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**BRIEFING PAPER
TRANSPARENCY IN THE NAMIBIAN
EXTRACTIVES SECTOR**



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INTRODUCTION: NAMIBIA'S RESOURCES

The extractive industries are vital to the Namibian Economy. Mining and quarrying is the third-largest sector by GDP in Namibia, contributing 11.9 percent in 2015.¹ In real terms, this means that mining accounted for almost N\$10 billion of economic activity in 2015.² Diamonds and uranium are particularly important industries: according to the national accounts, diamonds account for nine percent of GDP and uranium one percent— though in past years, uranium had contributed as much as six percent, while diamonds have increased their share.³ The mining industry continues to grow. While this growth is not evident every year – due to commodity price fluctuations determining the fortunes of the industry – overall, “the extraction and processing of minerals for export remains Namibia’s main growth driver.”⁴ Of course, the sector also contributes through employment. In 2015, mining and exploration companies employed just short of 19,000 people in Namibia, of whom 8,800 were permanent employees.⁵

In 2011, Namibians were optimistic that a new petroleum industry would soon add to mining in contributing to the national economy and job creation. The then-Minister of Mines and Energy, Isak Katali, claimed Namibia had nearly 12 billion barrels of offshore oil. However, hopes seemed to be pinned mostly on the fact that Namibia’s geology bears a strong resemblance to oil-rich areas off Brazil’s east coast. Since then, several exploratory wells have failed to find commercially viable quantities of oil.⁶

The fisheries sector boasts smaller GDP figures than mining: 2.9 percent of GDP in 2015.⁷ This comparatively small figure belies the importance of the sector, which is still the third-largest contributor to Namibia’s GDP.⁸ Fish is a top-five export commodity, accounting for 12.1 percent of commodities exported in 2015.⁹ Due to its labour-intensive nature, the sector employs a significant number of Namibians – as many as 16,800 people.¹⁰ The sector remains a growth area: the depreciating Namibia dollar will boost export earnings, while “the key species’ ecosystems have a stable outlook.”¹¹

Article 100 of the Namibian Constitution makes clear that natural resources belong to the state. It stands to reason that the benefits from extracting these natural resources should accrue to the Namibian people first and foremost. Unfortunately, the immense potential for self-enrichment, coupled with a traditionally opaque industry, means that the extractives sector in Namibia, as elsewhere, has seen its fair share of suspect deals.

Transparency in the sector should be increased for a variety of reasons. Firstly, transparency is an intrinsically valuable good in a democratic society. In this case, it helps citizens hold government and companies accountable to ensure that the country is not exploited to the detriment of development. However, more transparency can also be in the interest of the private sector. In an environment where so much is obscured, companies cannot know whether their competitors are gaining an unfair advantage over them. Transparent and clear governance assures companies that they are operating on an equal playing field. In addition, more openness on payments to the government, for example, can help companies demonstrate

¹ Namibia Statistics Agency, “Preliminary Annual National Accounts,” 2015, 23.

² *Ibid.*, 24.

³ *Ibid.*, 23.

⁴ African Development Bank, “Namibia: Country Strategy Paper 2014-2018,” February 2014, 2.

⁵ The Chamber of Mines of Namibia, “Annual Review: 2015,” 2016, 7, http://www.chamberofmines.org.na/files/6114/7040/2446/2015_Chamber_Annual_Review_Web.pdf.

⁶ Graham Hopwood et al., “Namibia’s New Frontiers: Transparency and Accountability in Extractive Industry Exploration” (Institute for Public Policy Research, June 2013), 13.

⁷ Namibia Statistics Agency, “Preliminary Annual National Accounts,” 23.

⁸ Riza Aryani et al., “Managing Natural Resources in Namibia: The Mining and Fisheries Sectors” (School of International & Public Affairs, Columbia University, May 2016), 108

⁹ *Ibid.*, 21.

¹⁰ Statement by the Minister of Fisheries and Marine Resources in Parliament, 20 February 2017.

¹¹ *Ibid.*, 21.



that they are contributing to the society whose resources they are selling.

This study examines the state of transparency in the extraction of minerals, petroleum, and marine resources in Namibia. Concerns around transparency are not unique to Namibia: a report on coverage of extractives businesses noted that “what are arguably some of the most critical industries on the continent operate in relative freedom from public scrutiny.”¹²

This report outlines the legislative framework governing who may extract resources, and highlights some weaknesses and potential for abuse. Specifically, it looks at the issue of beneficial ownership, and the difficulties of establishing who actually benefits from owning Namibian resources – a troublesome hindrance to transparency in the sector.

This paper makes a variety of recommendations about the legislation and policies governing extractives in Namibia. These include:

- To reduce conflicts of interest, Namibia should amend its laws to clearly define conflicts of interest for all public sector employees and set out mechanisms to prevent conflicts and deal with them. Government should amend relevant mining, petroleum and fishing legislation to close loopholes and prevent conflicts.
- Namibia should introduce modern mining legislation that is consistent with modern standards of transparency. State-owned enterprises involved in resource extraction should be held to especially high standards of transparency.
- Namibia should re-consider its stance on joining the Extractive Industries Transparency Initiative

TRANSFER (MIS)PRICING

When discussing transparency in the extractives sector, the focus is often on inappropriate conduct by government actors. However, the private companies involved in resource extraction can also engage in illicit conduct that deprives the people of their fair compensation for the extraction of resources. One method through which this occurs is called transfer pricing.

Transfer pricing is a practice where two related companies trade in goods and services. As the companies are related, they can set the price rather than having to pay the market rate. This can lead to abuse, and can mean that governments are deprived of tax revenue.

It is possible that the parties involved distort the real price of a transaction. Imagine a company that has one subdivision in Namibia and one in the Bahamas, where taxes are significantly lower. The Namibian subsidiary could ‘sell’ its mined goods to the Bahaman operation at a price that is lower than the market value, and therefore make less profit than it usually would. Because it makes less profit, it gets taxed less in Namibia – while the low tax rates in the Bahamas ensure that overall, the parent company benefits at the expense of the Namibian state. This hypothetical is very simple in order to illustrate the concept, but in reality, transfer pricing can take many different forms, including the provision of financial services, rights usage deals, and many more.

