Government agency <sup>61</sup>
LEITI issues company with Written Demand to Comply.	LEITI issues agency with Written Demand to Comply.
Non-compliant company will be subject to public censure by publication of its name and non-compliance in the daily press.	LEITI issues a written warning on the agency's continuing non-compliance.
LEITI issues a Notice of Intent to Affect Operations on behalf of the GoL.	The GoL removes from office the head of the agency concerned.
The GoL imposes a fine of US\$1,000 on the non-compliant company through its line agency or ministry responsible for the sector.	
LEITI institutes legal action to suspend or revoke the license and/or operations of the non-compliant company.	

<sup>60</sup> See section 2.1 of LEITI Regulation # 001/ 11/ 09

<sup>61</sup> Non-compliance is attributed to the head of the agency, who will be the subject of the RPS

- 2.3.4 Lastly, LEITI itself is subject to audits by Liberia’s General Auditing Commission and other private auditors as the MSG may determine, and is obligated to keep proper accounts of its expenditures and revenues.<sup>62</sup> Such requirements enhance transparency and accountability of LEITI’s financial management, thereby enhancing its own legitimacy to require the same standards from the entities it regulates.

## 2.4 Shortcomings Observed

- 2.4.1 A major criticism of the LEITI Act is that it does not provide for an administrative dispute resolution process prior to the commencement of legal action for the purposes of license revocation. Such an administrative process would ensure that experts on EITI would be able to make assessments, findings and rulings on issues before a matter is taken before a court of first instance which may not have those expertise and who may benefit from the analysis undertaken by an administrative tribunal of experts.
- 2.4.2 There is also a concern as to how LEITI is able to enforce sanctions against government agencies if it does not have, as part of its sanctions, a name and shame policy similar to reporting companies.
- 2.4.3 Lastly, it would take the intervention of Parliament to address these shortcomings in the LEITI Act and the process of amendment to the law is unpredictable and could take long.

## 3. GHANA EXPERIENCE

### 3.1 The Approach

- 3.1.1 With respect to the Ghana Extractive Industries Transparency Initiative (“**GHEITI**”), the GHEITI Framework Document<sup>63</sup> suggests that Ghana’s implementation was based on its observations of other developing resource-rich countries, and could thus be achieved without the enactment of separate legislation:

“The economy of Ghana like many developing countries heavily depends on her extractive sectors. The discovery of oil in commercial quantities in the later part of 2007 has raised the expectations of many Ghanaians. For this reason frantic efforts are being made by various stakeholders to ensure that the “resource curse” commonly associated with discoveries of this nature in developing countries are avoided in the case of Ghana.

Irrespective of the immense growth opportunities extractive resources such as oil, gas and mining have brought to some developed countries such as Norway, the reverse is true for many developing countries. Many a time poor management, weak institutional capacities and the lack of transparency and accountability has accounted for the poverty, conflict, mismanagement and corrupt practices associated with this sector...

It is for these reasons the Government of Ghana (GoG) signed onto the Extractive Industries Transparency Initiative (EITI) in 2003. The EITI is a governance tool aimed at improving transparency and accountability around the payments that companies in the extractive sector are making to governments and the revenues that governments are receiving from those companies.”

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<sup>62</sup> s.8 LEITI Act

<sup>63</sup> Framework for the Oil and Gas Sector – Ghana Extractive Industry Transparency Initiative (GHEITI) – September 2009

- 3.1.2 Although working with the same objectives as Liberia for the implementation of EITI, Ghana took a diametrically opposing path to that of Liberia in terms of method for implementation by not adopting any new specific legal framework to facilitate EITI.

### 3.2 Pre-implementation challenges and proposed solutions

- 3.2.1 Despite the observation in Ghana's legal audit report (the "**Ghana Legal Report**")<sup>64</sup> that new legislation is required in the area of enhancing access to information, the Ghana Legal Report strongly concludes that a basic legal framework already exists in Ghana to allow for the development of regulations, administrative instructions and other instruments to advance EITI's objectives in specific contexts, without the enactment of dedicated legislation.

- 3.2.2 The Ghana Legal Report further observes that Ghana's 1993 *Minerals Commission Act* (Act 450) already requires the Minerals Commission, which administers the *Minerals and Mining Act* (Act 703), to submit an annual report of its activities to the Minister within six months of the year ending, and empowers the Minister to make regulations for its effective implementation. The Ghana Legal Report argues that<sup>65</sup>:

"[such] power could be exercised to require the compilation and publication by the Minerals Commission of revenue collected by Government from mineral operations... [but]... [f]or the work of the Commission to be comprehensive, it would have to be empowered to require Government institutions and persons engaged in mineral operations to provide it with relevant information."

- 3.2.3 Moreover, the Minerals Commission annually compiles statistics on revenue collected by the Internal Revenue Service from mining companies, and is required to submit an annual report of its activities to the Minister within six months of the year ending.
- 3.2.4 The Ghana Legal Report further notes that Ghana's 2003 *Financial Administration Act* requires the Controller and Accountant General to prepare monthly accounts including, inter alia, monthly statements of revenue and expenditure which are to be transmitted to the Auditor-General and the Minister of Finance within fifteen days of the month ending or such other period as Parliament determines, and subsequently published in the Gazette for public consumption.
- 3.2.5 The 2003 *Financial Administration Act* further requires the Accountant-General to submit to the Auditor-General and Minister of Finance annual public accounts detailing, *inter alia*, a statement of the revenue and expenditure for the financial year. Unlike the case of monthly accounts, however, no obligation exists to publish annual accounts in the Gazette.

Finally, the basis for the conclusion that no legislative intervention was necessary for GHETI under the Ghana Legal Report is also premised on the provisions of Ghana's 1963 *Companies Code*. According to the Ghana Legal Report, the *Companies Code* obliges companies operating in Ghana to file annual returns with appropriate revenue agencies and the Companies Registry, notice of which is to be published by the Registrar in the Gazette. Documents filed include revenues paid to the GoG identifying corporate income taxes, royalties and dividends.

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<sup>64</sup> Ghana Extractive Industries Transparency Initiative: A Review of the Legal Regime by Fui S. Tsikata, Reindorf Chambers, Adabraka, Accra, 7 February 2008

<sup>65</sup> Ghana Extractive Industries Transparency Initiative: A Review of the Legal Regime by Fui S. Tsikata, Reindorf Chambers, Adabraka, Accra, 7 February 2008 pp 9 - 10

3.2.6 The *Companies Code* allows for a member of the public to inspect any document filed and obtain a copy on payment of a prescribed fee. In this respect, the Ghana Law Report argues that while public access is not permitted to the information filed with the tax authorities it is nonetheless available at the Companies Registry.

### 3.3 **Post-implementation challenges**

3.3.1 The Ghana Law Report, however, observes that the state of Ghana's Companies Registry means that it sometimes takes many trips and much persistence to obtain appropriate information.

3.3.2 The Ghana Law Report further observes that it is also not clear whether such information as filed with the Companies Registry is in an intelligible format and in compliance with international accounting standards for purposes of clearly identifying and isolating payments to the GoG by the mining companies.

### 3.4 **Shortcomings Observed**

The shortcomings observed with respect to Ghana and the implementation of EITI is discussed in more detail under 4 immediately below addressing the Lessons Learnt.

## 4. **LESSONS LEARNT**

### 4.1 **Liberia**

4.1.1 With respect to the Liberia experience the key lesson appears to be the ability of LEITI to have a more pointed and specific policy on the implementation of EITI because the policy itself is contained in a publicly promulgated and available statute that attempts to provide for the following:

- (a) the objectives of EITI;
- (b) how EITI can benefit Liberia;
- (c) the creation of LEITI as the implementation agency;
- (d) the creation of the MSG as the supervising agency for LEITI;
- (e) the clothing of LEITI with statutory powers for implementing EITI; and
- (f) the provision of statutory sanctions for non compliance with EITI.

4.1.2 Where a key issue is left out in the legislation, however, the legislative method may prove inflexible in providing a fix to the extent that it may take the similar effort to amend the law as it took in promulgating it at first instance.

## 4.2 **Ghana**

4.2.1 In relation to Ghana, on the other hand, legislative intervention in the implementation of EITI was not considered a priority but only an enhancement factor. It was illustrated that the existing legal framework could still be manipulated to accommodate the implementation of LEITI particularly using the following:

- (a) the Minerals Commission Act;
- (b) the Finance Administration Act; and
- (c) the Companies Code.

4.2.2 Although a practical as well as a flexible approach when compared to the statutory approach taken by Liberia it is possible that this practical approach may not be able to garner a consolidated framework for implementing, monitoring and enforcing EITI particularly that the named three statutes already have distinct respective regulators which GHEITI may not be able to influence. The failure to maintain proper records at the Companies Registry as observed by the Ghana Legal Report, for example, is symptomatic of the shortcomings of this approach.



**SECTION C : FRAMEWORK FOR IMPLEMENTATION OF EITI****1. SUMMARY OF THEORY OF REGULATION****1.1 Introduction**

- 1.1.1 Despite the importance of legal theory and jurisprudence in setting and carrying out regulatory and supervisory functions, in reality regulation is also an art and a quasi-political function because it involves a careful balancing of competing private and public interests. The introduction of regulation to a particular sector generally signifies the interest of Government in the orderly and safe establishment, structure and operation of the sector.
- 1.1.2 The key test for the introduction of regulation is generally whether Government can successfully and efficiently implement its policy objectives without regulation. If it can do so without regulation then the introduction of regulation becomes a non-critical consideration.
- 1.1.3 The concept of regulation refers broadly to the creation of formal standards and codes of conduct which private individuals, firms and other entities must follow (i.e. rules). In effect the function of regulation essentially involves the mandatory enforcement of standards of behaviour that reflect wider public policy interest worthy of promotion at the expense of unlimited personal freedom.
- 1.1.4 Regulation is normally complemented by supervision. The concept of supervision refers to a separate process of ensuring that the created standards are observed and complied with. Without supervision the regulations risk remaining only symbolic and ineffective. Without regulation, however, there may be no justification for supervision.

**1.2 Schools of Thought**

- 1.2.1 There are at least two well known schools of thought that try to measure the characteristics of a good or sensible regulatory system. Although the main areas of focus are common to both schools the approaches in analysing the focus areas are distinct. The focus areas for both schools include the following:
- (a) *instruments or legal forms selected for regulation* – to achieve the desired objectives of regulation the instruments for regulation (e.g. Act of Parliament, Statutory Instrument, Policy Pronouncement etc.) must be appropriate in the light of the social justifications for intervention and of their predicted impact on the regulated community; and
  - (b) *procedures or processes for adopting regulations* – for the selection and formulation of the instruments for regulation selected to succeed the operation of regulatory intervention process has to have legitimacy within the community to be regulated (e.g. transparency, accountability, expertise involved etc.).
- 1.2.2 The *Public Interest Analysis* school of thought involves a three stage analysis for what may be considered to be good or sensible regulation (i) identifying and explaining the failure in question (ii) investigating alternative methods of correcting the failure and (iii) predicting the response of actors to the different methods with a focus on the minimisation of administrative costs.

- 1.2.3 The *Private Interest Analysis* school of thought, on the other hand, seeks to explain how regulatory principles and structures may diverge from what is desirable in terms of the public interest, because politicians and bureaucrats may be motivated to meet the demands of private interest groups who seek the advantages which regulation cast in a particular form may confer on them.
- 1.2.4 Both schools of thought and the different treatment of their common focus areas are useful in characterising any form of regulation as to whether it is likely to achieve the desired policy objectives or whether an alternative course of action which does not involve regulation is more preferable.

## 2. FACTORS FOR CONSIDERATION IN ZAMBIA

### 2.1 Enumeration of the Factors

- 2.1.1 In line with the theory of regulation and the schools of thought discussed above it will be important to consider the implementation of EITI in Zambia from the perspectives of the factors identified namely:
- (a) has the current failure sought to be corrected by the implementation of EITI being clearly identified and explained;
  - (b) are there other alternative methods for correcting the failure identified under EITI other than regulatory intervention;
  - (c) what are the likely responses to the various methods for correcting the failure by various stakeholders with the objective of selecting the most cost effective method;
  - (d) are there any private interest groups that may hijack the process for personal benefit;
  - (e) what form of instrument would be best suited for introducing regulation; and
  - (f) will the result of the process for adopting a particular instrument of regulation be legitimate.
- 2.1.2 As a preliminary issue, it should be noted that factors (e) and (f) are largely dependent on the considerations of factors (a) through to (d).

