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ON A SLIPPERY SLOPE:
CORRUPTION AND THE EXTRACTIVE INDUSTRIES IN NAMIBIA

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Key aspects of this paper

It is well established that the mining sector is key to the current and future prospects of Namibia and has the potential to lift the country to higher wealth and human development levels.

Given its stable socio-political environment and its economic development prospects, Namibia has since independence become a favoured destination in terms of mining investment and has attracted its fair share of exploration activity and major mine developments have been and are being started on a regular basis.

As the point of entry into the sector, the licensing dispensation, within the Ministry of Mines and Energy allows mining companies, whether in the minerals or petroleum sectors, access to potential commercially viable, and possibly highly lucrative, deposits and reservoirs.

The various licensing regimes administered by the Mines Ministry are there to ensure that exploitation of the country's mineral resource wealth, ultimately in the best interest of broader society, given that these natural resources are non-renewable, is done in accordance with established law and best practice.

However, disturbing occurrences over the years within the exploration and mining/production licencing sphere have raised concerns that corruption could become a substantial threat to the future prospects for the extractive sector itself and broader socio-economic benefits.

Given that Namibia, according to recent reports, could be on the verge of striking major reservoirs of oil and possibly gas, corruption within the sectoral licensing dispensations creates the conditions that have seen other countries in the region and on the continent tragically descend into what is referred to as the 'resource curse'. In this climate, licensing in the extractive sector is in need of urgent re-appraisal with a view to ensuring the best possible governance of these systems and processes in the interest of future generations of Namibians.

In this regard, the following recommendations are made.

For the Ministry of Mines and Energy:

- That the review of the licence award dispensation incorporate wide ranging consultations with stakeholders, including civil society organisations;
- That the issue of transparency of decision-making be a central consideration in review processes;
- In the same vein, that secret mining and production contracts with mining companies be avoided;
- That appropriate oversight mechanisms, including specific and comprehensive codes of conduct, be put in place to monitor the dealings of licence authorising offices and structures in order to protect the integrity of these offices and structures.

For Government:

- To introduce and enforce codes of conduct for all strategic positions, offices, structures and agencies active in various economic sectors;
- To finalise black economic empowerment legislative and policy frameworks;
- To introduce and promulgate access to information, in keeping with obligations under various treaties and protocols;
- To look to introducing regular lifestyle audits at strategic offices and levels of state in order to minimise abuse of power, mismanagement, conflicts of interest and corrupt practices.

For the Chamber of Mines in Namibia:

- To continue advocating for coherent and consistent regulation, in terms of existing and coming legislation;

- To advocate for government to move towards finalising black economic and other empowerment mechanism in order to dispel uncertainty in the sector;

For civil society:

- To get involved in activities and launch initiatives aimed at monitoring developments in the extractive sector;
- To push for the installation of mechanisms ensuring greater transparency in decision-making over national natural assets and especially for revenue transparency in the extractive sector.

The path to prosperity or a curse?

The extractive or mining sector in Namibia has always been a crucial if not the most significant source of revenue, through taxes and royalties, to the state.

With oil and gas prospecting and exploration activities, as well as mine development – notably in the uranium sector – having picked up considerably since the turn of the century, indications are that the extractive sector's share of revenue flows to the state will balloon as well, especially if commercially viable oil deposits are struck.

The prospects of such wealth, and the national prestige and prosperity it promises to bestow on the country, have already given rise to a near palpable sense of giddiness in some quarters, despite no major or minor oil and gas finds – aside from the long established Kudu gas deposit – having been confirmed to date..

The continent and region abound with cautionary tales of how things can suddenly and dramatically go wrong once the existence of large-scale mineral resources have been established. In this regard, institutional and regulatory weaknesses have been a key factor in hastening some countries' headlong fall into the pit of widespread corruption, underdevelopment, and civil war following the discovery of great mineral wealth. As a result, what should be a period of national prosperity becomes one of crushing penury for most of the population while a small elite is able to skim off fabulous riches for itself. It is important to recognise that often institutional and regulatory weaknesses, coupled with undemocratic political practice, open the door to the greedy and corrupt, turning the resource blessing into a resource curse.

In the Southern African Development Community (SADC) region alone, there are examples of the 'resource curse' having brought states and societies to the brink of failure and collapse – the most notable example being Namibia's immediate northern neighbour, Angola, which is the second biggest oil producer on the continent, behind notoriously corrupt Nigeria, and a significant diamond producer. Despite its natural resource endowment, Angola is considered to be one of the most corrupt and poorly governed, not to mention lawless, countries in the world. There the majority of the population live in abject poverty while a small, politically powerful elite controls the oil and other natural resource wealth for its own benefit.

As a result, the potential discovery offshore oil could be a doubled-edged sword for Namibia. Already a coterie of politically well-connected individuals and interests are jockeying to get a slice of the eventual pie if the oil starts flowing. Over the last five years, irregularities in the issuing and subsequent trade in exploration licences for off-shore drilling blocks have started to raise concerns that, without a drop of oil having been pumped yet, the sector is already considerably compromised by corruption. Rent-seeking appears to already have become the order of the day as locals, with no experience or expertise in exploration and extraction of oil and gas, and arguably no intention in developing such experience and expertise, apply for and are granted licences, under the pretext of securing some sort of Namibian ownership of Namibian natural resources. Often these locals have sold on, completely or in part, their stakes in licences to foreign concerns with the know-how to explore and exploit such resources. Consequently, Namibian ownership of future commercially exploitable oil and gas discoveries is already considerably diminished, as a handful of politically connected individuals sell-out at the first best opportunity, turning a substantial immediate profit just from the sale of an EPL which might or might not pan out as commercially viable. Namibians should be involved in any developing oil industry, but in a manner that is both fair and transparent.