Many governments are concerned that companies are using transfer pricing to essentially decide how much they should pay in taxes, therefore depriving the state – and the people it represents – of the compensation they rightly deserve for the extraction of their resources. The Namibian government shares this concern. In its 2013/14 annual report, the Ministry of Mines and Energy states that “Suspicious discrepancies on volumes and values of mineral commodities declared on the royalty payment schedule lead to under-estimation of royalties. In some cases Transfer Pricing is suspected.”¹³

¹² James Christian Canonge, Matthew Purcell, and Michael Behrman, “Watchdog or Lapdog: Limits of African Media Coverage of the Extractive Sector” (School of International & Public Affairs, Columbia University, n.d.).

¹³ Ministry of Mines and Energy, “Annual Report 2013/14,” 2015, 54.



While the principle is simple enough, transfer pricing often involves very sophisticated accounting practices. One reason it is difficult to detect the practice is because “even relatively small percentage variations in transaction prices can translate into significant tax leakages.”¹⁴ The international corporations that make up a significant share of Namibia’s extractives sector have access to financial resources and industry knowledge that make transfer pricing possible, while the Namibian government, as many governments of small countries, struggles with the specialised skills necessary to detect and prosecute the practice.¹⁵

To guard against the abuse of transfer pricing, it is usually recommended that countries apply an “arm’s length” rule that means companies should trade as if they were not affiliated, even if they are.¹⁶ Namibia’s Income Tax Act includes an “arm’s length” provision, but as of 2014 there were no effective documentation requirements or annual disclosure requirements that could help the state enforce these rules.¹⁷

The Natural Resource Governance Institute outlines six methods that help tax agencies calculate what a fair price should be, to help apply the arm’s length rule. In addition, they note that some countries have explored alternative policies, including “advance pricing agreements and ‘safe harbors,’ which define an appropriate pricing method for specific related party transactions in advance.”¹⁸

In Namibia, the Ministry of Finance is in the process of drafting a bill with the aim of creating a dedicated revenue collection agency. The justification for this dedicated agency is partly that it will be able to acquire specialised skills. A recent brief on transfer pricing found that only a few countries in Africa have units dedicated to transfer pricing, and Namibia’s new tax agency represents a chance to change this.

GOOD GOVERNANCE OF EXTRACTIVES AND THE IMPORTANCE OF BENEFICIAL OWNERSHIP

The Natural Resource Governance Institute has drafted a charter outlining the steps countries should take to ensure the good governance of their natural resource sector. Twelve precepts across three groups address a variety of issues, including guiding policies, accountability measures, taxation, revenue distribution, government spending and more.¹⁹

Crucially, the charter recommends that countries should “provide transparency of information along the entire chain of decisions.”²⁰ The Revenue Watch Institute, a precursor to the Natural Resources Governance Institute, also emphasises this advice in its Resource Governance Index, a ranking of how well countries are doing in achieving good governance. To improve their governance, the Institute recommends countries should:

- “Disclose contracts signed with extractive companies.
- Ensure that regulatory agencies publish timely, comprehensive reports on their operations, including detailed revenue and project information.
- Extend transparency and accountability standards to state-owned companies and natural resource funds.

¹⁴ Pietro Guj et al., “Transfer Pricing in Mining: An African Perspective. A Briefing Note” (International Mining for Development Centre, September 2014), 8.

¹⁵ *Ibid.*, 6.

¹⁶ Natural Resource Governance Institute, “Transfer Pricing in the Mining Sector: Preventing Loss of Income Tax Revenue,” August 2016, 3.

¹⁷ Pietro Guj et al., “Transfer Pricing in Mining: An African Perspective. A Briefing Note,” 6.

¹⁸ Natural Resource Governance Institute, “Transfer Pricing in the Mining Sector: Preventing Loss of Income Tax Revenue,” 4.

¹⁹ Natural Resource Governance Institute, “Natural Resource Charter,” 2014, 10, www.resourcegovernance.org/sites/default/files/documents/nrcj1193_natural_resource_charter_19.6.14.pdf.

²⁰ *Ibid.*



- Make a concerted effort to control corruption, improve the rule of law and guarantee respect for civil and political rights, including a free press.
- Accelerate the adoption of international reporting standards for governments and companies."²¹

Publish What you Pay

It is becoming increasingly common for companies to publish what they pay to states in return for the right to extract resources.

Three initiatives have emerged that require this sort of disclosure. The Extractive Industries Transparency Initiative (EITI), which is covered below, is an association to which governments can sign up which requires publication of payments by both companies and countries.²²

The European Union amended its Transparency and Accounting directives in 2011, to require the publication of production entitlements, taxes, royalties, dividends, bonuses, fees and payments for infrastructure improvements.²³

All members had adopted these rules into law by 2015, and 2016 saw the first round of reports. Norway, Canada and the United Kingdom, three other major players in mining and oil extraction, also have laws requiring the publication of payments to governments.

In addition, two key jurisdictions home to many multinationals have implemented legislation requiring the publication of payments. In the US, the Dodd-Frank Act of 2010 requires companies that are subject to the US Securities and Exchange Commission's reporting requirements to include information about payments to governments. An industry lawsuit stalled progress, but the SEC finally adopted a rule in 2016 that will mean that 425 "oil, gas and mining companies listed on US stock exchanges" must "publicly disclose the billions of dollars in payments that they make to governments around the world in exchange for natural resources."²⁴ First reports should be available in 2019.

These rules have already revealed some information about the payments received by the Namibian government. The following table details some information gleaned from the United Kingdom's *Companies House*. The table is not exhaustive, but rather for illustrative purposes. It should also be noted that open payments do not have to be seen as a punitive measure: rather, companies who pay their fare share can benefit from transparency on payments, showing that they are contributing to the local economy.

Payments by UK-based companies 2015 (in Millions of USD)²⁵

Company	Taxes	Royalties	Fees
Glencore PLC	6, 66	1,04	-
Rio Tinto	-	5,03	-
Tullow Oil PLC	-	-	0.13
Vedanta	1.93	0.72	-

²¹ Revenue Watch Institute, "The 2013 Resource Governance Index: A Measure of Transparency and Accountability in the Oil, Gas and Mining Sector," 2013, 1, http://www.resourcegovernance.org/sites/default/files/rgi_2013_Eng.pdf.