### 2.2 How Factors Impact Project

- 2.2.1 In terms of issue (a) the EITI concept has been identified in 2.1 under Part I (*Introduction*) above particularly in 2.1 (*What is EITI?*) and in 2.2 (*Objectives of EITI*). In summary, the failure sought to be corrected under the Project has been the lack of transparency and accountability (or the appearance that these are absent) in the extractive industries in Zambia with respect to the key players namely the Mining Companies in terms of the payments they make to Government, and the Government in terms of what it receives from the Mining Companies. This has led to suspicions as to what exactly the Mining Companies contribute to the Zambian economy if at all, on the one hand, and whether the Government properly discloses and uses what it receives from the Mining Companies, on the other.

- 2.2.2 Is regulatory intervention the answer to the transparency and accountability problem in the sector in response to factor (b)? With respect to Zambia in particular, regulatory intervention may be invariably indispensable in light of the statutory impediments identified in Section A (*Legislative Review*) above and summarised in Table 2 (*Summary of Legislative Issues*) above. These impediments are unlikely to be addressed without any form of regulatory intervention.
- 2.2.3 Stakeholder buy-in for the EITI implementation in Zambia appears quite high from both the Mining Companies and the Government in response to factor (c). The sponsorship of the EITI process for implementation by Government and establishment of study groups with Government leadership is testimony of Government interest. The participation by the Chamber of Mines through a seat on ZEC also confirms the interest of the Mining Companies in seeing the process for implementation through. Some Mining Companies have actually gone public in supporting the EITI implementation process in Zambia as shown by the newspaper cuttings in **Annexure IV**. The EITI implementation in Zambia through regulatory intervention is, therefore, unlikely to suffer from a legitimacy crisis as a chosen method.
- 2.2.4 In response to factor (d) it is not clear at this stage whether the EITI implementation process may be hijacked by private interest groups hiding behind the public interest underpinning the desirability of the Project. Regardless of this possibility in the future becoming evident, the transparency and accountability objective of the EITI process is likely to have greater impact in protecting public interests than private interests.
- 2.2.5 The considerations of factors (a) through to (d) as discussed above suggest the need for regulatory intervention to facilitate the implementation of EITI in Zambia. In relation to factor (e), therefore, one of the remaining questions would be the identification of the appropriate regulatory instrument for use in implementing EITI. The legitimacy of the process for adopting any form of instrument for regulation under factor (f) is unlikely to arise as demonstrated by the general acceptance of EITI<sup>66</sup>.
- 2.2.6 The Ghana experience at 3 (*Ghana Experience*) reveals that it is possible to place a subject matter under regulation on the back of subsidiary legislation made pursuant to an existing principal statute without introducing a tailor made statute. The Liberia experience at 2 (*Liberia Experience*), on the other hand, illustrates the operability of the option of enacting specific primary legislation to facilitate EITI implementation.

### 3. RECOMMENDATIONS

#### 3.1 Introduction

- 3.1.1 The ZEC has at least four options for implementing EITI under the Project on the basis of the discussions particularly in Section B (*Comparative Review*) above:
- (a) voluntary compliance with EITI by Government and Mining Companies (the “**Voluntary Compliance Option**”);
  - (b) issue of Subsidiary Legislation (administrative rules that are not ordinarily issued by Parliament) on the back of existing legislation such as the Mines and Minerals Act (the “**Subsidiary Law Option**”);

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<sup>66</sup> See, for example, **Annexure IV**.

- (c) passing of an amendment law to incorporate policy under EITI into an existing primary law such as the Mines and Minerals Act or the Public Finance Act (the “**Amendment Law Option**”);
- (d) passing of new legislation to incorporate stand-alone policy on EITI (the “**New Law Option**”).

3.1.2 Each of the options outlined above are discussed in turn in 3.2 to 3.6 immediately below.

### 3.2 Voluntary Compliance Option

- 3.2.1 The Ghana experience has shown that it is possible to implement EITI without any regulatory intervention and without creating any new bureaucracy in the governance system. At face value, this appears relatively cost effective and practical.
- 3.2.2 As noted in 3 (*Ghana Experience*) of Section C above, however, implementation of EITI without supportive and specific regulatory intervention can become unwieldy and enforcement of the policy by a toothless regulator (who relies on other established regulators) may prove costly in the long run.
- 3.2.3 In addition, and in relation to historical costs, it is also possible that the policy under the Project, notwithstanding that it has demanded funding to be developed, may become ineffective due to the absence of regulatory and supervisory intervention.
- 3.2.4 Most critically, however, the identified statutory impediments in Section A (*Legislative Review*) above and summarised in Table 2 (*Summary of Legislative Issues*) above are unlikely to be addressed without any form of regulatory intervention. Unlike the situation obtaining in Ghana, the Zambian legal framework is currently more restrictive than permissive to the successful implementation of EITI.
- 3.2.5 As also noted in the 2008 Independent Reconciliation Report<sup>67</sup>, however, a voluntary process will not ensure:
  - (a) full compliance;
  - (b) common appreciation of the importance or prioritisation of compliance with the process; or
  - (c) the quality of the report.

### 3.3 Subsidiary Law Option

- 3.3.1 An attractive and less costly method for introducing EITI may be for either the Minister of Finance acting under say the Public Finance Act or the Minister of Mines acting under the auspices of the Mines and Minerals Act introducing subsidiary legislation on the back of an enabling amendment to any of such statutes in light of similarity of policy objectives with EITI.

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<sup>67</sup> Produced on behalf of ZEC by PriceWaterhouseCoopers

- 3.3.2 As noted above in 1 (*Theory of Regulation*) regulation is largely a consolidation of public interest principles by the Government in to an instrument prescribing standard behaviour which must be observed at the risk of imposition of sanctions if breached. In this regard the EITI implementation from the Zambian perspective will require:
- (a) overcoming the identified statutory barriers highlighted in Section A (*Legislative Review*) above and summarised in Table 2 (*Summary of Legislative Issues*);
  - (b) enacting legislation that will place obligations on Government agencies in addition to or contrary to existing statutory obligations;
  - (c) creation of a regulatory (supervisory) agency to implement and monitor the sustainable implementation of the policy; and
  - (d) conferment of powers to impose sanctions.
- 3.3.3 All the foregoing four characteristics require to be supported by primary legislation (i.e. an Act of Parliament) under Zambian law. Subsidiary legislation in the form of a statutory instrument may not make provisions that conflict with those of primary legislation for the purpose of addressing legislative impediments to EITI<sup>68</sup>.
- 3.3.4 The point in 3.3.3 immediately above also applies in relation to the placing of additional obligations on the various Government agencies that will be required under the Project to report to another implementing agency (i.e. ZEITI) responsible for EITI. Such an intervention may only be made via primary legislation.
- 3.3.5 Similarly, the creation of any Government department or agency is a preserve of the President or the National Assembly<sup>69</sup> and the latter may only generally act by way of Act of Parliament<sup>70</sup>.
- 3.3.6 In addition the imposition of certain sanctions above a prescribed threshold, in order to enforce compliance with regulations, may only be done pursuant to an Act of Parliament<sup>71</sup>.
- 3.3.7 In essence, therefore, the Subsidiary Law Option is unlikely to be ideal for the introduction and implementation of EITI in Zambia.

#### 3.4 **Amendment Law Option**

- 3.4.1 It is possible to introduced EITI in Zambia by having the Project subsumed under existing legislation as a substantive amendment to existing legislation such as the Mines and Minerals Act and the Public Finance Act.
- 3.4.2 This option, the Amendment Law Option, presents, however, a number of challenges which militate against introducing EITI in this fashion and these include:
- (a) it will involve the same effort as introducing a new statute under the New Law Option;

<sup>68</sup> s.20(4) Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia

<sup>69</sup> art. 44 Republican Constitution (see generally also the Statutory Functions Act Chapter 4 of the Laws of Zambia)

<sup>70</sup> art. 78 Republican Constitution (see generally also the Statutory Functions Act Chapter 4 of the Laws of Zambia)

<sup>71</sup> s.20(5) Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia

- (b) over the years the focus of the policy under the Project is likely to grow beyond a particular extractive industry or public institution (i.e. expand from covering only Mining Companies to include such other sub sectors as petroleum, forestry products etc.);
- (c) independence and legitimacy of the implementing and monitoring bodies may be undermined if perceived to be under a particular Government ministry;
- (d) while reporting functions are normally contained in existing legislation as support to a core subject of regulation, the reporting function under EITI will be a core function; and
- (e) efficiency and immunity from bureaucracy may be affected if EITI is made part of a Government ministry under a particular statute.

### 3.5 New Law Option

- 3.5.1 The New Law Option involves the promulgation of a new piece of legislation dealing specifically with the formal introduction and implementation of EITI in Zambia without any taint from other policies under other existing legislation.
- 3.5.2 The New Law Options appears to address the shortcomings of the other options discussed above:
  - (a) if properly drafted it is unlikely to be subject to the uncertainty and lack of effectiveness like the Voluntary Compliance Option;
  - (b) it is not limited by the inferiority of subsidiary legislation to primary legislation as obtaining under the Subsidiary Law Option;
  - (c) it is not tainted by the inherent restrictions arising from a multiplicity of competing policies under one instrument with respect to the Amendment Law Option;
  - (d) it still addresses the core requirements for the effective implementation of policy under the theory of statutory regulation.
- 3.5.3 The certainty of legislation, however, carries with it the disadvantage of rendering flexibility and adaptation more difficult in the face of Parliamentary constraints on legislative amendments. In this regard, it will be important for this option to be carefully implemented, if adopted, by ensuring that the full concept, objectives and benefits of EITI are captured in the main policy to avoid the policy being subjected to and delayed by frequent amendments before Parliament.
- 3.5.4 In light of the shortcomings affecting the other options discussed above the New Law Option, appears to offer the best method for implementation. In this respect the Liberia model discussed in 2 (*Liberia Experience*) of Section B above becomes more attractive in order to address the identified statutory impediments.

- 3.5.5 Taking into consideration the discussion above it is proposed that EITI be implemented in Zambia under a specific Act of Parliament dealing exclusively with transparency and accountability of all beneficiaries of the extractive industries in Zambia including the Mining Companies and Government<sup>72</sup>.
- 3.5.6 The LEITI Act offers a good blue print for the Project but the Ghana approach serves as a good reminder that any Act eventually enacted for the implementation of EITI should be flexible enough to allow for the appointed regulator or supervisor to be able to create and publish subordinate legislation for the actual implementation of EITI without having to engage the long and laborious process of Parliament. Effectively the Act should set out the principles of EITI in a generic fashion. The detail on policy implementation may be set out in subordinate legislation.
- 3.5.7 Some of the proposed minimum standards to be set out in a new ZEITI Act could include the following:
- (a) preamble or policy statement;
  - (b) establishment of regulator and appointing authority;
  - (c) status, functions and funding of regulator;
  - (d) disclosure, reporting and accountability obligations of Mining Companies and Government agencies;
  - (e) description of, and consequences of, breaches;
  - (f) disclosure, reporting and accountability obligations of regulator;
  - (g) dispute resolutions;
  - (h) power to issue regulations and status of such regulations; and
  - (i) relationship of regulator and statute with other regulators and statutes.
- 3.5.8 The New Law Option is, nevertheless, still subject to challenges and is still affected by a number of practical issues which are discussed in Section D (*Practical Issues and Implementation of EITI*) below.

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<sup>72</sup> This statement notwithstanding the scope of EITI may be expanded in the future to cover not only Mining Companies

**SECTION D : PRACTICAL ISSUES AND IMPLEMENTATION OF EITI****1. RECOGNISING AND ADDRESSING THE PROBLEMS****1.1 Introduction**

1.1.1 Once the option for implementing EITI is selected such a stage will only represent the theory. The actual implementation of EITI (i.e. the operationalisation of the policy) is likely to face even bigger obstacles that may be addressed mainly by drafting ingenuity and taking practical steps from the outset.

1.1.2 The main practical challenges are likely to include the following:

- (a) multiplicity of reporting obligations;
- (b) inherent weaknesses of Government reporting;
- (c) choice of regulator;
- (d) turf wars amongst regulators;
- (e) Sanctions and incentives;
- (f) dissemination of EITI reports;
- (g) ZCCM-IH question; and
- (h) Road User Fees.