Considering this, it should be borne in mind that the stakes are very high – oil, gas and other mineral resources are non-renewable and thus when revenues are lost they are lost forever, so the thinking should be to prolong the extraction of revenues from such natural resources, as well as devising ways to deal with the unavoidable environmental degradation which accompanies mining processes and which will be around long after mine closure. In this regard, government has a custodial role of ensuring that all natural resources are exploited to the optimal benefit of current and future generations.

Here Namibia does not have to reinvent the wheel. For how things can go wrong from the beginning of a mineral resource boom is well documented and the sheer amount of literature produced, by a growing number of concerned international organisations and academics, over especially the last decade in itself serves to underline the prominence that highly lucrative extractive industries have come to occupy in the international anti-corruption discourse.

Against this backdrop, the purpose of this paper is to contribute to calls and efforts to help Namibia avoid going down the 'resource curse' path and rather embrace more ethical and transparent ways of doing things in order to ensure not just national prosperity and equity, now and into the future, but also stability.

Warranted alarm?

Importantly, it is not the intention of this paper to overemphasise or exaggerate questionable occurrences or to be alarmist, but to merely, by way of appropriate examples, and comparisons to events elsewhere, sketch, discuss and analyse certain worrying trends. These examples should by no means be read as being the way business is generally done in the mining sector, for while there appears to be some very suspicious or borderline illegal and/or unethical things happening, they do not characterise the majority of dealings in the sector. That things are a long way from sliding down a dark shaft is arguably evidenced by Namibia's continued high standing and favourable international regard as a mining investment destination.

For the purposes of this paper then, the ensuing discussion will focus on a particular point, namely the State's exploration and mining licensing regimes in the context of the anti-corruption drive.

That said, this discussion will undertake to point out where things appear to be going wrong and attempt to make recommendations towards improving the efficiency and legitimacy of such systems and processes and to ultimately contribute towards dispelling suspicions of corrupt dealing.

It should be noted that examples of questionable dealings around licensing in the extractive sector discussed here, are just that – questionable – as no-one or no entity has yet been convicted on a charge of corruption involving the issuance, regulation or obtaining of a licence. We are merely highlighting disturbing occurrences with a view to illustrating the discussion.

What is at stake?

The role and importance of the extractive or mining sector in the Namibian economy cannot be downplayed, for over the past decade, with fluctuation in commodity prices, the sector has accounted for between eight and 16 percent of Gross Domestic Product and in 2010 alone mineral exports accounted for 53 percent of the country's merchandise exports, without factoring in the export of cut and polished diamonds.

In terms of its real impact on people and communities, the extractive sector employs about 13,000 Namibians at various skill levels and it has been calculated that every worker and contractor in the sector supports between five and seven other people, suggesting that mining activities support in excess of 90,000 people.

This is because, according to the website of the Chamber of Mines in Namibia[1], the country "is a world-class producer of rough diamonds, uranium oxide, special high-grade zinc and acid-grade fluorspar, as well as a producer of gold bullion, blister copper, lead concentrate, salt and dimension stone."

This 'world class' status has also translated over the years to ensuring a continued stream of prospecting and exploration activities and expeditions by an assortment of international mining majors and minors, activities which have in the process contributed billions to the local economy, including over N$12 billion in direct taxes alone in the last decade. The attractiveness of the Namibian geological environment and the promise of riches in the ground and under the offshore seas have seen the Ministry of Mines and Energy issue hundreds of exploration and prospecting licences annually over the last few years. While a decrease was experienced in 2009 in the granting of exclusive prospecting licences (EPLs) by the Ministry of Mines and Energy (MME), falling from 423 in 2008 to 316 in 2009, the granting of licences picked up again in 2010 with 439 issued that year, while 445 licences were granted in just the first half of 2011, which, if the trend held through to the end of last year, would have amounted to roughly 890 licences issued, a record. This has taken place even though there has been a moratorium on new uranium licences since 2007.

Much of the exploration hype over the last decade has revolved around Namibia's potential for oil and gas discovery, with estimates suggesting Namibia could become a major oil and gas producer in the not too distant future. In this regard, perhaps it's best to quote the Petroleum Commissioner Immanuel Mulunga, who a few years ago stated, "as far as we are concerned the recent estimates suggest offshore Namibia contains about 166 billion barrels of original oil in place, the mean prospective resources are about 42.6 billion barrels of oil and 128.8 trillion cubic feet of gas prospective resources".

At the time of writing, the only known substantial petroleum deposit was the Kudu gas field in the Orange Basin off the Namibian south coast. To date more than 30 oil and gas exploration licences have been issued, as interest has surged over especially the last five years. Also over this period the epicentre of petroleum exploration has moved north, with the Namibe Basin now considered the mostly likely area for striking commercially viable oil and gas deposits.

The potential and size of future revenues from the extractive sector could place Namibia into a higher wealth and development index bracket, if these revenues are harnessed appropriately to uplift and empower the majority of the country's citizens. At this point it can thus be reasonably confidently asserted that the extractive sector will for a long time continue to be the backbone of the Namibian economy.

When considering all this, it becomes clear that the stakes are exceedingly high indeed. And it is against this backdrop that the ensuing discussion will take place.