²² Ernst and Young, "Disclosing Government Payments: Implications for the Oil and Gas Industry," 2013, [http://www.ey.com/Publication/vwLUAssets/EY_-_Disclosing_government_payments_for_natural_resource_extraction/\\$FILE/EY-Disclosing-government-payments.pdf](http://www.ey.com/Publication/vwLUAssets/EY_-_Disclosing_government_payments_for_natural_resource_extraction/$FILE/EY-Disclosing-government-payments.pdf).

²³ Publish What You Pay, "Fact Sheet - EU Rules for Disclosure of Payments to Governments by Oil, Gas and Mining (Extractive Industry) and Logging Companies," November 2013, <http://www.publishwhatyoupay.org/wp-content/uploads/2013/11/PWYP-fact-sheet-on-EU-Accounting-and-Transparency-Directives.pdf>.

²⁴ Natural Resource Governance Institute, "U.S. Oil and Mining Companies to Disclose Payments to Governments," June 27, 2016, <http://www.resourcegovernance.org/news/2016-dodd-frank-ruling>.

²⁵ Source: <https://extractives.companieshouse.gov.uk/>



Beneficial Ownership

When it comes to transparency, beneficial ownership has become a key issue in the fight against corruption in the extractives sector. According to the Extractives Industries Transparency Initiative, “A beneficial owner in respect of a company means the natural person(s) who directly or indirectly ultimately owns or controls the corporate entity”²⁶

It is important to know the actual individuals who ultimately benefit from extracting a resource. Otherwise, it is easy for people with political connections, or even the individuals who make decisions about allocating natural resources, to unfairly access these resources. (For example, the Minister in charge of Mining could acquire a stake in a company applying for a licence to mine gold). To safeguard against conflicts of interest, it is therefore important to know the identity of beneficial owners of licences, fishing rights and quotas.

The Companies Act of 2004 requires annual returns from companies which include information about shareholders. The form which companies file as part of their return includes a section where they detail information about “shareholders/beneficial owners.”²⁷ In addition, companies involved in the extraction of minerals or petroleum are explicitly covered under the Financial Intelligence Act of 2012, which contains language about beneficial ownership. The Act defines beneficial ownership, and requires companies to submit updated data on their beneficial owners on an annual basis. If they fail to do so, companies face de-registration, fines, or even jail time for the culpable representative of the company.²⁸ However, as discussed below, information about beneficial owners is difficult to access in practice.

Companies applying for a fishing right in Namibia do not have to disclose any information relating to beneficial ownership as part of the application process.²⁹ It is true that the Minister may consider the ownership in granting rights and quotas, but it is a stretch to conclude, as others have, that disclosure “may be deemed a requirement” as the possibility to obtain a right or quota increases if the owners of the business are Namibian.³⁰ Given the extent of discretion involved in making the decision to grant fishing rights and quotas, and the opacity of the process, an applicant may well decide to take their chances and obscure beneficial ownership while using political influence to ensure the application is successful. And as the beneficial ownership is not disclosed to the public, it is possible for influence-peddling to occur regardless.

The Minerals Act and Petroleum Act both stipulate that any licence application has to include “the full names and nationality of any person who is the beneficial owner of more than five per cent of the shares” of the company applying for the licence.³¹ In addition, the Commissioner of Mines (and Commissioner of Petroleum) have to be notified if the beneficial ownership of at least five percent of the company changes.

This is insufficient. A report by Columbia University’s School of Law notes that, as this clause regards a mere notification after the fact, the regulator has “little control over the transfer of any assets, or the licence itself,” as selling the majority stake in a licence is essentially the same as transferring control of the licence.³² The implications are grave: this is a loophole that could in practice let people sidestep the requirement to ask the Minister for permission to transfer a licence, as the Ministry could find it difficult to track changes in ownership. Thus, despite the Mining Commissioner’s insistence that the Minister has to approve changes of more

²⁶ Extractive Industries Transparency Initiative, “The EITI Standard,” February 2016, 20.

²⁷ The form CM-23 is available at <http://www.bipa.gov.na/annual-duty/>

²⁸ Government of Namibia, “Financial Intelligence Act” (2012), sec. 4.

²⁹ Riza Aryani et al., “Managing Natural Resources in Namibia: The Mining and Fisheries Sectors,” 116.

³⁰ Ibid.

³¹ See sections 24, 32 and X of the Petroleum Act, and Sections

³² Riza Aryani et al., “Managing Natural Resources in Namibia: The Mining and Fisheries Sectors,” 98.



than five percent in ownership³³ this regime “leaves scope for shell companies to acquire licences purely for the purpose of re-selling them.”³⁴ In the past, there were concerns that this system could allow the sale of licences through intermediaries in a way that deprives the state of revenue it is due, a situation that could well comprise a ‘leakage’ that the United Nations Convention Against Corruption considers as a corrupt act.³⁵ At least some of these leakages are being stopped: a 2011 Income Tax Act amendment subjected the sale of mineral rights and licences to income tax.³⁶ The Act was amended again in 2015 to also include petroleum licences and rights.³⁷ In addition, the new amendment includes indirect transactions – where any interest in a company that owns a license is transferred – in the definition of taxable income.³⁸ However, “the Amendment Bill is silent on how this provision will be applied in the case of a non-resident indirect shareholder.”³⁹

At the same time, this limited disclosure leaves far too much in the dark. Firstly, due to the five percent threshold, “there is now room for undisclosed beneficial owners who may have political connections to influence outcomes of mining contracts.”⁴⁰ Secondly, while companies have to disclose beneficial owners to the Ministry, the Mining Ministry is not required to publish beneficial owners (this goes for both Petroleum and Mining). This makes it cumbersome to establish who finally benefits from Namibia’s natural resources, as information on beneficial ownership is scattered across various registries in different ministries (see below). Without publicly accessible knowledge of beneficial owners, it is difficult for the media, watchdogs, and the public at large to provide oversight over the sector and scrutinise suspect deals.

ESTABLISHING THE BENEFICIAL OWNERSHIP OF PETROLEUM LICENCES

As part of a recent project on transparency in the petroleum sector, IPPR sought to obtain information on the beneficial owners of all petroleum licences in 2015 and early 2016. The process, which is outlined below, indicated that transparency is gravely undermined by practical hindrances to obtaining information. The Business and Intellectual Property Authority, which was created to “facilitate, streamline, simplify and harmonise” the registration and administration of businesses and intellectual property,⁴¹ has been reportedly working on a unified database of company information. However, this is not accessible and there is no clarity on a timeline for completion.