1.1.3 Each of the practical challenges is discussed in more detail below. The approach is to explore the alternatives for addressing each challenge, evaluate each such possible solution and propose the best solution.

**1.2 Company Reporting**

1.2.1 The success of the implementation of EITI is likely to be impacted by the currency of each EITI report produced and by how synchronised the system of reporting by both Mining Companies and Government will be with respect to the expected due date of the EITI report. Two key challenges arise in relation to achieving currency and synchronisation:

- (a) varying financial reporting dates for companies;
- (b) other periodic or prescribed reporting obligations of companies;



- 1.2.2 The varying financial year ends for the reporting entities might pose a challenge to the uniform periodic dissemination of the report. In addition, if any of the Mining Companies are listed the release of information through EITI must be well coordinated otherwise the EITI process may negatively affect the Mining Companies in terms of both the performance of its securities on the relevant securities exchange and its compliance with the listing requirements of such securities exchange.
- 1.2.3 At least three possible solutions may be adopted to try and address the issue of misaligned financial reporting dates and release of price-sensitive financial information namely (i) the reporting deadlines are synchronised for all reporting companies under EITI or (ii) the report is published at least twice a year to allow for differing financial year ends or (iii) the report has a 1 Calendar year lag to allow for all reporting companies to make their filings with ZEITI.
- 1.2.4 The first alternative may not be easy to implement as the financial year ends for participating companies will always differ for many reasons including their multinational-character and group membership. The publication of the EITI report on a bi-annual basis may not be feasible as well due to the need to reconcile company payments and Government receipts.
- 1.2.5 A more practical solution to address both the misalignment of financial year ends and disclosure of price sensitive information may be to delay the production of the ZEITI Report by at least one calendar year so that it relates to all financial years ending in the previous year coupled with a 6 month reporting deadline from each financial year end of a reporting company.
- 1.2.6 A lingering problem for the selected solution, however, is that ZEITI Report will always be lagging and may not provide current information. The objective nevertheless is reconciliation and accountability rather than currency of the Report.
- 1.3 **Government Reporting**
- 1.3.1 Since the reporting by the relevant Government agencies is expected to comply with international standards it is not clear at what stage and in what form the information will move from the reporting Government agency to ZEITI. Will entities like ZRA or the Mines Department have to wait until the Auditor General audits them before releasing information or will such information be available to ZEITI in unaudited form? Is the Auditor General, in any case, going to be able to meet the dissemination deadlines of EITI in finalising their submissions?
- 1.3.2 The other key concern is the capacity of some of the Government reporting agencies to comply with international standards of reporting. This is of particular concern with the Councils especially and the question remains as to whether their capacity will be upgraded in order to comply with EITI objectives.
- 1.3.3 The two available solutions in this respect are either to place an obligation on the Auditor General and the Government agency concerned to provide audited reports by prescribed deadline or to allow the Government agency to appoint a registered private auditing firm for the production of financials by a prescribed deadline.

1.3.4 The challenge still remains as to whether the concerned Government agency will be able to produce financial reports on time and to standard and whether the Auditor General will have the capacity to audit on time. Unless a particular Government agency could afford private auditing services the cost exposure for engaging a private auditing firm will always remain a challenge for Government agencies.

#### 1.4 **Choice of Regulator**

1.4.1 The challenge for the success of EITI implementation will be the independence of the regulator or regulators under the Project. If the regulator is appointed and constituted by Government appointees, the efficacy and legitimacy of the reports produced under the Project are unlikely to be held in high esteem as they will still be perceived to be incestuous on the part of Government.

1.4.2 For EITI to succeed, therefore, it will be important for the main regulator to be independent and for it to have multi-sector representation mainly including the following:

- (a) Government;
- (b) Mining Companies (and other companies representative of other extractive industries);  
and
- (c) Civil Society.

1.4.3 The ideal will be for the main regulator to be autonomous and for the members to enjoy some form of immunity in discharging their functions during their tenure and for anything legal done during their tenure. If the main regulator is subsumed within a pre-existing ministry or department it is possible that it may lose its independence.

1.4.4 One downside with multi-sector representation is the possibility of polarisation within the apex body of the regulator where one group will always side with a certain category of regulated entities on certain decisions. This appears to be an easier problem to deal with, however, than the lack of efficacy or legitimacy.

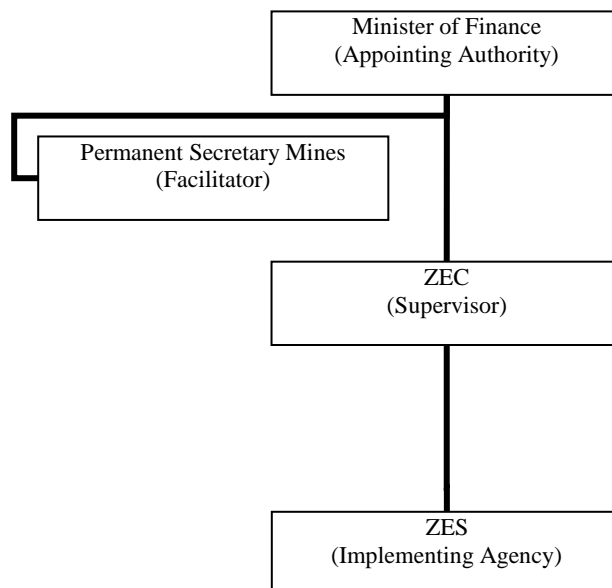
1.4.5 Where the implementing agency for EITI is also the body responsible for monitoring or supervising implementation of the policy by both the regulator and the regulated it is possible for a conflict to arise in the performance of the functions resulting into an accountability crisis. To avoid this in the case of EITI it is proposed that ZES is best placed to perform the implementation function while ZEC picks up the supervisory role for both ZES and the complying entities (i.e. the Government agencies and the Mining Companies as well as others).

1.4.6 It is further proposed that the process be 'figure headed' by the Ministry of Finance to ensure that reporting Government agencies responsible for public revenue, most of which fall within this ministry, are policed to comply with EITI administratively.

1.4.7 On similar consideration, it will be important for the Minister of Finance to be assisted by the lower ranking but senior functionary from the MoM, initially, to ensure that some of the Government agencies and all of the Mining Companies could be policed into compliance by direct interaction or persuasion without the need to impose punitive sanctions.

- 1.4.8 What will make the regulation work will be the implementation of the objective of EITI and this core function is likely to be more effectively performed if unadulterated by the other regulatory functions.
- 1.4.9 Lastly, the success of the regulatory structure for the implementation of EITI in Zambia is also going to be dependant on the accountability of the core regulators (i.e. ZEC and ZES). Accountability in this respect will take at least three forms namely (i) financial (ii) procedural and (iii) substantive.
- 1.4.10 ZES and ZEC should be held to certain standards of financial management in the conduct of their functions to ensure that the cost of administering EITI can be determined at each stage. Such requirements would enhance transparency and accountability of both ZES's and ZEC's financial management, thereby enhancing their own legitimacy to require the same standards from the entities they regulate.
- 1.4.11 Procedural accountability requires that a regulator's procedures must be fair and impartial such that there is an appropriate framework for making rules and decisions which serve the public interest and for resisting the undue influence of private interests.
- 1.4.12 Substantive accountability seeks to ensure that the rules and decisions of a regulator are themselves justifiable in terms of the public interest goals of the regulatory system in question.

**Fig 1**  
**Structure for ZEITI<sup>73</sup>**



<sup>73</sup> The facilitation role could be overseeing by either the Deputy Minister of Mines or the Permanent Secretary Mines but preferably the latter since the position is normally occupied by a technocrat who is likely to be more focused in the role

## 1.5 Interface amongst Regulators

- 1.5.1 Since EITI will be implemented across different regulatory agencies with ZEC and ZES ideally overseeing its compliance the potential for ‘turf wars’ and shirking of responsibility when things go wrong is quite high. Due to the divergent objectives that each of the relevant reporting agencies was set up to achieve it is unlikely that a set of regulations under one statute could resolve this practical difficulty.
- 1.5.2 The challenge is further complicated by the fact that reporting functions are normally contained in existing legislation (regulating either Mining Companies or Government agencies) as support to a core subject of regulation while the reporting function under EITI will be a core regulated function.
- 1.5.3 A tried and tested method is for the concerned agencies to execute respective memoranda of understanding (“**MoUs**”) under which the following will normally be agreed:
- (a) objective to cooperate;
  - (b) identification of roles and scope of such roles to be played by each regulator;
  - (c) the regulator that will play lead when there is an intersection of roles;
  - (d) the points of contact; and
  - (e) the process for resolving conflicts.
- 1.5.4 The MoU concept may not be used, however, to delegate statutory functions. In countries like the United Kingdom it has been effectively used to coordinate separate but similar functions of financial regulators such as the Bank of England, HM Treasury and the Financial Services Authority<sup>74</sup> towards maintaining stability in the financial system to achieve cooperation between the 3 institutions with the following guiding principles:
- (a) clear accountability;
  - (b) transparency;
  - (c) no duplication; and
  - (d) information exchange.
- 1.5.5 Although the MoU concept is not common in Zambia, it is in fact not unprecedented. An MoU was executed on 8 November 2008 between the Energy Regulation Board, the then Communications Authority of Zambia and the National Water Supply and Sanitation Council with the objective of implementing joint efforts towards establishing transparent regulatory processes, systems and procedures for effective regulation.

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<sup>74</sup> Abolished with effect of 1 April 2013 and its responsibilities split between two new agencies (the Prudential Regulation Authority and the Financial Conduct Authority) and the Bank of England

- 1.5.6 Where there is irreconcilable conflict amongst regulators an overriding clause in favour of EITI<sup>75</sup> with respect to the disclosure function may be an invaluable tool particularly to obviate restrictions on disclosure within the Local Government Act, Rating Act, Lands Act and National Road Fund Agency Act.
- 1.5.7 Such an overriding clause would be akin to what is obtaining to address irreconcilable conflict, under the following provisions for the named statutes:
- (a) s. 31 and s. 43 Pension Scheme Regulation Act;
  - (b) s. 113 Public Health Act; and
  - (c) s. 4 Emergency Powers Act.
- 1.5.8 The overriding nature of the provision in the EITI enabling statute should be limited solely to transparency and the obtaining of information for the production of the ZEITI reports.
- 1.6 **Sanctions and Incentives**
- 1.6.1 There will be a need to not only graduate sanctions but to distinguish between the sanctions enforceable on the private regulated entities and the public agencies. Failure to do so may render the whole enforcement process under EITI unworkable and unresponsive to the situation on the ground.
- 1.6.2 From the outset, it will be important to note that enforcement mechanisms will play an important part in ensuring that regulated bodies comply with their reporting obligations. There are basically two approaches to ensuring compliance (i) compliance and (ii) deterrence<sup>76</sup>. A compliance based approach is an approach which is grounded on cooperation rather than punishment, therefore, requiring regulated institutions to comply with standards by compulsion, influence or demands (pre-monitory).
- 1.6.3 Deterrence based approach (post-monitory), on the other hand, is focused on retribution and normally engaged as a last resort to ensure observance with regulatory requirements particularly in the case of mature regulatory regimes.
- 1.6.4 Compliance and deterrence mechanisms are essential and interdependent aspects for ensuring observance of a regulatory regime, provided that there is a balance between overly stringent and overly accommodative enforcement strategies. The former could undermine the regulatory regime by excessively increasing the cost of regulation and compliance while the latter may give the impression of lax regulation.
- 1.6.5 The downside is that all these advanced methods of sanction application and imposition require a sophisticated and skilled regulator. For its success to be potentially achievable both ZEC and ZES (more particularly ZES) would have to be fully resourced.