1 www.chamberofmines.org.na

'Grease payments', conflicts of interest and political connections

With the extractive sector being such a critical and prominent contributor to the Namibian economy, and with the country relatively bountifully blessed with natural resources, it follows that most interest and investment, local and international, would be focused on the sector.

While such focus is overwhelmingly positive, not everyone with an eye on getting into highly lucrative exploration and mining activities has honourable intentions and these elements are constantly on the look-out for loopholes and weaknesses in regulation in order to extract maximum profit or benefit at the least cost, irrespective of whether such exploitation is in the best interest of the broader society or the natural environment.

In this Namibia is not unique, as the African continent is littered with examples of how natural resource wealth, particularly mineral and oil/gas wealth, has become a burden to countless societies or the 'resource curse' of literature. The centuries-old scramble for access to mineral resources on the continent has given rise to conflict and conflagration of every sort. Post-independence Africa has been laid low by corrupt and vicious authoritarian governments with the sole interest of cornering mineral wealth for rapacious elites, while the mass of citizens scrape by daily in the most deprived circumstances and entire states teeter on the verge of total collapse.

Corruption has seen billions upon billions of dollars in revenues primarily derived from the extractive sector being siphoned off by corrupt officials across the continent and their cronies, local and international, and stashed in off-shore banking havens or invested abroad, while millions of Africans are caught in endemic poverty and perpetual economic desolation. Resource-rich African states have on the whole failed to positively employ revenues derived from the exploitation of mineral resources wealth, alongside all other revenue streams, to uplift their societies.

It is unnecessary here to go into the specifics of individual case studies of how the continent, as well as other regions of the world, has been impacted by the discovery and extraction of minerals of all sorts, for much has been comprehensively and numerously documented, discussed and debated over the years and is relatively easily accessible. For our purposes here, suffice to say that corruption has become a, if not the, pre-eminent topic within discussions and debates around the role of the extractive industries in the economic, and socio-political, emergence and development of societies, particularly on the African continent.

As such, it would stand Namibia in good stead at this point in time to heed the clanging of warning bells, arguably still sounding relatively faintly. As already sketched, these warnings relate to already visible weaknesses in the institutional and regulatory framework concerning licencing of activities and rights in the extractive sector. In other words, political failure – insufficient provision of appropriate oversight – already seems to characterise these licencing processes.

In respect of this, there are issues or occurrences needing to be addressed, as these could come to seriously negatively taint and possibly even undermine the contribution of the mining sector to the national economy, considering how trends have unfolded elsewhere. These issues or occurrences can be classed broadly as the following: The payment of commissions or 'grease payments'; influence peddling and political connections, and; conflict of interest. It has to be noted that while we discuss these issues individually, they mostly do go hand-in-hand in reality, intertwining to often give rise to highly questionable and borderline corrupt conduct and circumstance.

Negotiating tax breaks in secret contracts

The OECD Guidelines for Multinational Enterprises state that 'enterprises should refrain from seeking or accepting exemptions related to … taxation not contemplated in the statutory or regulatory framework'.

Despite this global standard, multinational mining companies seeking to invest or expand their investment in Africa continue to enter into confidential agreements with governments to acquire special tax rates and concessions that are outside the statutory framework.

These tax concessions are normally included in a mining development agreement, which sets out the detailed responsibilities of each party. These agreements are legal commercial contracts, and override national law. Where they include tax rates, these override the national tax regime.

Confidential mining development agreements have been a key instrument used by companies to avoid paying mining taxes set out in the national law. They have been able to obtain these exemptions in countries desperate to attract foreign private investment into their mining sector since the 1990s after the World Bank told them that their existing mining tax regimes, as set out in mining and income tax laws, were not conducive to private investment.

Instead of revising their tax laws through parliament, high-level politicians started making secret tax deals with individual mining companies – giving the latter ample opportunity to push for as small a tax burden as possible.

Extract from: Breaking the Curse: How transparent taxation and fait taxes can turn Africa's wealth into development, March 2009.

Political connections = undue influence?

As already sketched above, the way to ensure the successful application for an exclusive prospecting licence (EPL) or a mining licence appears to have become, once the decision has been taken to enter the Namibian prospecting and mining landscape, to rope in politically connected individuals with access to the highest offices.

In arguably the most blatant parade of political support for an exploration enterprise, in June 2011, Brazilian oil and gas prospector and miner, HRT Petroleum, threw a lavish party at the Hilton Hotel in Windhoek to mark the launch of its Namibian office, HRT Africa. Present and prominent at the event, which included performances by a bevy of scantily clad samba dancers brought in specially from Brazil, was former Namibian Head of State Sam Nujoma, along with an assortment of senior politicians and a who's who of business persons with known political connections.

Foreign oil and gas concerns, as well as other mineral miners, once again in a replication of well-documented practices from other parts of the continent and the world, are wily operators when it comes to parlaying political goodwill into economic success.

Over the last five years, HRT Petroleum has been a robust trader in shareholding stakes in various off-shore oil and gas exploration licence blocks, in attempts to cast its net as wide as possible in order to strike an oil and gas bonanza similar to that identified off-shore the Brazilian coastline over the last decade and the company has continuously been issuing pronouncements that the discovery of a large oil and/or gas deposit, similar to the Brazilian finds, is imminent in Namibian waters.

One of HRT's Namibian associates is EPL entrepreneur Knowledge Katti, who has on occasion been open about his political connections and is a regular visitor to the Office of the Presidency. Katti is a part owner in a number of off-shore oil and gas exploration licences, along with other on-shore mining concerns.