Like most appeals to government bodies, a request must usually be approved by the Permanent Secretary of the Ministry. As stipulated by the law, the licence register is situated in the offices of the Petroleum commissioner. IPPR was granted access to physical copies only, with the understanding that there are no digital files.

It cost N\$300 to inspect the register. Reproductions also incur costs, at

³³ Graham Hopwood et al., “Namibia’s New Frontiers: Transparency and Accountability in Extractive Industry Exploration,” 31.

³⁴ Riza Aryani et al., “Managing Natural Resources in Namibia: The Mining and Fisheries Sectors,” 98.

³⁵ *Ibid.*, 97.

³⁶ Deloitte Namibia, “Income Tax Amendment Bill,” Namibian Tax Alert, September 2015, <https://www2.deloitte.com/na/en/pages/tax/articles/namibia-tax-alert-04-2015-income-tax-amendment-bill.html>.

³⁷ *Ibid.*

³⁸ EY Namibia, “Namibia Enacts 2015 VAT and Income Tax Amendments,” Global Tax Alert (Ernst and Young Namibia, January 2016), [http://www.ey.com/Publication/vwLUAssets/Namibia_enacts_2015_VAT_and_income_tax_amendments/\\$FILE/2016G_CM6182_Namibia%20enacts%202015%20VAT%20and%20income%20tax%20amendments.pdf](http://www.ey.com/Publication/vwLUAssets/Namibia_enacts_2015_VAT_and_income_tax_amendments/$FILE/2016G_CM6182_Namibia%20enacts%202015%20VAT%20and%20income%20tax%20amendments.pdf).

³⁹ Deloitte Namibia, “Income Tax Amendment Bill.”

⁴⁰ Riza Aryani et al., “Managing Natural Resources in Namibia: The Mining and Fisheries Sectors,” 98.

⁴¹ Government of Namibia, “Business and Intellectual Property Authority Bill” (2016), sec. 2.



N\$150 per copy. Given the the total number of petroleum licences, the costs that would have been incurred forced IPPR researchers to take notes by hand.

Researchers generally found that the documents in the register did not contain enough information to identify the individuals who hold beneficial ownership. Some licences are owned by individuals of course, in which case names were there. But in the case of companies holding licences, the law does not require details of its owners to be included in the register.⁴²

Thus, establishing the beneficial owners of many licences required the consultation of the companies' register located at the Ministry of Trade and Industrialisation. These files tended to be comprehensive, showing both the original owners and changes in ownership. However, there were still gaps. Firstly, the Namibian register does not cover international companies who own a stake in licences if they have not established a local subsidiary. This meant almost half of licences did not have available information in Namibia. Secondly, files on a significant number of companies were simply missing – from both the register at the Trade Ministry, and the tax register at the Ministry of Finance.

The government officials contacted during the project were very helpful, and tried their best to grant access. But the system is designed in such a way that systematic research is very difficult. Most Namibians do not live in the capital city, do not have the time to copy dozens of files by hand, and do not have the funds to gain access. The current system, while granting access in theory, blocks any significant investigation in practice.

THE LICENSING REGIME

Minerals and Mining⁴³

Applicants – who can be a company, or a Namibian citizen – submit their application to the Ministry of Mines and Energy. Applications include an environmental impact assessment (EIA) and usually an environmental management plan.

There are four types of Licence that relate to the extraction of Minerals in Namibia:

- *Reconnaissance Licences* cover short-term preliminary explorations of a large piece of land, to facilitate “the identification of exploration targets.”⁴⁴ These are valid for six months, and only renewable once with special permission from the Minister.
- *Prospecting Licences* “enable the licensee to undertake territorially based excavations, usually for the purpose of feasibility studies”⁴⁵ There are two sub-types: non-exclusive prospecting licences, which only cover one year, and exclusive prospecting licences (EPLs), which are limited to areas of 1000km² and are valid for three years.
- A *Deposit Retention Licence* covers cases where licence holders have found deposits that are currently economically unviable. They retain the area for future operations, can continue with prospecting from time to time to assess the profitability of the enterprise, and may with the permission of the Mining Commissioner remove materials for the purposes of selling it.
- Finally, a *Mining Licence* allows the holder to carry out full-scale mining operations, and to sell what they mine. These licences have a period of up to 25 years.

⁴² The register includes “the name of every holder and joint holder of a licence”, which in the case of companies seems to translate simply to the company name

⁴³ Based on the Government of Namibia, “Minerals (Prospecting and Mining) Act” (1992) especially parts V and VIII-V12; and Graham Hopwood et al., “Namibia’s New Frontiers: Transparency and Accountability in Extractive Industry Exploration,” 15.

⁴⁴ Ministry of Mines website: <http://www.mme.gov.na/mines/mrd/>

⁴⁵ Riza Aryani et al., “Managing Natural Resources in Namibia: The Mining and Fisheries Sectors,” 85.



Overview of Minerals Licences in Namibia⁴⁶

Licence Type	Exclusivity	Validity Period	Renewal Period	Transferability
Reconnaissance		6 months	Up to 6 months	No
Prospecting	Non exclusive	1 year		No
	Exclusive	3 years	Up to twice, in 2-year blocks or by discretion of the Minister	Yes, with consent of the Minister
Deposit Retention		5 years	Up to 2 years	Yes, with consent of the Minister
Mining	Where exclusive prospecting licence held	25 years	Renewable in blocks of 15 years	Yes, with consent of the Minister
	Where non-exclusive prospective licence held	3 years	Renewable in blocks of 2 years	Yes, with consent of the Minister

Petroleum

The laws governing the licensing regime for petroleum extraction are the Petroleum (Exploration and Production) Act of 1991 and its Amendment Act of 1998. In its broad outline, the licensing process mirrors the Mining sector. Companies submit their applications to the Petroleum Commissioner, and the Minister makes a decision on whether or not to grant the licence, taking into consideration “the need to conserve and protect the natural resources” in the block covered by the application as well as the surrounding areas.⁴⁷

There are three types of petroleum licence:⁴⁸

- A *Reconnaissance Licence* grants the holder the exclusive right to conduct reconnaissance operations in the specified block. It is valid for two years and may be renewed twice for another two year period.
- An *Exploration Licence* allows the licence holder to “carry on exclusively exploration operations” in the block it concerns. It may be granted for a block where there is already a reconnaissance licence, but may not be granted if any other type of licence was already granted relating to the block. Exploration Licences are valid for four years, and can be renewed to reach a total timespan of nine years.⁴⁹
- *Production Licence* authorises holders to carry out petroleum production, to sell or dispose of the petroleum thus recovered, and any operations necessary to produce and sell petroleum.