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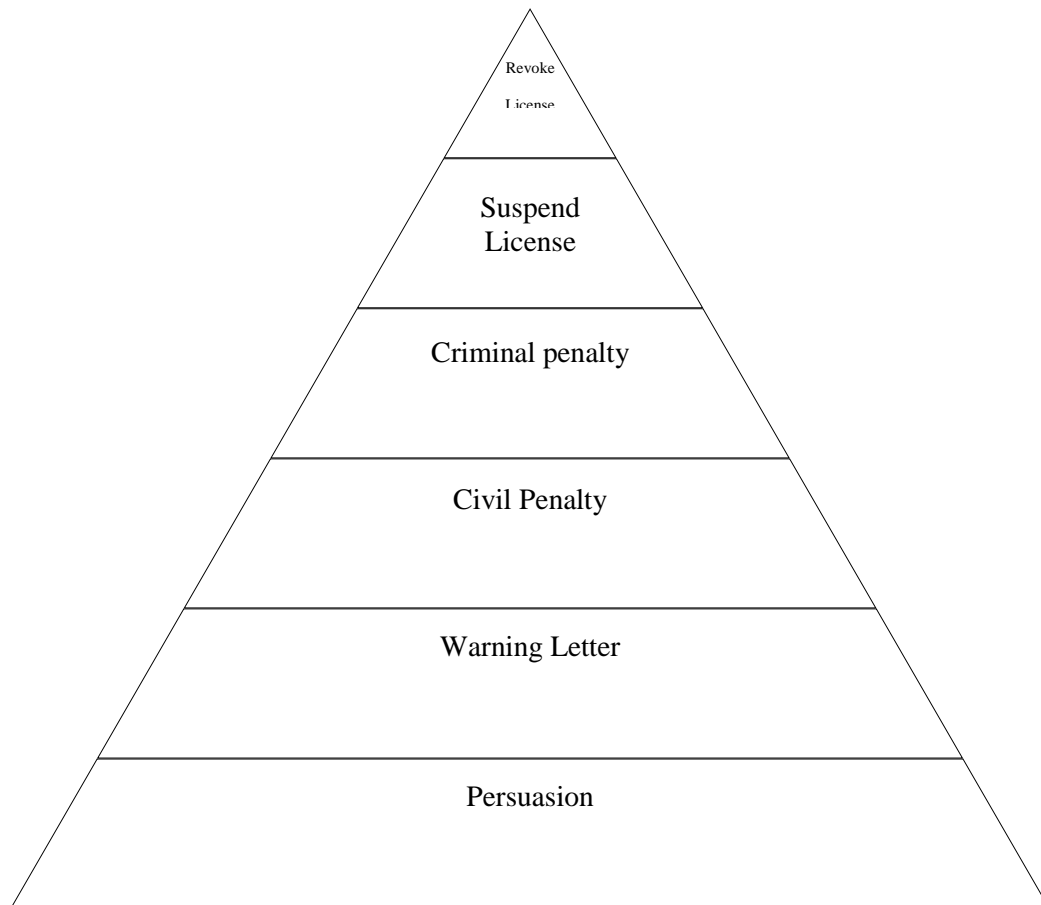
<sup>75</sup> With statutory backing perhaps in the proposed new ZEITI Act

<sup>76</sup> Singh, D (2002) 'Enforcement Methods and Sanctions in Banking Regulation and Supervision', *International and Comparative Corporate Law Journal*, Vol. 4, Iss. 4, pp. 307-343

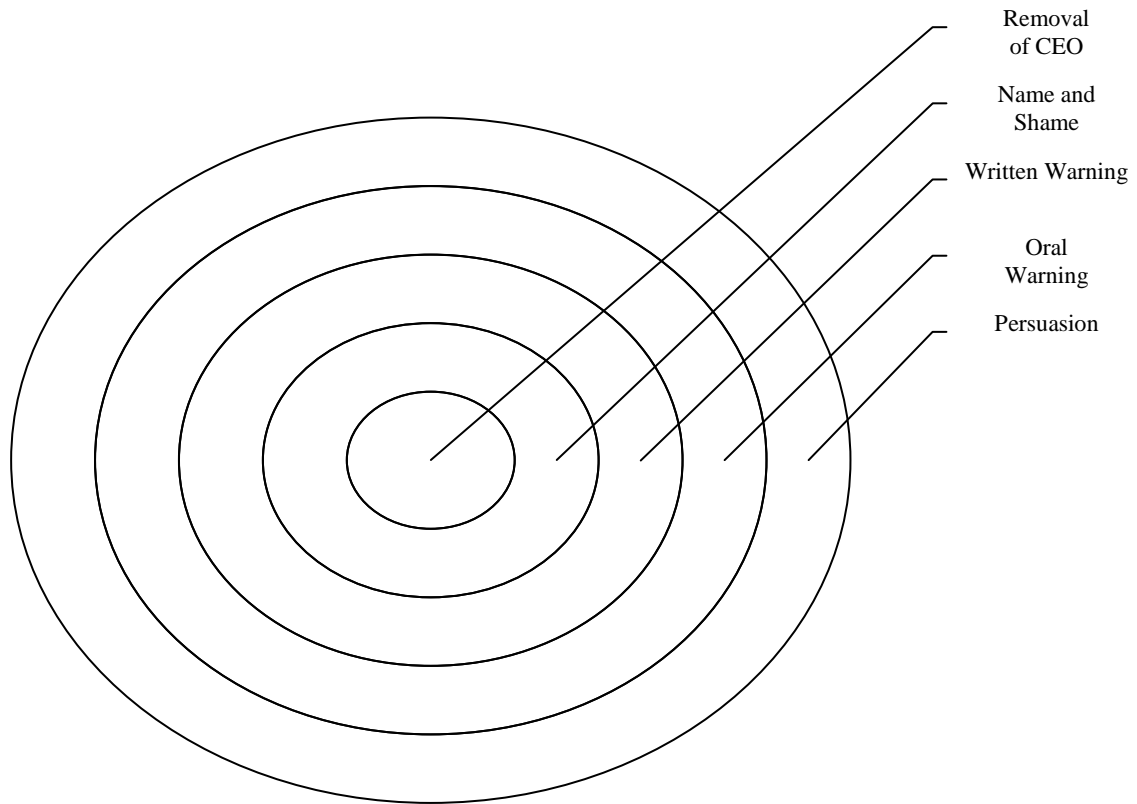
- 1.6.6 A balanced enforcement mechanism for the implementation of ZEITI could thus be achieved by observing an organised bevy of sanctions as illustrated in the following pyramid (with the most common sanction being represented by the base while the rarest is at the apex):

**Fig 2**

**Sanctions Pyramid for Mining Companies**



- 1.6.7 With respect to Government agencies the pyramid would be modified to include the following sanctions with escalation towards the smallest disc.

**Fig 3. Sanctions for Government Agency<sup>77</sup>**

## 1.7 Dissemination of EITI Report

1.7.1 Some lingering questions about the publication of the ZEITI report include:

- (a) can it be used for other purposes (e.g. carrying out investigations)?
- (b) what will be its evidentiary value?
- (c) is it going to be gazetted and widely published or will it be sold or subject to subscription?
- (d) is any entity going to own the intellectual property in it?
- (e) what happens if the information in the report conflicts with information in another official document?

1.7.2 These issues will need to be addressed in an appropriate provision of the new legislation otherwise the process may be impeded by external influences such as litigation etc.

<sup>77</sup> Non-compliance will be attributed to the head of the agency, who will be subject to the sanctions

## 1.8 **ZCCM-IH question**

- 1.8.1 ZCCM-IH qualifies both as a Mining Company as well as Governmental Agency. This is because it holds some mining interest and therefore obliged to make certain statutory payments to Government agencies. On the other hand, however, it is the beneficiary and conduit of certain payments from Mining Companies, on behalf of Government, such as dividends and price participation payments.
- 1.8.2 In addition, ZCCM-IH has certain obligations under the Bank of Zambia Act as discussed in **Annexure III** which appear to suggest that it has certain administrative law obligations similar to a Governmental agency.
- 1.8.3 To capture the receipts and payments made to and by ZCCM-IH it would be important for the enabling legislation for the implementation of EITI to recognise this dual status of ZCCM-IH and to provide guidelines on how to determine specific roles in each of the capacities. This may lead to complications in the reporting process but it is not impossible to undertake.
- 1.8.4 Tying ZCCM-IH to a single or no status is likely to omit significant amounts of the payments or receipts by ZCCM-IH to the extent that the objectives and benefits of EITI will be lost for payments or receipts passing through ZCCM-IH.

## 1.9 **Road User Fees question**

- 1.9.1 A process complication may arise in relation to capturing of Road User Fees paid by Mining Companies to the NRFA under the National Road Fund Agency. This is because NFRA will be dealing with collections from the Mining Companies not made to it directly but most likely to oil marketing companies, operators of weigh bridges, toll bridges etc.
- 1.9.2 Since the NFRA will be dealing indirectly with the Mining Companies it would be important for the enabling legislation for implementing EITI to recognise this indirect form of disclosure by placing an obligation on the conduit entities (the “**Conduit Agencies**”) dealing with the Mining Companies to ensure that they collect this information when dealing with the Mining Companies and also when making payments to NFRA. This could be achieved through a system of prescribed forms.
- 1.9.3 A challenge still remains as to the imposition of sanctions against the Conduit Agencies particularly where it is not clear as to the party in default. It may be important for sanctions to be sparingly imposed against such Conduit Agencies particularly if they can show that they observed certain prescribed minimum standards of procedure.

## 1.10 **Summary of practical problems and preferred solutions**

- 1.10.1 The table below attempts to summarise what has been discussed in 1 above and is presented in more or less a practical problem solving work sheet form.



**Table 4. Practical Problems and Solutions**

<b>Practical Challenge</b>	<b>Selected Solution</b>	<b>Possible Benefits</b>	<b>Lingering Harms</b>
<b>1.</b> Multi-reporting Obligations	Common reporting date which is at least one calendar year from the last financial year	Standardisation of information flow	Report will not be current
<b>2.</b> Weakness in Governmental agency reporting	Upgrading of financial function and appointment of Auditor General or private auditor	Improved quality in report and reporting standard	Incremental costs and lack of capacity of the Auditor General's office
<b>3.</b> Choice of Regulator	Multi-sector representation in the apex regulator	Legitimacy and efficacy of regulator's decisions	Risk of polarisation during decision making
<b>4.</b> Turf wars between regulators	MoU concept and overriding provisions	Effective coordination and Finality of decisions	The overriding provisions if consistently relied on may eventually take away the benefits of the MoU concept
<b>5.</b> Rigidity of sanctions	Differentiation of Sanctions and progressive imposition	Healthy relationship between regulator and regulated	Too dependent on expertise of regulator
<b>7.</b> Dissemination of report	Protection from liability for dissemination	No show stoppers	Open to abuse
<b>8.</b> ZCCM-IH	Recognition of dual status in law	Captures hidden revenue for disclosure	Complication in the reporting process
<b>9.</b> Road User Fees	Recognition for indirect responsibility for reporting	Eases the reporting challenge	Complication in the reporting process

1.10.2 It may be noted that the lingering harms may not be completely eliminated but the practical solutions selected, however, represent the best evaluated solution.

## 2. PRIORITY ACTIONS

### 2.1 Main Actions

2.1.1 In light of the recommendation for a new stand-alone EITI law in Zambia as set out in Section C (*Framework for Implementation of EITI*) as well as the practical issues identified in this Section D (*Practical Issues and Implementation of EITI*) the following activity is recommended to be considered as a matter of priority (the “**Main Actions**”):

- (a) fully equip and mandate ZEC and ZES to champion the next phase of statutory integration of EITI policy in Zambia;
- (b) engage legal consultant to start preparing a layman’s draft for the new stand-alone EITI law in Zambia (“**Draft ZEITI Bill**”);
- (c) legal consultant, in consultation with ZEC and ZES, to prepare road map for statutory integration to include the following milestones:
  - (i) preparation of concept note for Draft ZEITI Bill;
  - (ii) preparation of Draft ZEITI Bill;
  - (iii) preparation of executive summary of concept note and Draft ZEITI Bill;
  - (iv) present concept note and Draft ZEITI Bill to key stakeholders;
  - (v) present concept note and Draft ZEITI Bill to key Ministers, Permanent Secretaries and other Government officials;
  - (vi) consolidate comments after milestones (iv) and (v) into final concept note and Draft ZEITI Bill; and
  - (vii) hand over process to key line ministry such as MoM or MoF to finalise through Government and Parliamentary process.

### 2.2 Other actions

2.2.1 Pending the implementation of the Main Actions ZEC and ZES should still continue with the implementation of the Project under the assumption that the Draft ZEITI Bill will be enacted in to law.

2.2.2 To this effect ZEC and ZES should continue sensitising all stakeholders on the EITI concept, its objectives and benefit to the country to prepare the ground for the possible introduction of the Draft ZEITI Bill. Effectively ZEC and ZES should advocate for the following:

- (a) amendment of the current policies of key institutions under EITI that appear to impede the implementation of the Project such as the MoM Charter and the ZRA Code of Ethics;

- (b) where possible influence consequential amendments in support of EITI to legislation impacting the implementation of EITI undergoing separate review process;
- (c) ensure that a cabinet memorandum is prepared in good time for presentation before cabinet following milestone (vii) above.