In what can reasonably be seen as an example of seeking political support and blessing, as well as arguably a clear demonstration of access to the highest offices in the land, Katti in early August 2012, in a much publicised visit to the offices of both the President, Hifikepunye Pohamba, and Prime Minister, Nahas Angula, unveiled the facilitation of a N$50 million bonus payment to the National Petroleum Corporation of Namibia (Namcor) by another Brazilian oil and gas exploration company, Cowan Petroleo e Gas S.A., of which Katti is a partner in exploration activities off the country's southern coast.[2]

Katti is by no means the only one engaging in such public flaunting of political muscle, for it appears to have become standard practice for foreign miners on the verge of clinching or having clinched a stake in exploration licences to be seen hosting and entertaining senior members of the executive as well as ruling party bosses.

In arguably the clearest example of a company trying to use political clout or connection to high offices to swing a decision in its favour, it was reported[3] that in 2011 Dutch oil and gas exploration company Petroholland, with influential Namibian businessman Sidney Martin as local partner, after failing to secure exploration rights for an entire off-shore block got embroiled in a dispute with the Mines and Energy Ministry, asserting that elements within the Ministry were trying to deny the company access to considerable exploration acreage. The claim was ultimately shot down as unfounded, but what raised eyebrows was the fact that the company, through Martin, went over Ministerial heads directly to the Office of the President. The company's expectation – which is highly disturbing – appears to have been that by demonstrating association to the highest office in the land, a decision would be made in their favour. This episode, along with others, has cast doubts over the credibility of ministerial decision-making processes and ultimately taints the company, the ministry and even the Office of the President.

To reiterate, none of this legally constitutes corrupt activity. However, the emergence of this trend in recent times, especially around jockeying for interest in oil and gas exploration licences, has created an impression that political connections have come to play a significant role in farm-in activities in exploration licences, as well as the issuing and retention of extractive industry licences in general. A prominent Namibian law firm, which acts as an advisor to foreign exploration and mining companies, in a briefing of investors and legal experts, has simply stated in this regard: "Undue influence can become a concern".[4]

The suggestion appears to be that companies in the running for licences, by parading their political connections, place undue influence on licencing processes and bureaucrats to decide in their favour, as public association of company executives with senior politicians and ruling party officials implies political support for a specific company's application for or inclusion in a licence. The implied threat of political displeasure could be a strong incentive to deliver a favourable decision, especially in a single dominant party context, such as Namibia's. Furthermore, the suggestion appears to be that in this sort of climate it wouldn't be a long hop to under-the-table dealings, for which the next example should be flagged.

2 'Katti key in Namcor's N$50 million bonus', *The Namibian,* 8 August 2012.

3 'Petroholland given deadline on N$8 million debt', *Windhoek Observer*, 24 February 2012.

4 'Legal implications of a developing country entering oil and gas, with specific regard to the Republic of Namibia', PF Koep & Partners, March 2011.

Conflicts of interest = clear-cut corruption?

In June 2012 it was reported[5] that Namibia's Petroleum Commissioner, Immanuel Mulunga, had been the recipient of large sums of money through suspicious transactions involving an exploration licence holder. As Petroleum Commissioner, Mulunga's mandate is direct oversight of the oil and gas exploration and production sector, as well as advising the Mines and Energy Minister on the awarding of licences in the sector.

According to a prominent monthly magazine, it has apparently emerged that through 2009/2010 Mulunga had received almost N$2 million, in separate transactions, from licence holder Knowledge Katti, ostensibly, according to the men, on behalf of a third party who was buying a stake in one of Mulunga's companies. In one instance, Namibia's Financial Intelligence Centre, at the Bank of Namibia, allegedly picked up a direct payment of N$80 000 from Katti into Mulunga's account at a local bank.

According to the report on the matter, Mulunga admitted to these highly irregular payments and even stated: "It wouldn't be right to have direct business relations to Mr Katti. It is not correct and it can be seen as a corrupt activity and it is not really the case."

However, there is more, for it appears that Mulunga has been lax in his regulating of licence payments involving Knowledge Katti-owned exploration licences.

This was not the first time that allegations of inappropriate or corrupt behaviour had been levelled at the Petroleum Commissioner though. In early 2011, in a media report[6], an executive of an oil and gas exploration company claimed that Mulunga had tried to solicit a bribe from him in exchange for an exploration licence. This was denied by Mulunga. Aside from this, Commissioner Mulunga is apparently involved in a number of businesses, seemingly without having sought permission from the Permanent Secretary in the Mines and Energy Ministry or the Public Service Commission.

These and other allegations of inappropriate or corrupt behaviour levelled against Mulunga have apparently been or are being investigated by the Anti-Corruption Commission (ACC), but at the time of writing the status of this investigation was unclear.

To murky the waters around Mulunga even more, recently a weekly newspaper reported[7] that the Petroleum Commissioner had a approached a licence holder to apparently make a donation of millions of Namibia dollars to a school he was affiliated to. Mulunga had apparently approached the licence holder, a British company, in his official capacity as a senior Ministry of Mines and Energy official. However, according to the report, both the Minister and Permanent Secretary stated they were unaware of the solicitation for a donation, something which should have passed across the desk of the Permanent Secretary if it had been official.

These incidents and occurrences cannot be viewed as anything other than extremely disconcerting.