Before a licence is issued, the Minister has to enter into an agreement with the company that has applied for the licence. A model agreement, by all accounts of excellent quality, was drafted in 2007 and is posted on the Ministry website.⁵⁰ The law does not require the agreement to be published; neither does the model agreement itself refer to publication of any information related to the project.

Fishing

⁴⁶ adapted from *ibid.*, 84.

⁴⁷ Government of Namibia, “Petroleum (Exploration and Production) Act” (1991), sec. 12.

⁴⁸ Government of Namibia, Petroleum (Exploration and Production) Act sections 13, 22-3, 29-30, 44-5.

⁴⁹ This is specified in the Amendment to the original Act.

⁵⁰ See <http://www.mme.gov.na/publications/?designation=dm>



Commercial fishing is mostly done via a 'fishing right,' one of three types of rights the Ministry grants (the others are an exploratory right to harvest and a fisheries agreement, which allows another country to extract marine resources).⁵¹

The Ministry announces in the gazette that a period for applications is open. Applicants supply details including feasibility studies. The Minister decides who gets rights based on criteria including whether the applicant is a Namibian (or whether the company applying is controlled by Namibians), the ability of applicants to exercise the right, the advancement of previously disadvantaged Namibians, and more.⁵² After Cabinet endorses the rights allocation, the final decision is announced in the media.⁵³

A fishing right is not sufficient, however. After receiving a fishing right, the right-holder must also receive a quota from the ministry, which indicates how much the right-holder may harvest. Quotas are allocated on an annual basis.⁵⁴ The Marine Resources Act does not require that Quotas allocations be published, only that all applicants should be informed of the Minister's decision.⁵⁵

PROBLEMS WITH THE ALLOCATION OF LICENCES AND QUOTAS

General Lack of Transparency

A key issue with the allocation of rights to extract resources in Namibia is that throughout the process, the default is secrecy, not transparency. Thus, both the Minerals and Petroleum Acts have sections dedicated to the "preservation of secrecy," which enforce blanket secrecy about any matters Ministry employees may come across, unless otherwise stipulated by the law.

But the laws do not stipulate any significant pro-transparency measures. Whether fisheries, minerals or petroleum, the Minister in charge does not have to publish any information on why they granted rights to a particular applicant, or open up contracts or licence terms and conditions. As far as the Namibian public is concerned, the process of obtaining resource extraction rights is a completely opaque process hidden from view, where abuses may or may not happen. Either way, it is impossible for the public to know.

Therefore an IPPR report on the extraction of resources states that when applying for a prospecting licence, "the requirements are comprehensive" and comparable with neighboring countries, but noted that "whether or not they are followed is another question."⁵⁶ This lack of transparency makes it difficult to know what is going on. For example, the IPPR reported that there was a pervasive practice of individuals holding several licences through different shell companies.⁵⁷ In 2009, *Samicor Diamond Mining* felt slighted after a competitor received, after a three-month wait, a licence for the same block Samicor had applied for three years earlier without hearing from the Ministry.⁵⁸ Without transparent processes, it is difficult to know whether improper conduct is going on in cases such as this one.

After fishing rights are awarded, the results are announced in the media. However, there is no requirement that the Ministry publish the criteria it considered when awarding the decision. This leaves room for corruption. Without a public explanation of the decision, the public cannot scrutinise whether the allocations oc-

⁵¹ Riza Aryani et al., "Managing Natural Resources in Namibia: The Mining and Fisheries Sectors," 114.

⁵² Ministry of Fisheries and Marine Resources, "Policy Statement (Guidelines) for the Granting of Rights to Harvest Marine Resources and the Allocation of Fishing Quotas," July 2009.

⁵³ Riza Aryani et al., "Managing Natural Resources in Namibia: The Mining and Fisheries Sectors," 118.

⁵⁴ *Ibid.*, 115.

⁵⁵ Government of Namibia, "Marine Resources Act" (2000), sec. 39.

⁵⁶ Graham Hopwood et al., "Namibia's New Frontiers: Transparency and Accountability in Extractive Industry Exploration," 17.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*, 20.



curred on an impartial basis.⁵⁹ In late 2016, the Fisheries Ministry announced that it would implement a new system, which the Minister claimed would make the system “more transparent and predictable.” Notably, the Minister promised that weights would be assigned to the criteria considered in quota allocation.⁶⁰

NAMIBIA AND THE EITI

The Extractives Industries Transparency Initiative, or EITI, is a standard that seeks to promote accountability in the oil, gas and mining sectors.⁶¹ Currently, there are 51 “implementing countries” and 31 that have reached full compliance with the standard.⁶² The standard has been widely adopted in West Africa, but has not taken hold in Southern Africa.

Namibia is not a member of EITI, and it seems the country has no intentions to join the process. In a 2013 interview, the Mining Commissioner told IPPR that Namibia decided against joining partly because of the cost, as countries must establish local offices and contribute to the organisation, which in a time of fiscal stress may not seem a priority. He also noted that “there was no need to be part of the initiative” as the licensing system is “fairly open.”⁶³

Notwithstanding the Commissioner’s comments, efforts to live up to the EITI standards would undoubtedly improve the governance of natural resources in Namibia. It is not possible here to provide a complete overview of Namibia’s current level of compliance, were it to join EITI, but some benefits of the process are outlined below.

Namibia would already pass some requirements: for example, it has a cadastre system that shows different licence blocks. But EITI members are encouraged to maintain a register of beneficial owners, and encouraged to disclose contracts and licences that govern the extraction of resources.⁶⁴ EITI would also require more detailed publication of revenues from resource extraction, as well as push the country to share more information about its State-Owned Enterprises – a key benefit given the current confusion surrounding SOEs involved in resource extraction.