### 3. INTERACTIONS WITH STAKEHOLDERS

#### 3.1 ZEC and ZES

- 3.1.1 Before the current draft and after the initial draft of the Legal Audit Report the Legal Consultant interacted extensively with both ZEC and ZES in the form of presentations and receipt of comments on the draft. These interactions and feedback have influenced some of the inclusions in the the Legal Audit Report.
- 3.1.2 A full catalogue of the comments received from ZEC and ZES together with the responses of the Legal Consultant are set out in **Annexure V**.

#### 3.2 Larger Stakeholder Meeting

- 3.2.1 More extensive contribution on the Legal Audit Report was sort when the public stakeholder meeting was held at the Government Complex in Lusaka on 20 February 2013 (the “**Stakeholder Meeting**”). A cross-section of participants was invited representing Government Agencies (“**GAs**”) constituting mainly regulators and implementing agencies for the extractive sector and public revenue, Non-Governmental Organisations (“**NGOs**”) mainly collective interest groups such as the chamber of mines and Private Sector Organisations (“**PSOs**”) made up mainly of mining companies.
- 3.2.2 The feedback from the Stakeholder Meeting detailing contribution from Government, GAs, NGOs and PSOs is set out in **Annexure VI** to this Legal Audit Report.

## ANNEXURE I

### Terms of Reference

#### 1. Background

- 1.1 The Extractive Industry Transparency Initiative (EITI) is the global standard for promoting transparency and accountability in countries rich in oil, gas, or mineral resources. **The EITI sets a global standard for companies to publish what they pay and for governments to disclose what they receive.** This is done through mining companies, Governments and civil society working together to develop a framework for the publication of payments and receipts from the extractive industry. Ultimately this will strengthen governance, enhance transparency and accountability in the extractive industry, increase participation of civil society in key sector decisions and address the negative public perception of the industry and Government.
- 1.2 The Government of Zambia officially launched the process of implementing the EITI in Lusaka on July 16, 2008 at a national workshop and attained candidate status on 15<sup>th</sup> May 2009. The implementation of the Initiative is being spearheaded by the Zambia EITI Council (ZEC) comprising representatives from the civil society, Government and mining companies with support from the World Bank and other Cooperating partners. ZEC is supported by a small Secretariat housed in the Ministry of Mines and Minerals Development. The EITI implementation process is currently voluntary but will later be legislated.

#### 2. Objective

The main objective of the consultancy is to undertake a review of the current regulatory framework to identify potential obstacles to EITI implementation, recommend whether a new and dedicated legislation is required for EITI implementation and to create practical problem solving research which would help to guide the formulation and effective implementation of Government policies, laws and regulations in support of the EITI implementation.

#### 3. Scope of work

The Consultant will be expected to undertake the following tasks:

- review existing laws, policies and recommendations in the area of corporate disclosure, transparency and accountability in the mining sector and government in Zambia, and provide a summary of the key issues highlighted in the documents reviewed and what can be done to address these issues;
- review legislation with regard to EITI in selected EITI implementing countries such as Liberia, Ghana, Nigeria
- recommend whether a new and dedicated legislation is needed for EITI implementation in Zambia;

- create practical problem solving research which would help to guide the formulation and effective implementation of Government policies, laws and regulations in support of EITI implementation;
- develop a draft report with a set of recommendations and priority actions in co-operation with the EITI- Secretariat ;
- disseminate the research findings and recommendations at a national workshop;
- prepare and submit a final report that includes comments from stakeholders; and
- In addition to providing copies of the above-noted deliverables to ZEC, the Consultant shall also e-mail a copy of each written deliverable, including copies of any presentation materials, to the World Bank Task Team Leader associated with this assignment and to the World Bank Legal Department, at [projectlaw@worldbank.org](mailto:projectlaw@worldbank.org)

#### **4. Schedule of work**

The assignment is expected to be completed within thirty (30) working days. The Consultant is required to indicate how s/he plans to distribute his time within this period

#### **5. Consultant's competencies**

The Consultant shall be a firm or individual with the following minimum profile:

- be a member in good standing of a law society that accredits legal practitioners, and shall have at least 10 years of international professional experience in corporate, financial and mining law;
- should have at least 3 years of international professional experience with EITI issues, including the implementation of EITI in Africa;
- should have in-depth information of the Zambian mining sector in general and how it is regulated particularly in terms of information disclosure;
- have excellent communication skills, both written and oral; and
- a master's degree in any related field, will be an added advantage ;

#### **6. Reporting procedures**

The Consultant will report to the Head, EITI Secretariat.

#### **7. Deliverables**

- Draft report for review of existing Laws, policies, legislation and recommendations; and
- Presentation of the final report incorporating stakeholder views.

**ANNEXURE II**

## Other Important Legislation Impacting EITI

**1. Public Audit Act**

- 1.1 The Public Audit Act has the main objective of empowering the Auditor General to undertake audits of public receipts and expenditure and produce a report following such audits.
- 1.2 The Public Audit Act grants the Auditor General and any public officer, agent or specialist consultant authorised thereby, the power to access all books, records, returns, reports and other documents relating to the accounts (“**material**”) of any statutory corporation, public company, department or private institution under audit examination or inspection.
- 1.3 The Auditor General is further granted broad powers to access at any reasonable time of the day, the premises of any statutory corporation, public company, department or private institution under audit examination or inspection, as well as to call for any relevant information from persons responsible for the financial administration of the same.
- 1.4 The Auditor General determines the nature and extent of any audit review s/he considers on the basis of information collated, and where desirable, prepare and submit to the President a report on such audit review. The President is, in turn, obliged to lay the audit report before the National Assembly.
- 1.5 At least two concerns arise from the functions of the Auditor General under the Public Audit Act with respect to the implementation of EITI. In the first place, and at least with respect to public or statutory institutions, EITI may be viewed as a parallel process. This might mean that the functionary under EITI tasked to collate information may not receive cooperation from the subject or may engage in a turf war with the Auditor General’s office relating to the entity with proper jurisdiction and the timings of the audits between the two institutions.
- 1.6 Secondly, the standard for audit created by the Public Audit Act may be imposed on the EITI process as well as the procedure that is understood by the subjects. Without statutory enforcement mechanisms, this could be a daunting task for the EITI process.

**2. Zambia Revenue Authority Act**

- 2.1 The Zambia Revenue Act establishes the ZRA, the same entity which is the appointed regulator under the Income Tax Act, the Customs and Excise Act, the Value Added Tax Act and the Property Transfer Tax Act among others.

- 2.2 Unless the written consent of ZRA is obtained the Zambia Revenue Act prohibits any person from publishing or disclosing to any person, other than in the course of his duties, the contents of any document, communication or information whatsoever, which relates to, and which has come to his knowledge in the course of, his duties under the Act<sup>78</sup>. This restriction presents a challenge against the implementation of EITI in Zambia as ZRA is a key player in the collating of information from both the Mining Companies and Government in relation to payments or receipts from the extractive industries.

### 3. Electronic Communication and Transactions Act

- 3.1 The Electronic Communications Act proscribes the disclosure of personal information collected through electronic means. Personal information could include any financial transactions in which the individual<sup>79</sup> concerned has been involved (“**Personal Information**”)<sup>80</sup>.
- 3.2 A data controller is not permitted to disclose any Personal Information held by the data controller to a third party unless required or permitted by law or specifically authorised to do so in writing by the data subject<sup>81</sup>. A data controller is defined to mean any person, either alone or in common with other persons, who controls and is responsible for keeping and using Personal Information on a computer, or in structured manual files, and electronically requests, collects, collates, processes or stores personal information from or in respect of a data subject.
- 3.3 The information collected and kept under the EITI process in data format can easily qualify as Personal Information prohibited from being disclosed through the dissemination process unless the Mining Companies and the Government consent in writing to do so. An EITI enabling statute may also assist in overcoming this complication.
- 3.4 The restrictions under the Electronic Communications Act are likely to have a more direct impact on Personal Information relating to individuals or natural person such as disclosures on Employee Taxes, National Pension Contributions, Workers Compensation Contributions etc. The restrictions may not have an impact on disclosures relating to other persona such as corporate bodies although an argument still subsists that even corporate bodies are captured under the Personal Information disclosure restriction.

### 4. Bank of Zambia Act and Zambia Development Agency Act

- 4.1 The Bank of Zambia Act, through the Bank of Zambia (Foreign Exchange) Regulations (the “**Foreign Exchange Regulations**”), require the Zambia Consolidated Copper Mines Limited (“**ZCCM**”) to dispose all its income in foreign exchange at the directive of the Bank of Zambia (“**BoZ**”)<sup>82</sup>. ZCCM used to be the operating state owned company that owned and operated virtually all mines in the country until about 2000 when the mines were privatized.

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<sup>78</sup> s.21 Zambia Revenue Authority Act

<sup>79</sup> It is not clear whether this term is restricted to natural persons or extends to both artificial persons (such as companies) or public bodies (such as government agencies) under the Electronic Communications Act

<sup>80</sup> s.2 Electronic Communications Act

<sup>81</sup> s.42 Electronic Communications Act

<sup>82</sup> reg.3 Foreign Exchange Regulations

- 4.2 The objective of the Foreign Exchange Regulations with respect to ZCCM appears to have been to ensure that BoZ assumes control in managing the key source of foreign exchange income for the country by BoZ acquiring an interest in the foreign exchange if it actually buys it in accordance with the laws of Zambia.
- 4.3 Further, the Foreign Exchange Regulations appear to place an administrative law obligation on ZCCM-IH which may affect its characterisation as a purely private company incorporated under the Companies Act like all other companies.
- 4.4 Following privatization of the mines ZCCM has now become an investment company acquiring mainly equity stakes in Mining Companies on behalf of the Government and reincarnated as Zambia Consolidated Copper Mines Investments Holdings PLC or ZCCM-IH owned by the Government. ZCCM-IH owns both carried and paid stake in most of the Mining Companies that own productive mines and also earns income or capital from dividend payments or sale of some of its stake in these Mining Companies ("**Investment Returns**").
- 4.5 As an arm for Government investment in the mining sector ZCCM-IH has also entered into strategic price participation agreements with some of the key Mining Companies through which it earns participation income as part of the privatization process ("**Price Participation Income**") under the now repealed Zambia Privatisation Act which was replaced by the Zambia Development Agency Act passed as a consolidating statute. Like the Foreign Exchange Regulations, the channelling of Price Participation Income through ZCCM-IH using an Act of Parliament places a public interest custodianship obligation on ZCCM-IH with respect to Price Participation Income which must be accounted for particularly under EITI.
- 4.6 As the Investment Returns and Price Participation Income are not necessarily paid by Mining Companies to the Government under the EITI ToRs there is a risk that these potentially significant forms of payment of public revenue may not be captured under the Project.



**ANNEXURE III**

## Other Legislation Relevant to EITI

**1. The Petroleum Act**

- 1.1 Section 10(1) of the Petroleum Act provides that a person whose bid under section 9 of the Petroleum Act is successful may apply for a petroleum exploration license to the Minister of Mines in the prescribed form upon payment of the prescribed fee ("**Petroleum License Fees**").
- 1.2 Section 79(1) of the Petroleum Act provides that there is payable to the Government by the holder of a license an annual fee of such amount as may be determined by the Minister of Mines by statutory instrument ("**Annual Petroleum License Fees**"). The Annual Petroleum License Fee is payable on a grant of a license and thereafter annually on the anniversary of the grant until the termination of the license.
- 1.3 In addition, a licence holder is subject to payment of a petroleum royalty at a rate that may be prescribed by the Minister of Mines ("**Petroleum Royalty**").
- 1.4 Section 70(1) of the Petroleum Act establishes a Petroleum Environmental Protection Fund ("**PEPF**"), which shall be administered and managed in such manner as the Minister of Mines may, by statutory instrument, prescribe. A cash deposit is payable into the PEPF by each licensee ("**PEPF Payment**"). The Petroleum Act does not contain provisions of how the money received in the form of the PEPF Payment is accounted for as there is no requirement to keep books of account. This may undoubtedly impede on the implementation of EITI in this sector.
- 1.5 Section 86 of the Petroleum Act generally prohibits disclosure of any information obtained by that person in connection with the administration of the Petroleum Act or furnished by a holder of a license under the Petroleum Act without the consent of the licensee, except:
- (a) where the disclosure is made for or in connection with the administration of the Petroleum Act to a person, being an officer employed under the Petroleum Act; or
  - (b) where the disclosure is made for or in connection with the administration of the Petroleum Act to a consultant to the Government for the purpose of facilitating the performance by the consultant under the Petroleum Act:
    - (i) of any functions under the consultancy arrangement, for the purpose of any legal proceedings
    - (ii) for the purpose of preparing official statistics or publications relating to exploration or development and production operations;
    - (ii) for the purpose of determining the licensee's liability to the Government or for any purpose which may be prescribed.
- 1.7 Generally, therefore, dissemination of information under the Petroleum Act is prohibited and such information includes that relating to Petroleum License Fees, Annual Petroleum License Fees, Petroleum Royalty, PEPF Payment. This may impede on the implementation of EITI in this sector as well.