Once again, the examples used in the preceding section have not been proven to be acts of corruption or criminality, but are merely put forward to spotlight concerns and threats.

The licence trade

Aside from the issues addressed above there's another and interlinked one that needs unpacking in order to get a coherent picture of goings-on in the mining and exploration licencing sector.

The Namibian mining sector, as with all other sectors of the economy, has traditionally been dominated by South African firms. Of late, the South African interest has diminished significantly, while multinational mining houses from as far as Canada, Australia, France and even China, have supplanted the erstwhile political and economic rulers as the dominant players in the Namibian extractive sector.

That this crucial economic sector is wholly dominated by foreign companies is a situation which sits uneasily with national authorities. The Namibian government, according to economist Robin Sherbourne, is "keen to see more local and especially black Namibian involvement in the mining industry, both as active shareholders and at senior management level."[8] However, locals do not possess the expert skills or capital required to undertake large scale long term exploration and mining activities and thus, through an informal undertaking between authorities and mining companies, have to largely settle for passive minority stakes in exploration and mining activities. Namibian authorities have long been talking about introducing a legislated empowerment scheme in the mining sector in order to legally force some sort Namibian ownership into all deals in the industry. In the absence of this, foreign companies have by their own initiative, and tacitly pushed by government, entered into empowerment arrangements with local entities.

Parallel to this, licencing authorities within the Ministry of Mines and Energy have issued exploration licences, especially in the oil and gas sector, to locals with the expectation arguably being that these locals would farm-in seasoned international partners to carry the burden of exploration costs and activities. The

5 'Business unbecoming', *Insight Namibia* magazine, June 2012.

6 'Bribery alleged', *New Era*, 24 March 2011.

7 'Petroleum Chief manipulates Brits for N$2.6 million', *Confidente*, 23-29 August 2012.

8 *Guide to the Namibian Economy 2010*, Institute for Public Policy Research (IPPR).

aim of this practice is and was to get Namibians in at the very beginning, especially in the oil and gas exploration sector, so that they can, through partnering with international firms, gain experience in exploration and ultimately go on, once a discovery has been made, to become a legitimate partner in actual extraction activities. In other words, the objective was to ensure some sort of, if not considerable, Namibian ownership over the long term.

While this is and was arguably a noble aim, what has transpired is a speculative trade in exploration licences and even 'fronting', according to some, which has made a small group of locals instant millionaires, while it's hard to see what the long term benefits to society could possibly be of these goings-on in the sector.

In a recent example, in July 2012 it was reported[9] that a local company, Paragon Investment Holdings Limited, which has close ties to powerful factions within the ruling party, had sold most of its interest in an exploration block to its longstanding foreign partner for a handsome sum. This was just the latest example in a trend which sees locals cashing in royally on EPLs and oil and gas exploration licences without having done a stitch of actual work or having made any sort of substantial investment in exploration activities. Once again, it is hard to see how this sort of activity benefits society, despite claims by individuals and authorities that monies from such transactions are ultimately spent in the local economy. All that is clear is that a handful of individuals have become enormously wealthy even before a single drop of oil or a cubic foot of gas has been pumped or a single shaft has been blasted.

With regard to this sort of activity, Global Witness has postulated the following[10]: "…the risk of corruption lies not only in the flow of revenues from contracts and licences, but also right at the start, when extractive companies are granted access to these licences and contracts. Too often private 'shell' companies with opaque ownership structures are awarded lucrative concessions, with little information available as to who the beneficial owners of the company are, how much (if anything) the company has paid for the licence, and what the country has gained in return.

"If these companies do not have the technical capacity or financial resources to develop the asset themselves, they may end up being carried by international and national operators. Alternatively, they may squat on lucrative concessions by acquiring them from government before 'flipping' them quickly to other investors who actually have the capacity to develop the licence.

"It is our view that joint ventures with such shell companies, while not necessarily breaching anticorruption laws, could be indirectly sustaining a system in which resource revenues are being siphoned off by corrupt elites. Whilst foreign investors may be fully compliant with the local and international laws, in effect, they are paying huge fees to elites in order to access the local market."

These comments were made in relation to goings-on in the oil and gas sector in Angola and Nigeria, both resource-rich and widely recognised as highly corrupt. However, these statements could reasonably be argued as also in some respects being true of the current situation in Namibia.

To conclude this section, while the existence of corruption in the issuing of exploration and/or mining/production licences remains to be proven, there are enough disturbing signs to suggest things are probably not as they should be. Most disturbing of all is that political considerations, rather than economic and/or technical capabilities, appear to play a substantial role in jockeying for licences in the extractive sector. In the process it appears as if politically connected elites have already cornered the lucrative exploration licence trade and are on-selling national resources for a mere pittance, when considering the potential economic value of as yet untapped deposits and reservoirs, to foreign interests.

As the Global Witness report from earlier this year indicates, the impact of these activities, if unchecked, could be far-reaching and detrimental to the development prospects of any country. The report states: "As this report shows, the apparent overlap between political and business elite … has undermined public confidence in the licence bidding process and created suspicion over its legitimacy. The very existence of this suspicion, whether or not it is founded, is harmful. Political institutions and the sustainability of investments into industry are both endangered, which is counterproductive for development."

THE LEGISLATIVE AND REGULATORY FRAMEWORK

Given the warnings sounded, as illustrated by the various examples cited, in the previous section around the different licencing processes in the extractive sector, the question has to be asked to what extent the nature of the legislative and regulatory environment is contributing to casting the pall of suspicion over these processes. In other words, and more succinctly, to what extent are systemic and procedural weaknesses, the political failure of earlier mention, undermining the credibility of the state's various extractive industry licencing regimes?