Namibia would also benefit in a broader sense, as the process of becoming a member encourages scrutiny of the current system. The first requirement of EITI is that the process should be overseen by a multi-stakeholder group including government, companies, and civil society.⁶⁵ The mere formation of this sort of a group would be a useful tool in fighting for better resource governance, especially as this group is specifically mandated to publicise information about Namibia’s governance and encourage public discussion around the issues.⁶⁶ In the process of applying to join EITI, countries have to provide a comprehensive overview of their laws and regulations governing the extraction of natural resources, and provide extensive, detailed information about current licences, revenue collections, and more. This systematic information would be very useful for civil society and members of the public interested in transparency in the sector.

Ministerial Discretion

Across Minerals, Petroleum, and Fisheries, one area of concern is the concentration of power in the Ministries overseeing the industries, the Ministry of Mines and

⁵⁹ Riza Aryani et al., “Managing Natural Resources in Namibia: The Mining and Fisheries Sectors,” 118.

⁶⁰ Otis Finck, “Esau Launches New Fishing Rights Bidding System: Penalties for Incomplete Applications,” *New Era*, September 12, 2016.

⁶¹ Extractive Industries Transparency Initiative, “The EITI Standard,” 8.

⁶² EITI, “Who We Are,” n.d., <https://eiti.org/about/who-we-are#aim-of-the-eiti>.

⁶³ Graham Hopwood et al., “Namibia’s New Frontiers: Transparency and Accountability in Extractive Industry Exploration,” 31.

⁶⁴ Extractive Industries Transparency Initiative, “The EITI Standard,” 7–9.

⁶⁵ *Ibid.*, 13.

⁶⁶ *Ibid.*, 29



Energy and Ministry of Fisheries and Marine Resources, respectively.

Throughout the process of acquiring a Minerals Licence, the Minister of Mines and Energy exercises immense discretion to decide whether an application will be successful. In fact, the Act identifies no other significant actors in determining whether an application is granted or not. It is true that while Minister grants the licence, the Commissioner issues it and sets the terms and conditions of the licence, which at a glance seems like a check on the Minister. However, the law is clear that Minister “directs” the Commissioner to issue the licence (e.g. section 62), and in any case the Commissioner is appointed by, and is “subject to the direction and control of the Minister”⁶⁷

The same system holds for Petroleum. The Minister decides whether to grant a licence, and whether a licence may be transferred from one actor to another. Similar to the Mining sector, the Petroleum commissioner is appointed by the Minister and subject to his will.

As with mining and petroleum, the Minister of Fisheries and Marine Resources holds an immense amount of power over the granting of fishing rights. As a recent report from Columbia University points out, while there is a long list of requirements the minister can consider,

the minister has discretion to decide which of these criteria will be afforded greater weight when granting rights. In other words, the minister has no obligation to consider all of these requirements simultaneously or to balance the different criteria in a particular way.⁶⁸

As the Minister is not required to follow specific criteria, he or she can essentially allocate quotas as they please, creating opportunities for favouritism.

This concentration of power in one office is a matter of concern, as abuses of the system could theoretically go unchecked. The discretion might be less worrisome if there were transparency in the system. However, as discussed above, neither applications nor the reasons for the final decision and terms of licences or quotas are published. If they were, public scrutiny would discourage illicit activity. The current system, however, has no such check. The combination of opaque processes and concentrated power makes for a worrying situation.

CONFLICT OF INTEREST

Namibia’s approach to conflict of interest is currently not up to the task of preventing corruption. One problem is that there is no clear, consistent definition applied across the board. Neither the Public Service Act nor the Anti-Corruption Act explicitly mention conflicts of interest, though both include clauses that relate to the issue. Laws regulating the extractive sector do contain some clauses on conflicts of interest.

The Petroleum Act of 1991 states that neither the Commissioner, the Chief Inspector, nor any other employee of the Ministry of Mines and Energy may acquire any interest in a licence or share in a company that holds a licence. Notably, this extends to employees’ spouses.⁶⁹

The Minerals Act contains similar language.⁷⁰ The Marine Resources Act states that the Marine Resources Advisory Council, which advises the Minister on a number of issues including the total allowable catch, may allow people with an interest in the matter being discussed to attend, but that these persons may not vote.⁷¹

The Columbia report cited above argues that a strict law could, for example, stop all government officials, politicians or even political party members from

⁶⁷ Government of Namibia, Minerals (Prospecting and Mining) Act, sec. 4.

⁶⁸ Riza Aryani et al., “Managing Natural Resources in Namibia: The Mining and Fisheries Sectors,” 116.

⁶⁹ Government of Namibia, Petroleum (Exploration and Production) Act, sec. 6.

⁷⁰ Government of Namibia, Minerals (Prospecting and Mining) Act, sec. 7.

⁷¹ Government of Namibia, Marine Resources Act, sec. 29.



obtaining mining company shares.⁷² The report concedes that this may be impractical in Namibia, where the circle of professionals is sufficiently small that most people can be linked to one another in some way, and where monitoring all officials would pose a significant logistical challenge.⁷³ Instead, the report suggests a number of intermediary steps: there should be a declaration of conflicts of interest *before* transferring or obtaining shares, while “false, incomplete or omitted” information relating to beneficial ownership should be harshly punished with an “immediate, non-discretionary and automatic termination of all mining licences, rights and contracts.”⁷⁴

Going forward, Namibia should rework its legislation to clarify a definition for conflicts of interest, and to specify what government should do to deal with these conflicts as they arise. Neighbouring countries can serve as a guide: in South Africa, for example, all senior managers have to disclose their interests, and the Public Service Commission assesses their disclosed for conflicts of interest.⁷⁵

Licence and Quota Information

An earlier section of this report identified beneficial ownership as a key issue in ensuring good governance. Knowing who owns resources is a prerequisite to determining whether the resources are extracted for the benefit of the people. Thus it is important that Namibians should have access to information about who owns licences and quotas. Unfortunately, the existing regime leaves a lot to be desired on this front.

For minerals, the Mining Commissioner maintains a register of licences, which contains information on the holders of licences including the full name of “the holder and joint holder of a mineral licence or interest in such mineral licence in whose name such mineral licence has been issued,”⁷⁶ the dates covered by the licence, the area and minerals covered. Licence holders have to notify the Minister about any changes in the directors of the company, “the share capital of the company”, and “the beneficial owner of more than five percent” of the company.⁷⁷

This register is open to the public according to the law, though in reality access is not guaranteed for most Namibians: the law only mandates that a physical copy be available at the Mining Commissioner’s office for inspection during office hours. This would effectively bar most Namibians from viewing the documents. The Ministry does feature a relatively up-to date list of Mining Licences on its website, but it does not have to provide this list and could stop doing so at any moment.