## 2. Forests Act

2.1 The Forest Act makes provision for:

- (a) establishment and management of national forests and local forests;
- (b) the conservation and protection of forests and trees; and
- (c) the licensing and sale of forest produce.

2.2 Section 3 of the Forests Act provides for the ownership of all trees standing on, and all forest produce derived from the state lands, customary areas, national forests and trees as vested in the President on behalf of the Republic until lawfully transferred.

2.3 It is unlawful to deal in forest produce or to build or construct or operate any plant, machinery or equipment without a proper licence under the Forests Act. In addition to any prison term or fine that the court may impose on a person contravening the provisions of the Forests Act, the court may order removal or demolition of any unauthorised establishments, buildings, structures, plants, machinery, equipment upon a forest.

Further the court may order forfeiture of any forest produce in respect of which the offence is committed and of any livestock, tools, plants, machinery, equipment, vehicles or other property used in the commission of such offence.

2.4 Critically, section 50 of the Forests Act provides that any forest produce covered by an appropriate licence may not be removed from the licence area or sold, pledged, charged or otherwise disposed of, unless full fees payable in respect of the licence have been paid, and until then the forest produce remains the property of the Republic. In this respect the Minister responsible for the environment may make regulations under section 68 of the Forests Act concerning the fees and prices to be paid in respect of forest produce and other acts requiring a licence and the methods of calculating or fixing such fees and prices (the “**Forest Produce Fees**”).

2.5 The Forest Produce Fees, that could be of interest to EITI under the Project in the near future, have since being prescribed under the Forests Regulations and are payable to a Government department referred to under the Forests Act and known as the Forest Department in respect of the felling or taking of indigenous forest produce and of other acts requiring a licence as set out under parts I and II of the First Schedule to the Forests Regulations.

## 3. The Public Finance

3.1 The Public Finance Act regulates the control and management of public finances in Zambia, and contains no confidentiality provisions or prohibitions on disclosure in relation to Government revenues and expenditures. The Public Finance Act, however, has a number of provisions that would, as an alternative option, aid in the reinforcement of reporting obligations and accountability over the receipt and use of funds by the Government and other Government agencies under EITI.

- 3.2 Firstly, the Act provides for the establishment of a Consolidated Fund into which all general revenues and public moneys accruing to the Treasury shall be credited and deposited in the Treasury Account, payments from which shall only be made in accordance with the Act and the Constitution. However, it is unclear whether the sources of the funds are identified for the purposes of determining revenues obtained from Mining Companies in particular, especially since loans, grants and donations are also paid into the Consolidated Fund. The Public Finance Act only provides that the Consolidated Fund will exclude:
- (a) any deposit arising from seizures of money and property until such cases are disposed of in the courts of law or by relevant authorities;
  - (b) any interest accruing on a deposit;
  - (c) money other than public moneys raised or received which may be deposited with any public officer authorised to receive such deposit.
- 3.2 Secondly, the Public Finance Act confers upon various public servants important powers that would help further EITI's functions should it be subsumed within MoF. The Public Finance Act states that the Minister of Finance has the management, supervision, control and direction of all matters relating to financial planning and the economic management of the Republic, and may make regulations he considers necessary for the proper carrying out of the Public Finance Act which could provide for, *inter alia*:
- (a) the collection, receipt, custody, issue, expenditure, due accounting for, care and management of all public moneys including donor funds and public stores, except where and to the extent otherwise expressly provided in that behalf by any written law;
  - (b) the keeping of records, the examination, inspection and checking of all receipts and payments and the keeping of all necessary books and accounts;
  - (c) the forms of accounts, books, records and other documents required pursuant to the Public Finance Act;
  - (d) the proper management of the Consolidated Fund;
- 3.3 It is possible, therefore, for regulations to be passed under the Public Finance Act compelling ministries and other Government bodies to provide financial information for the purposes of EITI's report as and when required.
- 3.4 The Public Finance Act further establishes the Office of the Treasury and provides the functions of the Secretary to the Treasury to include, *inter alia*, the promotion and enforcement of transparency and effective management in respect of revenue, expenditure, assets and liabilities of ministries, Government departments and statutory corporations.
- 3.5 The Office of the Treasury is also empowered to prescribe standards of generally recognised accounting practices and uniform classification systems in ministries, departments and statutory corporations, and to assist ministries, departments and statutory corporations in building their capacity for efficient, effective and transparent financial management. It can also take appropriate steps to redress any serious or persistent breach of the Public Finance Act by any ministry, department or statutory corporation.

- 3.6 In light of the foregoing, not only would the Office of the Treasury be entitled to compel government bodies to adhere to international auditing standards (as required under EITI), but it is also empowered to address any non-compliance therewith, which would help reinforce adherence to EITI's reporting obligations.
- 3.7 In this regard, the Secretary to the Treasury and any authorised officer thereof is entitled to inspect and have full access to all accounts, documents, books and records of any ministry, department, or statutory corporation as is necessary for the exercise of the functions of the office of the Treasury under the Public Finance Act.
- 3.8 Some of the more useful functions of the Secretary to the Treasury for the purpose of an EITI option include:
- (a) ensuring that consolidated financial statements for statutory corporations are prepared in accordance with generally recognised accounting practice for each financial year;
  - (b) compiling in accordance with international standards and publishing in the *Gazette*, financial statistics and aggregations concerning all spheres of Government;
  - (c) maintaining compatible, effective, efficient and transparent financial management information system;
  - (d) providing a regulatory framework for sound financial management to accounting units.
- 3.9 Moreover, a controlling officer appointed by the Office of the Treasury is the Chief Accounting Officer in respect of all public moneys collected, received or disbursed and in respect of all public stores received, held or disposed of by or on behalf of a ministry or department or service for which such officer is charged. The Chief Accounting Officer is charged with the duty of planning and compiling the expenditure of funds under his control encompassing, *inter alia*:
- (a) the maintenance of a system of internal audit under the control and direction of an audit committee complying with and operating in accordance with the Public Finance Act;
  - (b) ensuring effective, efficient, economic and transparent use of the resources under their control;
  - (c) taking immediate, effective and appropriate disciplinary steps against any officer in the ministry or department who contravenes or fails to comply with the provisions of the Public Finance Act.
- 3.10 The Secretary to the Treasury further controls the Controller of Internal Audit, appointed by the Public Service Commission, who is responsible for the internal audit of every ministry, department and statutory corporation, and is empowered to assign internal auditors to carry out special audits thereon, notwithstanding the provisions of any other written law and the existence of internal auditors in any statutory corporation. Information obtained under the purview of the Controller of Internal Audit would override any confidentiality provisions or prohibitions on disclosure pertaining to financial information in legislation such as the Local Government Act that presently pose an impediment to EITI.

- 3.11 Further, internal auditors appointed by the Public Service Commission are also entitled to access at all reasonable times all accounts, records, books, vouchers and other documents relating to the accounts of any statutory corporation, ministry or department, and may require therefrom such information and explanations as may be necessary and investigate whether there are adequate measures and procedures for the proper application of sound economic, efficient and effective management of public funds. Internal auditors are required to submit reports to the Chief Accounting Officer and an audit committee, with copies to the Secretary to the Treasury and the Auditor General. It is however unclear whether these parties may provide such reports to another party or the public.
- 3.12 Finally, the Public Finance Act provides that in the event of any dispute arising as to whether access to any account, document, book or record is necessary for the exercise by the Office of the Treasury of any functions under the Public Finance Act or any other written law, the dispute must be referred to the Minister of Finance and the decision of the Minister of Finance is final. This of course grants the Minister of Finance discretion to determine whether persons acting under the auspices of EITI can access information in the event of a dispute with any Government body.
- 3.13 The Public Finance Act, however, states in this regard that nothing shall be construed as authorizing the Office of the Treasury to issue instructions which contravene either the Constitution or the Public Finance Act. This could mean, therefore, that if the Public Finance Act is amended to entitle the EITI process to information obtained thereunder, the Minister cannot decide otherwise.
- 3.14 The arguments in favour of, and against, the option of subsuming the EITI process under the Public Finance Act are discussed in 3.3 and 3.4 of Section C (*Framework for Implementing EITI*) of the Legal Audit Report.

**ANNEXURE IV**  
Mining Company Adverts

**ANNEXURE V**

## Stakeholder Interactions – ZEC and ZES

**1. ZEC Comments (by Mwaka Nhdlovu representative of the Ministry of Justice on ZEC)**

## 1.1 Interface amongst regulators

*Comment*

The legal consultant has suggested that “turf wars” and shirking of responsibilities which may arise among the various reporting agencies can be resolved by the execution of respective memoranda of understanding under which the following will normally be agreed:

- (a) objective to cooperate;
- (b) identification of roles and scope such roles to be played by each regulator;
- (c) the regulator that will play lead when there is an intersection of roles;
- (d) the points of contact; and
- (e) the process for resolving conflicts.

In the process of drafting new legislation, one cannot bring in provisions which overlap the functions of another agency without amending the conflicting provisions. Can a regulatory body deriving its functions from an Act of Parliament allow another body established under another Act to perform its functions or play its role without a statutory provision to that effect? Can an MOU override what is contained in an Act of Parliament? (*See section 5 of the Statutory Functions Act*).

The legal consultant may consider giving Zambian examples in support of his statement that this is a tried and tested method. I am of the view that points (b) to (e) are matters which should be covered by legislation and not an MOU.

*Response*

This is a valid observation, although it may have been made out of context. As far as we are aware, ZEITI will be regulating as a primary function what may qualify as a secondary function with respect to the other regulators. ZEITI will not necessarily be concerned with the primary functions administered by the other regulators. In other words, ZEITI is regulating a reporting function under statute while the other regulators usually administer entry, operation, imposition of taxes, disqualification etc., coupled in some instances with a reporting function.

Although these functions are distinct in nature with respect to policy motivation, they relate to the same operator and the imposition of these functions will invariably collide if not coordinated properly. The MoU referred to in our report is not intended to be a delegating mechanism but a coordinating mechanism. Each of the respective parties will be recognising each other’s role and permitting each to exercise its respective role without impeding the progress of the other.

The Statutory Functions Act does not therefore apply in our view as ZEITI will derive its powers/ functions from a specific Act of Parliament, not from the delegation thereof by another government body. The issue to be determined is how to reconcile the respective roles of ZEITI and other entities conducting similar functions.

By way of illustration, an MoU was signed on 8<sup>th</sup> November 2008 by the Energy Regulation Board, Communications Authority of Zambia and National Water and Sanitation Council to formalise the regulatory alliance between the three bodies and set out joint efforts in establishing transparent regulatory processes, systems and procedures for effective regulation.

- 1.2 Recommendation for implementation of EITI under a specific Act of Parliament dealing exclusively with transparency and accountability of the Mining Companies and Government exclusively.

*Comment*

I am of the view that the legal consultant needs to carry out additional research on the impact that a ZEITI Act would have on existing legislation. This will ensure that provisions that need possible amendment are identified.

I do not agree that the provisions of the proposed ZEITI Act would automatically override the provisions of existing Acts. For instance the Mines and Minerals Development Act No 7 of 2008 provides for the termination, suspension or cancellation of mining licenses or permits. It is the specific Act of Parliament dealing with mining in Zambia.