In order to attempt at some sort of answer of this question and to ultimately get at the weaknesses in regulation and oversight it is necessary here to first briefly unpack the pertinent aspects of the extractive sector licencing framework.

9 'Paragon sells stake in EPL', *Windhoek Observer*, 20 July 2012.

10 *Rigged? The scramble for Africa's oil, gas and minerals*, Global Witness, January 2012.

The Five Links

According to Oxford University academic Paul Collier "there is a chain of decisions that governments should go through to successfully harness the potential offered by natural resources. There are five links in this chain.

1. The first is managing the discovery process as that is one reason why natural resource extraction in Africa has gone so drastically wrong. Without any rules you get the economics of the Gold Rush: long periods of neglect but when someone makes a discovery too many people starting searching. As discoveries happen, these reveal information and that should be captured by governments, which should rights off gradually as new discoveries raise the revenues available.
2. The next step is a system of taxation. Governments can tax profits, royalties or equity participation.
3. The third step is dealing with people in the area of natural resource extraction. The challenge is that people will see the economic costs but not the benefits. This can lead to anger that turns into violence and finally demands for ownership. It is important at all costs to stop this discussion of ownership. The best way forward is to spread the benefits of ownership across the whole country. The variation of natural resource allocation between African nations is bad enough already without making it worse. The challenge is to set up credible commitments to manage the economic costs and the allocation of revenues. What should be offered to citizens is full credible participation for the whole nation and equal participation in the benefits. That will help deflect illegitimate demands for local ownership.
4. The fourth step is to decide on the balance between consuming and saving the revenues generated.
5. The final step is the use of the resources that are spent. What excites finance ministers in developing countries most is Norway. Its decision to establish a sovereign wealth fund to manage its oil revenues is seen as the prudent option. Actually it makes no sense for a low income country in Africa. Norway has the highest level of assets per worker. It only established its sovereign wealth fund years after it found oil – Norway did not "do Norway" until it was rich. Low income countries should build their capacity to invest.

"The political challenge is to get that chain right, not just once but repeatedly for generations," Collier states.

Taken from: 'The ultimate prize', *Emerging Markets*, 8 June 2011.

The Minerals Act[11]

According to the provisions of the Minerals Act, the Minister of Mines and Energy is mandated to appoint the Mining Commissioner. This office is responsible for assessing licence applications in respect of various mineral types and ultimately the recommendation of the granting or denial, which in the final instance is the Minister's prerogative, according to law, of applied for licences. Also, the Mining Commissioner is legislatively tasked with inspecting all mining operations to ensure these are in compliance with licence conditions.

The Minerals Act stipulates five types of licences for which prospective miners can apply, namely:

Mining Claims – These are available to Namibian citizens only and concern small-scale mining operators. This licence has a duration of three-years, with a further two-year extension a possibility.

Reconnaissance Licence – These licences are granted for six-months, with possible extension of another six-months, for the purpose of conducting a preliminary exploration of a considerable expanse of land in order to determine where prospecting should be focused once an exclusive prospecting licence (EPL) has been obtained.

Exclusive Prospecting Licence (EPL) – Sherbourne[12] adequately defines this licence as being "available to enable the systematic prospecting of areas up to 1,000 km2 for a period of three years with the possibility of up to two two-year extensions provided sufficient progress can be demonstrated".

Mining Licence – This licence is valid for 25 years and in this regard Sherbourne states "mining licences are granted to applicants who can show sufficient technical and financial capacity to develop and operate a mine." A licence holder also has the right to "approve the development of other mines on the same area".

Mineral Deposit Retention Licences – In this regard Sherbourne states that these licences "allow exploration companies to retain their rights on prospecting licences, mining licences or mining claims without mining obligations recognising that the commercial prospects of a mineral may change over time."

11 Minerals (Prospecting and Mining) Act (Act No. 33 of 1992)

12 *Guide to the Namibian Economy 2010*, Institute for Public Policy Research (IPPR).

The Petroleum Act[13]

In much the same way as the Minerals Act, according to the provisions of the Petroleum Act, the Minister of Mines and Energy is mandated to appoint the Petroleum Commissioner. This office is responsible for assessing licence applications in respect of oil and gas and ultimately the recommendation of the granting or denial, which is the Minister's duty, according to law, of applied for licences.

The Petroleum Act stipulates three types of licences for which prospectors can apply, namely:

Reconnaissance Licence – As with minerals, these licences are granted for the purpose of conducting a preliminary exploration of a considerable expanse of land or sea-bed acreage in order to determine where prospecting should be focused once an exploration licence has been obtained. These licences are valid for no more than two years and can be extended twice.

Exploration Licence – The petroleum equivalent of the exclusive prospecting licence (EPL), and to borrow from the earlier text, is to "enable the systematic prospecting" for oil and gas deposits. These licences are issued for a period of four years, which can be extended twice for no more than two years each time.

Production Licence – This licence allows the holder to carry on production activities and to sell or dispose of petroleum derived from such production activities within the production area. This licence is valid for 25 years and can be renewed only once, for no more than 10 years.