Rules regarding petroleum licences are similar. The Petroleum commissioner keeps the records, which include the same set of basic information enumerated above, including name of holders/persons who have any interest in the licence, nature of licence, and terms and conditions of the licence.⁷⁸ The rules for accessing the register are familiar: people may view the during office hours – but they have to pay a fee just to view the register, and also for making copies. As the box on page 7 shows, this system makes systematic research unworkable in practice.

Finally, the most up-to date list of quota holders on the Fisheries’ Ministry website is from 2012.⁷⁹

It must be noted that Namibian institutions sometimes provide more informa-

⁷² Riza Aryani et al., “Managing Natural Resources in Namibia: The Mining and Fisheries Sectors,” 98.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Corruption Watch, “Conflict of Interest,” n.d., <http://www.corruptionwatch.org.za/wp-content/uploads/2015/06/Corruption-Watch-Conflict-of-interest.pdf>.

⁷⁶ Government of Namibia, Minerals (Prospecting and Mining) Act, sec. 51.

⁷⁷ Ibid., 50.

⁷⁸ Government of Namibia, Petroleum (Exploration and Production) Act, sec. 15.

⁷⁹ Riza Aryani et al., “Managing Natural Resources in Namibia: The Mining and Fisheries Sectors,” 119.



tion than required by law, or go further than the law requires. That mining licenses are posted online is not a legal requirement, for example. In addition, while the state publishes the royalties and taxes received from various extractive industries, broken down into diamond and non-diamond revenues,⁸⁰ IPPR could not establish that there is a legal requirement to do so.

As commendable as it is that government institutions publish more than they strictly have to, laws should be amended to make sure these practices continue. Transparency cannot depend on the generosity of institutions; it should be built into their legal foundations.

OTHER TRANSPARENCY ISSUES

This report focuses mainly on the licensing regime, but greater Transparency is needed in a lot of other areas. For one, resource extraction does not only happen in the formal sector of the economy as discussed here. In the north of the country, many Namibians make a living from fishing, and there is some artisanal mining as well.

Transparency is often lacking when it comes to the environmental impact of mining operations. While the law makes provisions for environmental impact assessments, the process could be more transparent. For example, in one recent high-profile case, the Ministry of Environment and Tourism issued an environmental clearance for sea-based phosphate mining under controversial circumstances. According to news reports, the clearance certificate was issued without notifying the public, meaning that affected parties could not appeal the decision.⁸¹ More needs to be done on this front.

Namibia does not require social impact assessments or consultations with local communities apart from Environmental Impact Assessments. At the moment, most mining projects in Namibia are not located very close to settlements, but this may change in the future. For such cases, and when the environmental or health impacts could be severe, there should be more consultation of the affected communities.

Another area that could benefit from more transparency is the process of law-making. The private sector has often complained of a lack of consultation when new regulations or laws are considered. In the past there have been instances where government proposed a new law, only to face an outcry from the industry forcing it to reconsider. Better, more consistent consultations could result in better legislation.

ALLEGATIONS OF CORRUPTION IN ALLOCATING RESOURCES

As detailed above, the Ministers of Mining and Fisheries exercise a great deal of power in allocating valuable resources to individuals and companies, and they have been criticized for alleged abuses of their powers to benefit those with connections rather than the best-suited candidates.

The diamond sector is a case in point. Diamonds in Namibia are harvested by Namdeb, a 50-50 joint venture between the government of Namibia and international diamond company De Beers. To ensure value-addition in Namibia, the agreement included a stipulation that 10 percent of diamonds would be sold at a discount through the Namibia Diamond Trading Company to selected 'sightholders', who would polish the stones locally. An investigation revealed that "Namibia's ruling elite have ties with at least nine" of the eleven sightholding firms at the

⁸⁰ See for example the Estimates of Revenue, Income and Expenditure for 2016-2019, p.

⁸¹ Ellanie Smit, "Too Late to Appeal against Phosphate Mining," *Namibian Sun*, October 21, 2016, <https://www.namibiansun.com/news/too-late-to-appeal-against-phosphate-mining->



time.⁸² The founding President's son, Namibia's first deputy Minister of Energy, senior military officials, the chairperson of the ruling party's think tank, the wife of the then-mayor of Windhoek and others were implicated. In a striking aside, the article also notes that the lawyer for one sightholder – American businessman Maurice Tempelsman, whose Namibian business partner was the founding president's brother-in law – “doubled as Tempelsman's lawyer and the Namibian government's legal consultant when the current Diamond Act of 1999 was drafted.”⁸³

The newest agreement between DeBeers and the Namibian government has also raised suspicions.⁸⁴ It stipulates that 15% of Namdeb's production, worth around US\$150 million, should go to a new state-owned company, Namib Desert Diamonds (or Namdia). The Minister of Mines and Energy stressed that the company can sell internationally, with the idea of maximizing profits (and thereby revenue for the state) and gathering information about pricing that will inform policymaking in the sector. The Minister acknowledged Namdia had sold the entire allocation of diamonds it received, but unlike the Namibia Diamond Trading Company, which published its beneficiaries, Namdia has not done so.

The fisheries sector has also long been surrounded by allegations of improper conduct, specifically related to the Minister's discretion in allocating valuable quotas. In 2014, The Namibian revealed that the Minister of Fisheries had appointed a relative to chair the State-owned fish company Fishcor – despite the law saying the board should appoint the chair – and then allocated Fishcor a quota for horse mackerel, despite the fact it had a hake fishing rights. The same article questioned the decision to award a lucrative quota to Etale Fishing, a company that did not have the fishing rights or facilities to process mackerel, and was in fact retrenching staff and winding down all operations. The company “accepted the quota and sold it for about N\$40 million.”⁸⁵

Fishing giant Namsov has taken the Ministry to court several times over the quota process. In 2014, a judge ruled in Namsov's favour that the Minister's decision to allocate quotas to companies without fishing rights was “unlawful and irregular.” In 2015, the company sued again, to demand that the Ministry account for its decision-making process for the horse mackerel quota for 2014/15. Namsov complained that their quota had steadily decreased without a satisfactory explanation, attributing this to “the animosity harboured by the ministry towards Namsov,” and accused the Ministry of favouritism and nepotism.⁸⁶