*Response*

This discussion should be placed within the context of a hierarchy of policies. It is difficult to debate this issue without appreciating the importance that the policy makers attach to a particular policy introduced by a statute. If GRZ sponsors the EITI policy under the ZEITI Act as critical (e.g. because it will address the current debate on mining taxes), it is possible that overriding provisions may be inserted into the ZEITI Act in case of conflict with other legislation. Again this underscores the importance of the MoU approach. An example of a similar scenario of a hierarchy of policies is s.29 of the Banking and Financial Services Act as read with s.35 of the Employment Act with respect to the transfer of employees of amalgamating banks.

Another practical means by which the relevant statutes may be integrated would be to provide for the cancellation of licences granted under the Mines and Minerals Act in the case of non-compliance with the ZEITI Act. In this regard, adherence to the ZEITI Act could be made a condition for the holding of a mining license, breach of which may lead to cancellation thereof by the Director of Mines. A cancellation or suspension in the circumstances would be coordinated under a MoU.



*Comment*

An analysis of relevant policy and law is therefore essential in order to take into account laws in *pari material* (*subject area laws*). This will also ensure that the ZEITI Act will have an appropriate place in the regulatory framework. The roles and responsibilities of existing agencies in the regulatory space must not be confused by the introduction of a ZEITI Act as this will have a bearing on the efficacy of the proposed Act. Lessons must be learnt from Acts in Zambia that have failed to come into operation such as the Forestry Act No. 7 of 1999 which has not come into force to date.

*Response*

Noted.

## 1.3 Amendment of existing legislation

*Comment*

I disagree with the assertion that amending existing legislation does not provide a guarantee that all “problematic” legislation will be identified for the purposes thereof, or that it cannot guard against the risk of future enactment or amendment that would run counter to EITI’s aims.

The consultant may wish to take into account the following rules which are considered before legislation is amended:

- (a) the drafter must acquire a comprehensive acquaintance with the whole of the Act that is to be amended and with other pertinent laws; and
- (b) the effect of the proposed amendments on provisions of the principal Act other than those directly amended and on other legislation must be studied and necessary consequential amendments must be made.

Therefore amendments are never done without a careful study of the principal Act and all other relevant existing legislation that may be affected to ensure consistency and avoid conflicting provisions. Thus provisions in all other relevant existing legislation which require amending are always identified before an amendment Bill is drafted. Further, an amendment Bill is subject to the same Parliamentary procedures as any other Bill.

*Response*

Although we appreciate the points raised above, we still maintain the view that practice and experience would possibly flag up potential conflicts in the future that would not be envisaged at the time of enactment.

Moreover, it is conceivable that the amendment of several pieces of legislation will be a more arduous and longer process than the enactment of one piece of legislation, particularly in light of the necessity of acquiring a comprehensive acquaintance of all pertinent laws that would be affected.

Furthermore, we are not advocating a total disregard of the existing statute book. Our exact task in the report was to understand the impact of the introduction of EITI on existing laws in Zambia, but in addition to this task, we were also mandated to identify the most efficient way of introducing it. Your suggested method, although feasible, may not be efficient in the circumstances.

#### 1.4 Critical Legislation

Value Added Tax Act, (Section 37)

##### *Comment*

There is no express prohibition on disclosure of information obtained by the Commissioner General to another party in this section.

##### *Response*

Although the Act does not expressly prohibit disclosure, it is arguable that no member of the public can request, nor employee of ZRA reveal, tax-related information obtained under the Act as and when needed, particularly information of a sensitive nature.

Moreover, the Act makes reference to the obtaining and requesting of information by the Commissioner, which seems to imply that only the Commissioner and other persons authorised thereby are empowered to request information under the Act.

Property Transfer Tax Act

##### *Comment*

It is clear from the cross referencing contained in the Property Transfer Tax Act that many of the provisions of the Income Tax Act are applicable to the Property Transfer Act. However, only the provisions that are specifically referred to apply are applicable to the Property Transfer Act. I am therefore of the view that the provisions relating to secrecy in section 8 of the Income Tax Act do not apply to Property Transfer Tax.

##### *Response*

Noted.

Environmental Protection and Pollution Control Act

##### *Comment*

The Act does not contain provisions that prohibit the disclosure of any information contained in the Environmental Council's Annual Report. In addition, the fact that the Report is laid before the National Assembly and not published in the Gazette does not mean that it is not accessible to the public. The proceedings of the National Assembly are recorded verbatim and published in the Hansard. Therefore once these proceedings are published, the information contained is in the public domain.

Further, according to the Standing Orders of the National Assembly, any person can have access to any paper laid upon the table of the house unless the paper is declared confidential by the Minister laying it.

*Response*

We are not able to find in our report any statement that there is a prohibition of disclosure of information under this Act. Our observation is that the ECZ report is not directly subject to public consumption, at least not until it is presented to Parliament. In addition, and in agreement with your observation, it appears to us that ZEITI faces the risk, however minimal, of the Minister declaring a paper confidential. What is key nevertheless is that ZEITI requires certain information at a particular time for the preparation of its report. The publication of the Council's Report provides no guarantee that all requisite information will be made available in the Report as and when required for the purposes of publishing the ZEITI report. It may thus be impractical for ZEITI to wait until the requisite information enters the public domain<sup>83</sup>.

Inclusion of payments made under the National Pension Scheme Act No 40 of 1996 and Workers Compensation Act No. 10 of 1999.

*Comment*

I am of the view that payments made pursuant to these two Acts of Parliament should be excluded as these are payments made by mining companies and other employers for the benefit of their employees/workers as an incident of their employment. The contributions paid by employers under the National Pensions Scheme Act are administered by NAPSA in accordance with the provisions of the Act.

*Response*

It is difficult to see why such payments should be excluded, considering that they represent a significant amount of revenue received by the Government from mining companies. Moreover, the fact that they are collected for the benefit of employees reinforces the importance of the Government's proper accounting of all moneys received, particularly since such payments are not paid out immediately.

To provide some further comfort in this regard, you may wish to visit the International Bar Association's Model Mining Development Agreement on [www.mmdaproject.org](http://www.mmdaproject.org) which sets out international best practice on what mining companies contribute to a country that they are investing in.

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<sup>83</sup> Please note that the statute under discussion has since been repealed and replaced and the discussion modified by the prescription of confidentiality provisions under the new replacement statute as now discussed in the finalized report

### 1.5 Other important Legislation impacting EITI Annexure II

Public Audit Act Chapter 378 of the Laws of Zambia

*Comment*

The legal consultant has expressed concern that EITI may be viewed as a parallel process. According to section 4 of Chapter 378 the scope and purpose of auditing carried out under this Act is for the Auditor General to satisfy himself that the moneys expended by each statutory corporation, public company, Department or private institution have been applied to the purposes for which they were appropriated. The collation or collection of information for EITI purposes is limited in scope as the focus is on the disclosure of payments by mining companies to government or government agencies and conversely what government or government agencies receive as revenue from Mining companies.

*Response*

It is our understanding that one of the intended functions of EITI is to ensure or at least facilitate the proper management and use of resources received by Governments from Mining Companies. Thus, it is possible that ZEITI will play an increasingly parallel role in this regard. Most importantly, however, the accuracy of the disclosures under EITI is also critical and hence the reconciliation exercises required to be undertaken by an independent credible administrator applying international auditing standards.

*Comment*

In view of the distinction in purpose and scope, I do not think that EITI will be viewed as a parallel process.

*Response*

Your opinion is noted.

### 1.6 Annexure III - Other Legislation relevant to EITI

The Electronic Communications and Transactions Act No. 21 of 2009

*Comment*

According to section 2 of this Act, “personal information” is defined as “information about an identifiable individual...” Section 2 also defines a “natural person” as an “individual”. Section 2 further defines a “data subject” as “any natural person from or in respect of whom personal information has been requested, collected, collated processed or stored...” The Act therefore makes a clear distinction between natural persons and companies. It therefore follows that section 42 refers to personal information about individuals and not companies. The legal consultant should therefore revisit his interpretation of section 42 as an impediment to the implementation of EITI in Zambia and whether this Act is relevant.

*Response*

Point noted. What is confusing, however, is that the definition provided by the Act is not that of an “individual” but that of a “natural person”, yet the ordinary and legal meaning of the term “individual” could include a body corporate. Would it therefore not be safer to err on the side of caution in this regard?

The Public Finance Act

*Comment*

The legal consultant has suggested that regulations can be passed under the Public Finance Act, compelling ministries and other government bodies to provide financial information for the purposes of ZEITI's report as and when required.

This can only be done if the principal Act is amended to include provisions relating to ZEITI. The Act deals with the general control and management of public finances of the country Regulations can only be drafted within the content and policy of the principal Act.

*Response*

Please note that this is an option (alternative to the introduction of a special ZEITI Act) which focuses on convergence of two policies under a single statute, provided that there is no conflict. As aforementioned, we envisage EITI playing an increasing role in facilitating the proper accountability and management of resources received by the Government, thereby having an impact on the control and management of the public finances of the country. Thus, Regulations passed in this regard for the purposes of a ZEITI report would not, in our opinion, be contrary to the content and policy of the Public Finance Act.

The problem that we see with this option is that EITI will not be the main policy incorporated in this way under the Public Finance Act. Therefore, substantive provisions in another Act of Parliament can override the EITI policy contained in subsidiary regulations in case of conflict.

*Comment*

According to section 5(3) of the Act, any dispute arising as to whether access to any account, document, book or record is necessary for the exercise by the Treasury of any functions under this Act or any other written law, shall be referred to the Minister. The legal consultant should clarify the relationship between the Treasury's exercise of functions under the Act and access to information by ZEITI. (Do the functions of the Treasury include access to information for ZEITI?)

*Response*

If ZEITI is subsumed within the purview of the Ministry of Finance (again as an alternative to the special ZEITI Act option), this could certainly be made a function of the Treasury in order to reinforce and support the initiative under ZEITI.

## 1.7 Other issues for consideration

*Comment*

- (a) practicality of the structure on page 30. Will it work?

*Response*

Our view is that this is practical, but we welcome any suggestions on the structure to determine the most appropriate form of implementing the initiative.

*Comment*

- (b) need to state some of the functions of the regulator(s) in order to justify the need for their creation and also identify the possible points of conflict with existing regulators.

*Response*

Noted.

*Comment*

- (c) all Bills whether intended to amend existing legislation or to create a new Act of Parliament are subject to the same parliamentary procedures and processes.

*Response*

We are of the view that the amendment of several pieces of legislation would be a longer and more difficult process than the enactment of one. Moreover, we maintain the position that the former cannot guarantee that no future conflicts or omissions would arise over time.

*Comment*

- (d) the Mines and Minerals Development Act is currently under review and proposed amendments are yet to be submitted to the Ministry of Justice. Consider whether provisions relating to EITI can be included in this process.

*Response*

Noted. We are still awaiting a copy of the same from the ZEITI Secretariat.

**2. ZEITI Secretariat Comments:**

## 2.1 Inclusion in Report

*Comment*

- (a) as paragraph 1.3 the benefits of ZEITI; and

- (b) as part of the purpose and scope of the legal audit (paragraph 1.3) that the purpose of the legal audit is also intended to “address legal impediments to the implementation of ZEITI in Zambia”.

*Response*

Noted.

2.2 Auditing of financial records

*Comment*

Following from your summary of the Mines Act on pages 7-8, does the Mines Act require the accounts and other financial records of large-scale mining license holders to be audited?

*Response*

The Act does not appear to require submission of audited accounts. We therefore suggest that this requirement be included within the currently proposed amendments to the Act.

2.3 Restrictions under Local government Act and Rating Act

*Comment*

We suggest that the Local Government Act and/ or Rating Act be amended to obviate the risk that disclosure by Councils under the Rating Act may be restricted by virtue of the Local Government Act.

*Response*

Noted. However, an overriding clause in the ZEITI Act addresses this concern.

2.4 Lands Act

*Comment*

We suggest that the Lands Act be amended to enable ZEITI to acquire information on ground rent payments made by mining companies to enhance accountability over the management of the Land Development Fund, in addition to the Minister’s current provision of a statement of income and expenditure to Parliament.

*Response*

We feel that an overriding clause in the ZEITI Act would address this concern.

## 2.5 Road Fund Agency Act

### *Comment*

You note that the National Road Fund Agency Act's prohibition against the publication of any information other than audited annual accounts for the National Road Fund Agency would affect ZEITI's ability to obtain information on Road User Charges and other payments made by mining companies to the Road Fund. How can this information be captured?

### *Response*

In our opinion, we feel that this can also be addressed by an overriding clause in the ZEITI Act.