The Diamond Act[14]

With regard to the provisions of this Act the following licences can be applied for to the Minister of Mines and Energy:

"(a) a diamond dealer's licence entitling the holder to carry on business as a buyer, seller and exporter of unpolished diamonds;

(b) a diamond cutting licence entitling the holder to polish diamonds for the purpose of business or trade;

(c) a diamond tool-making licence entitling the holder to set unpolished diamonds in tools, implements or other articles or to crush or to alter those diamonds for the purpose of trade;

(d) a diamond research licence entitling the holder to conduct research and tests in connection with diamonds, but not to polish diamonds for the purpose of business or trade."

These licences have various duration periods and are issued by the Diamond Commissioner, who heads the Diamond Board and whose mandate is mainly to perform various regulatory tasks and to advise the Minister on issues pertaining to the downstream diamond sector.

Something to note at this stage is that exclusive prospecting licences (EPLs) apply only to minerals while exploration licences apply to petroleum. Often times the EPL reference is used to apply to both minerals and petroleum and is understood by the layman to be the same thing as an exploration licence (petroleum).

This confusion aside, the reason for granting licences, any licences, is to quite simply ensure that the exploitation of natural resources is regulated in the best interest and to the benefit of broader society. Or to quote Collier and Venables[15], the underlying principle is aptly summarised as being the following: "For most economic activities the role of government is peripheral; however, for the exploitation of natural assets government is centre stage. Being natural, the ownership rights to these assets must be assigned socially: for practical purposes government has custodial rights on behalf of citizens who are collectively the owners. Government must manage the natural assets in its custody in such a way as to maximize their value to citizens …."

Against this backdrop – the custodial role of the state – if corruption is perceived to have infiltrated the licencing regimes this would have stark implications for those involved. Bureaucrats involved in or implicated in unethical behaviour and activity are in effect engaging in a betrayal of public trust, if not outright criminal activity, when they mismanage and manipulate natural resource licensing regimes.

How licences are awarded, according to the wording and prescription of the various pieces of legislation, is and should be a fairly straightforward exercise – the various laws state that anyone is invited to apply for licences or a licence in an open application process and these applications will be assessed, by the relevant and statutory boards and/or commissioners, according to set criteria developed for the particular licence applied for, with the Minister of Mines and Energy ultimately granting or refusing a licence, or renewing or transferring such a licence, on the strength of advice from the advising boards and commissioners.

However, despite the processes, as set out in the various laws, appearing to be fairly simple, in reality, they have become a challenge. Consider for instance a 2011 presentation, on the oil and gas licencing environment, by a prominent local law

13 Petroleum (Exploration and Production) Act (Act No. 2 of 1991)

14 Diamond Act (Act No. 13 of 1999)

15 *Managing the exploitation of natural assets: Lessons for low income countries*, October 2008.

firm[16], which identified under "areas of concern" the following regarding the state of affairs at licensing level in the oil and gas sector: "Ad hoc decisions; No consistent enforcement; Uncertainty; Legal confrontations; Responsibility for environmental loss or damage; Question of skills in the Ministries responsible; attempts at enforcing BEE without proper framework."

Together these "concerns" paint a picture of a fairly chaotic situation and bring two issues to the fore that appear to be central to undermining the credibility of licensing regimes. These issues are, firstly, a lack of transparency and, secondly, the incorporation of black economic empowerment (BEE) concerns as an influential factor in decision-making. Furthermore, these issues do not stand separate of each other, but are rather finely related in the context of worrisome dealings around licences in the extractive sector.

Lack of transparency

Concerning the issue of a lack of transparency, consider the following statements made in a 2009 report[17] exploring the intersection of confused environmental protection, corrupt officialdom and lax regulation: "… The Minerals Act does not provide for transparency in the mineral licensing process. To the contrary, the Act contains specific language that discourages it. Section 6 calls for the preservation of secrecy by the MME of all matters pertaining to compliance with the provisions of the Minerals Act. This cloak protects the mining companies and inhibits public awareness and participation in decision-making relating to prospecting and mining operations."

The report continues: "The Minerals Act currently only requires information on the previous convictions of individuals applying for NEPLs and Mining Claims; corporations are entirely exempt from any background checks. In a globalised economy, this gaping hole creates an incentive for companies with histories of poor environmental performance to seek licences in Namibia where their records will not be subject to public scrutiny in any way. In this way, the Minerals Act seems to create a perverse incentive for the country: it attracts precisely the type of unscrupulous companies that the country should be avoiding …."

These sentiments concern dealings and decision-making under the auspices of the Minerals Act, but can be carried across to aptly describe circumstances under the other licencing regimes sketched earlier as well. In fact, transparency of decision-making is a general concern in the public sector.

16 'Legal implications of a developing country entering oil and gas, with specific regard to the Republic of Namibia', PF Koep & Partners, March 2011.

17 *Striking a better balance: An investigation of mining practices in Namibia's protected areas*, Legal Assistance Centre (LAC), 2009.

The Extractive Industries Transparency Initiative (EITI) Principles

1 We share a belief that the prudent use of natural resource wealth should be an important engine for sustainable economic growth that contributes to sustainable development and poverty reduction, but if not managed properly, can create negative economic and social impacts.

2 We affirm that management of natural resource wealth for the benefit of a country's citizens is in the domain of sovereign governments to be exercised in the interests of their national development.

3 We recognise that the benefits of resource extraction occur as revenue streams over many years and can be highly price dependent.

4 We recognise that a public understanding of government revenues and expenditure over time could help public debate and inform choice of appropriate and realistic options for sustainable development.

5 We underline the importance of transparency by governments and companies in the extractive industries and the need to enhance public financial management and accountability.