STATE INVOLVEMENT IN EXTRACTION: THE CURIOUS CASE OF EPANGELO

In 2008, the government established the state-owned mining company Epangelo. It was immediately unclear what sort of projects the company could feasibly undertake, given its limited resources. Epangelo only received N\$1.5 million in start-up capital from the state.⁸⁷ In 2013, the company stated that it would need about N\$400 million for its capital projects, while it only received N\$5 million from the state.⁸⁸

In 2011, Cabinet declared that gold, uranium, copper, coal, diamonds and rare earth materials are ‘strategic minerals,’ and decreed that Epangelo would have exclusive rights to explore for and mine these resources. The expectation was that Epangelo would receive new exploration licences and then negotiate

⁸² Shinovene Immanuel, “Diamonds Are Swapo's Best Friends,” *Mail and Guardian*, September 18, 2014, <http://mg.co.za/article/2014-09-18-diamonds-are-swapos-best-friends>.

⁸³ Ibid.

⁸⁴ The following is adapted from Shinovene Immanuel, “Diamond Firm Takes off Secretly,” *The Namibian*, October 14, 2016.

⁸⁵ Ndanki Kahiurika, “Esau Relative Chairs Fishcor,” *The Namibian*, September 17, 2014.

⁸⁶ Diana Ndimbira, “Namsov Cry Foul Again,” *Windhoek Observer*, March 27, 2015, <http://www.observer.com.na/8-latest-news/4237-namsov-cry-foul-again>.

⁸⁷ Jo-Mare Duddy, “Govt Entry into Mining ‘No Threat,’” *The Namibian*, January 2, 2010, <http://www.namibian.com.na/index.php?id=62298&page=archive-read>.

⁸⁸ <http://www.namibian.com.na/index.php?id=104847&page=archive-read>



“earn-in” joint ventures with other companies, where Epangelo would supply the licence and the partner would fund the enterprise, with Epangelo’s share of the joint venture reducing over time.

Upon the announcement of Epangelo’s exclusive rights, the Chamber of Mines warned that Epangelo’s monopoly would lead to a stagnation of exploration. It is unclear how much exploration the company has done, though it has certainly been granted a lot of licences: at the end of 2012 Epangelo had been granted 39 Exploration Production Licences, and a 2013 company profile lists another 7 pending licences.

The most recent list of Mining Licences, however, only lists Epangelo once, noting the 10 percent share the company acquired in Swakop Uranium’s Husab mine. This deal, and the acquisition of 7.5 percent of the Navachab gold mine, allow Epangelo to pay off their purchase with dividends once the mine attains a profit.⁸⁹ Epangelo also reportedly holds “5% in Reptile Uranium, 5% in the Aussinanis Project and 10% in Manila Investments,” a company in which well-known middleman Knowledge Katti also holds a stake.⁹⁰

It is not inherently problematic for a state-owned company to be involved in mining; this is a fairly common occurrence around the world. However, extreme caution is required: under the current governance framework for State-Owned Enterprises, the Ministry of Mines and Energy supervises Epangelo. This means that the Ministry “is effectively granting licences to itself.”⁹¹ These potentially conflicting functions require careful attention.

Another area of concern is Epangelo’s lack of transparency. Apart from budget documents stating how much the company has received from the fiscus, as well as the occasional media story, there is little information on the operations of the company. Epangelo has not published any annual reports. Especially as its modus operandi centers around deals with other actors, a great deal of transparency is needed to ensure the public that Epangelo’s dealings are above board. At the current moment, it is not maintaining that standard.

RECOMMENDATIONS

Conflict of Interest

Namibia should update its legislation to deal with conflict of interest legislation as a matter of urgency. Laws should make clear that all public servants are covered, clearly define conflicts of interest and prescribe methods for dealing with them as they arise.

In addition, the specific laws dealing with the allocation of natural resources should be amended. While it is commendable that employees and their spouses are barred from owning licences, for example, this is not enough to ensure that allocation is impartial.

If strict conflict of interest legislation is found to be unworkable in some areas, at the very least conflicts of interest should be declared before shares in licences are acquired or transmitted, with harsh penalties for noncompliance.

To deter against conflicts of interest, loopholes regarding beneficial ownership should be closed to ensure the Ministry has knowledge of changes and is aware when they result in a conflict of interest. The law should further provide guidance on the steps to follow to resolve these issues as they arise.

⁸⁹ <http://www.epangelomining.com/2014/10/24/epangelo-seals-navachab-gold-mine-deal/>

⁹⁰ <https://www.newera.com.na/2015/04/16/katti-buys-kombat-town/>

⁹¹ Riza Aryani et al., “Managing Natural Resources in Namibia: The Mining and Fisheries Sectors,” 72.



Transparency

In line with emerging best practices, contracts and licences should be made publicly available, so that the public can monitor whether the prices paid for Namibia's resources are fair. The application process could be rendered far more transparent. An online system could show applicants the stage at which their application is.

Information about resource extraction – including the licence registers and fishing quotas – should be available online and updated regularly, so as to allow Namibians as much access as possible. These registers should also include information about the beneficial owners of licences and quotas.

The above recommendations should be implemented through changes in the law, so as to make them mandatory.

Circumscribe Ministerial Power

The Columbia University report on the Management of Natural Resources in Namibia recommends that “the scope of the Minister’s discretionary powers should be prescribed and limited by amending the legislation to include a list of mandatory requirements to be considered, and how they are considered, in the process of allocating fishing rights and quotas.”⁹²The same recommendation applies to Minerals and Petroleum, where the Minister of Mines and Energy should have to follow a prescribed process in making decisions. Added transparency measures, such as the above proposal to publish details about decision-making and specifics of licences, will help to check discretionary power.

State Involvement

Namibia is currently revising its governance framework for State-Owned Enterprises. In this reform, particular attention should be paid to companies involved in the extraction of natural resources, including Epangelo, Namdeb, NDTC, Namdia, and Flshcor.

The parastatals involved in extracting and selling Namibia’s resources should have especially stringent governance standards, and commit to industry-leading standards of transparency in their dealings.

Finally, Namibia should reconsider joining the Extractive Industries Transparency Initiative.

⁹² Riza Aryani et al., “Managing Natural Resources in Namibia: The Mining and Fisheries Sectors,” 118.



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