### *Comment*

Furthermore, how can fuel levies be separated from the pump price in order to enable the Road Fund Agency to account for fuel levies paid by mining companies?

### *Response*

This could be a recording and reporting function placed on mining companies and oil marketing companies by the ZEITI Act, with an ultimate reporting function to the National Road Fund Agency.

## 2.6 Investment Act

### *Comment*

Is there an Investment Act in Zambia, and if so, what would its effect be on ZEITI?

### *Response*

The Investment Act was repealed and its provisions largely subsumed within the Zambia Development Agency Act. We consider that both these Acts would have no significant impact on the implementation of EITI in Zambia.

### *Comment*

In your criticisms of the shortcomings of the LEITI Act, we feel that there is a need for the Report to acknowledge the disadvantage that any regulations implemented in pursuance of ZEITI may deter investment, and thus work contrary to the aim of EITI which is to attract investment.

### Noted.

## 2.7 Public Finance Act

### *Comment*

We suggest that the Public Finance Act be amended to require government agencies to provide accounts that are audited to international standards.



*Response*

We are of the view that such a requirement should apply only to the extent required for the production of a ZEITI Report. Extending this requirement for any other purposes for which audited accounts are required from government bodies is at the discretion of Parliament. We nevertheless consider that your concern would be addressed if the ZEITI Act provides this requirement.

## 2.8 Scope of EITI in Zambia

*Comment*

Under your recommendations in 4.4, we ask that you do not limit your proposed Act of Parliament to mining companies, as other sectors may be included in the future.

*Response*

For practical purposes, any enacted legislation would have to subsequently be amended to encompass additional sectors.

## 2.9 Listing of Companies

*Comment*

Does your reference to the listing of mining companies in 5.1 refer to the stock exchange?

*Response*

Yes, but please distinguish this from our explicit reference to the securities exchange.

## 2.10 Standard of Auditor General's Audits

*Comment*

Should the Auditor General's audits be required to meet international standards?

*Response*

This would help further ZEITI's functions but we are unsure of the feasibility of this suggestion.

## 2.11 Distinction between ZEC and ZEITI under proposed structure

*Comment*

Your report makes reference to both ZEITI and ZEC. However, they are one entity and should not be distinguished.

*Response*

For the purposes of structure, we understand ZEC to be an upper organ responsible for overseeing the ZEITI Secretariat, which is a lower organ responsible for implementation. If our understanding is correct, then where we refer to ZEITI, we are actually referring to the ZEITI Secretariat which we propose should be transformed into an implementing institution under the ZEITI Act.

**ANNEXURE VI**

## Stakeholder Interactions – Public Stakeholder Meeting

**1. Government**

- 1.1 Government, through the speech by the Permanent Secretary at the Ministry of Mines, Energy and Water Development, reiterated its commitment to ZEITI as being a project that is in line with Government policy of promoting development, good governance, maximising benefits from Zambia's natural resources, reducing levels of poverty and fighting corruption.
- 1.2 Government also intimated its desire to expand EITI beyond mining to other sub-sectors of the extractive industry in the near future such as forestry, fisheries and tourism.
- 1.3 Government explained that the main objective of the Stakeholders Meeting was to review the Draft Legal Audit Report which had identified some legal impediments to the introduction of EITI in Zambia and has recommended the introduction of a specific statute for the implementation of EITI in Zambia.

**2. Governmental Agencies**

- 2.1 A number of GAs thought that there was too much focus being placed on the revenue from the extractive sector yet EITI did not appear to make an attempt at monitoring production to identify incidencies of transfer pricing. The panel, consisting of ZEC, ZES and the Legal Consultant (the "**Panel**") explained that EITI could work in conjunction with institutions like ZRA to assist in identifying such issues but that this was an area for ZRA to monitor in conjunction with MoM as already established under existing legislation.
- 2.2 Another GA representative expressed concern about the introduction of yet another piece of legislation under EITI which could lead to overregulation in the mining sector. A question was paused as to whether monitoring disclosure and reconciliation under EITI required a 365 day regulator. The Panel explained that EITI represented a global standard which required a competent and effective regulator to monitor and police disclosure and accountability in the extractive sector for the benefit of the country. It was, therefore, upto the country to determine whether the benefits to be derived from implementing EITI would out-weigh the cost of monitoring disclosure, compiling the report, undertaking the reconciliation and validation and publishing the report for public consumption. The Panel expressed the opinion that EITI was a worthwhile undertaking in this respect with overwhelming benefits as achieved in other jurisdictions.
- 2.4 A GA representative also queried the finding in the Draft Legal Audit Report that the Auditor General or Public Audit Act posed a threat to the introduction and implementation of EITI since the Public Audit Act only spells out the scope of the powers of the Auditor General in carrying out a public audit. The Panel explained that it was largely a question of how the interface between a public audit and EITI would work as opposed to the Public Audit Act being an impediment that completely blocks the implementation of EITI. The issue was mainly whether the GAs would rely on the standard and timings of a public audit in order to comply with EITI or whether EITI will be completely independent of such process.

- 2.5 A GA also wondered whether there will not be duplication between EITI and other existing regulators since Mining Companies already disclose to the Companies Registry, the Mines Department and ZRA. It was explained by the Panel that disclosure and accountability by both Mining Companies and GAs would be the main function under a ZEITI Act. Under the existing laws disclosure appears to have been designed as a complementary function of the subject of regulation such as licensing for mining operations. The EITI function was, therefore, more of a coordinating function for the larger purpose of accurate disclosure and accountability to the public.
- 2.6 A question posed by another GA was whether the public would be more interested in tracking the use of revenue from the extractive sector rather than disclosure of the results of a reconciliation exercise of what the extractive sector says it has paid in public revenue and what Government says it has received. The Panel explained that the idea behind EITI was to arm communities and civil society with accurate information which could be used to intelligently challenge policy makers and implementors on the use of such resources.
- 2.7 A GA raised concern about the proposed overriding provisions of the ZEITI Act particularly in light of the provisions of the Constitution and a United Nations Treaty (which Zambia is yet to endorse) that prescribe for the independence of the office of the Auditor General. The Panel explained that the objective for EITI was not to relegate the office of the Auditor General to EITI process but to ensure disclosure and accountability of the institutions that may also be the subject of a public audit. The Panel, nevertheless, assured the GA that it will look into this particular issue of the Auditor General particularly in relation to the structure of the new ZEITI Act and how it will interface with other statutes such as the Public Audit Act.

### **3. Non-Governmental Organisation**

- 3.1 An NGO representative raised issue with Government representation within the proposed structure of ZEITI as capable of politicising the structure particularly from the facilitation role of the MoM point of view.
- 3.2 The Panel explained that ZEITI is proposed to be a multi-sector group regulator designed not to be dominated by any interest group whether from the Government, private sector or civil society. Effectively, therefore, Government will be an important part of the structure but not the dominant one. Similarly, each of the other sectors represented within ZEITI will also not be expected to dominate the others.

### **4. Private Sector Organisations**

- 4.1 The main objection from the PSO representative was against the introduction of more regulations and regulators for investors to deal with despite having to contend with the already existing heavy compliance burden. The objection was mainly along the following lines:
- (a) that the voluntary process under EITI without regulation was working just fine;
  - (b) that the power of public opinion and 'name-and-shame' was enough; and
  - (d) that the new regulator and new processes will require funding and the Mining Companies would not like to fund this through new taxes.

4.2 The Panel explained that to address the current legal impediments as well as formally adopt the objectives of EITI as official policy of the Country the most effective and efficient method for intervention was via an Act of Parliament.

## **5. General Overview of EITI Policy by meeting**

5.1 A quick survey with pre-set questions covering the main contentious issues including the foregoing and in the form of Appendix A was distributed to participants and 22 questionnaires were returned with responses at the end of the meeting.

5.2 Set out in Appendix B is a table analysing the general attitude adopted by the meeting towards the implementation of EITI in Zambia. Some of the key responses include the following:

- (a) 91% of the respondents thought transparency and accountability was necessary for the extractive sector and 4 % thought it was not;
- (b) 86% of the respondents thought that the extractive industry was the most important sector to Zambia and 9 % thought it was not;
- (c) 86% of the respondents thought the extractive sector required to be also managed from the disclosure and accountability point of view and 4% did not think so;
- (d) 64% of the respondents thought it was necessary to introduce a specific ZEITI Act for managing the extractive sector and 36 % thought it was not;
- (e) 95% of the respondents thought it was acceptable to impose penalties on GAs that breached formally adopted EITI policy and 4% thought it was not;
- (f) 81% of the respondents thought it was necessary to urgently introduce regulation for implementing EITI in Zambia and 4 % thought it was not.

## Appendix A

## Form of Questionnaire for Quick Survey

**Zambia Extractive Industries Transparency Initiative  
Consultative Stakeholder Meeting  
Quick Survey**

1. What is your view about transparency and accountability in the extractive sector?
2. Do you think the extractive sector is the most important for Zambia?
3. How would you like to see the sector being managed?
4. What do you think about introduction of Act of Parliament for the extractive sector in general that is superior to other public revenue statutes?
5. Do you think it is a good idea to penalize defaulting Governmental agency under the ZEITI Policy?
6. How soon would you want to see the extractive industry being formerly collectively regulated?
7. Any other comment

## Appendix B

Table of Responses to Stakeholder Meeting Quick Survey

	Necessity for Transparency & Accountability in extractive sector		Importance of extractive sector to Zambia		Need for proper management of extractive sector		Need for overarching specific Statute to manage extractive sector		Acceptability of penalties against GAs		Urgency for introduction of overarching sector legislation	
	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
1ND	●		●		●		●		●		●	
2ND	●			▲	●		●		●		●	
3ND	●		●		●		●		●		●	
4ND	●		●		●		●		●		●	
5PS	●		●		●		●		●		●	
6GA	●		●			▲		▲	●		●	
7ND		▲	●		●			▲	●		●	
8NG	●		●		●		●		●		●	
9ND	●		●		●		●		●		●	
10ND	●		●		●		●		●		●	
11ND	●		●		●		●		●		●	
12ND	●		●		–	–	●		●		●	
13PS	●		●		●			▲	●			▲
14ND	●		●		●			▲	●		–	–
15ND	●		●		●		●		●		●	
16ND	●			▲	●			▲	●		●	
17NG	●		●		●		●		●		●	
18GA	●		●		●			▲		▲	–	–
19GA	●		●		●			▲	●		●	
20ND	–	–	●		●		●		●		●	
21GA	●		●		●		●		●		●	
22ND	●		–	–	–	–		▲	●			▲
<b>Total GA</b> 4	<b>100%</b> 4	<b>0</b>	<b>100%</b> 4	<b>0</b>	<b>75%</b> 3	<b>25%</b> 1	<b>25%</b> 1	<b>75%</b> 3	<b>75%</b> 3	<b>25%</b> 1	<b>75%</b> 3	<b>0</b>
<b>Total PS</b> 2	<b>100%</b> 2	<b>0</b>	<b>100%</b> 4	<b>0</b>	<b>100%</b> 2	<b>0</b>	<b>50%</b> 1	<b>50%</b> 1	<b>100%</b> 2	<b>0</b>	<b>50%</b> 1	<b>50%</b> 1
<b>Total NG</b> 2	<b>100%</b> 2	<b>0</b>	<b>100%</b> 2	<b>0</b>	<b>100%</b> 2	<b>0</b>	<b>100%</b> 2	<b>0</b>	<b>100%</b> 2	<b>0</b>	<b>100%</b> 2	<b>0</b>
<b>Total ND</b> 14	<b>86%</b> 12	<b>7%</b> 1	<b>71%</b> 10	<b>14%</b> 2	<b>86%</b> 12	<b>0</b>	<b>71%</b> 10	<b>28%</b> 4	<b>100%</b> 14	<b>0</b>	<b>86%</b> 12	<b>7%</b> 1
<b>Grand Total</b> 20	<b>91%</b> 20	<b>4%</b> 1	<b>86%</b> 19	<b>9%</b> 2	<b>86%</b> 19	<b>4%</b> 1	<b>64%</b> 14	<b>36%</b> 8	<b>95%</b> 21	<b>4%</b> 1	<b>81%</b> 18	<b>9%</b> 2

GA Government Agency  
 ND Not Disclosed  
 NG Non Governmental Organisation  
 PS Private Sector

● indicates a positive response  
 ▲ indicates a negative response  
 – indicates no data provided in response