6 We recognise that achievement of greater transparency must be set in the context of respect for contracts and laws.

7 We recognise the enhanced environment for domestic and foreign direct investment that financial transparency may bring.

8 We believe in the principle and practice of accountability by government to all citizens for the stewardship of revenue streams and public expenditure.

9 We are committed to encouraging high standards of transparency and accountability in public life, government operations and in business.

10 We believe that a broadly consistent and workable approach to the disclosure of payments and revenues is required, which is simple to undertake and to use.

11 We believe that payments' disclosure in a given country should involve all extractive industry companies operating in that country.

12 In seeking solutions, we believe that all stakeholders have important and relevant contributions to make – including governments and their agencies, extractive industry companies, service companies, multilateral organisations, financial organisations, investors and non-governmental organisations.

Source: EITI Rules, 2011 Edition (November 2011)

According to the report quoted here, the lack of transparency in decision-making has contributed to creating a climate of corruption and ultimately led to the emergence of such conduct and incidences as exemplified by the case studies, and others not mentioned, presented in the previous section. When it came to licences, according to the report, "Mining companies bypassed the corrupt MME officials or the unyielding MET personnel by appealing directly to the Ministers themselves. This was effective in forcing the ministries to act, and also helped ensure that future EPL applications or conversions to mining licenses would be reviewed and approved expeditiously. At times, this created the incentive for mining companies to bypass the process ruled by law and formal policy, and instead to use political and personal connections. This had the effect of degrading the importance of legal standards and requirements, and removed the few mechanisms in place intended to help the country distinguish between good and bad mining companies. If a company with poor environmental practices and inadequate qualifications did not acquire a licence through outright bribery, they could nonetheless use their political influence to put pressure on the ministry staff to approve their application."

These are indeed strong statements and the underlying sentiments are damning, but it has to mentioned that the report authors have been accused of making sweeping statements and been challenged, by amongst others Mining Commissioner Erasmus Shivolo, to specify instances of corruption.

This aside, what is clear from the quoted sections is that the lack of transparency in the awarding of licences is considerably contributing to tainting the credibility of these important processes, and ultimately introduces a legitimacy concern into relevant and critical governance structures. The bottom line is that a situation which denies citizens access to and insight into decision-making is not conducive to good and accountable governance and oversight.

Black economic empowerment (BEE)

As it stands and by all accounts, and not just in the extractive sector, black economic empowerment has in a sense become synonymous with the flouting of established rules and procedures, and even the law in some cases, in order to ensure entry and participation of previously disadvantaged individuals and groups in various economic sectors.

While the broad aims of BEE schemes and mechanisms are commendable, in reality in many cases empowerment in Namibia has come to apply to and benefit only those with the right political or familial, or other close personal, connections. This has seen the emergence of a narrow elite straddling both the political and business spheres. This mirrors disturbing BEE trends playing out in South Africa, the home of formalised BEE, which shares a similar history to that of Namibia.

On the exploration and mining/production licensing landscape BEE has come to be identified with suspicions and fears of widespread 'fronting' practices – foreign mining concerns co-opting politically connected individuals in order to secure exploration and/or mining rights – and conflicts of interest on the part of public officials, as already illustrated earlier.

The major concern, as already articulated, with regard to BEE, in the extractive and other sectors, is that it is being pushed without a proper framework being in place. The Namibian government is purportedly engaged in attempting to formalise BEE, but this has been going on for more than a decade now. In the same vein, relevant stakeholders are apparently engaged in deliberations on developing an empowerment charter, similar to what exists in South Africa, for the Namibian extractive sector.

It is appropriate here to quote Sherbourne[18] to summarise the situation, as follows: "Namibia has so far failed to come up with either a national or a mining specific BEE policy despite repeated announcements that a draft BEE or TESEF policy is in the offing. Mining companies are of course keen to avoid having to take on shareholders who have nothing to offer in terms of capital and skills and end up being little more than expensive passengers."

As it stands and as a consequence of this lack of definition, and coupled with the transparency deficiency, BEE can and has come to cloak just about anything – conflict of interest, influence peddling, etc – and take on any form – i.e. slackening of regulation and oversight, or looking the other way, in order to accommodate 'beneficiaries' – including highly questionable and even unethical and/or corrupt activity. And in effect, most locals or BEE interests in the extractive sector do come across as no more than "expensive passengers", not just for companies but broader society as well.

Licencing reform

At the time of writing discussions were on-going around regulatory reforms in the extractive sector and included proposals for the revamping of certain licensing processes, notably the oil and gas exploration and production licensing regime.

As already stated, licensing is statutorily done on the basis of an open invitation to anyone to apply for a specific licence. According to reports[19], authorities are apparently looking at introducing a bidding system in respect of petroleum exploration licences. Others closer to discussions say a closed-bidding system is being considered.

In this regard, an expert observer stated: "The choice of allocation regimes is an important issue and one that receives quite a lot of attention from international writers. The main reason why a

18 *Guide to the Namibian Economy 2010*, Institute for Public Policy Research (IPPR).

19 'Plans to open EPLs for bidding', *Windhoek Observer*, 2 March 2012.

state would want to change this regime is to try and get a greater benefit from the allocation of rights to petroleum. For example, under the normal system of awarding licences, a fee prescribed by legislation has to be paid. However, with a bidding system, the block is awarded to the highest bidder. A change in allocation regimes often follows an increase in a country's resources."

With the size of Namibia's petroleum and gas resource remaining to be established, it is unclear what the reasoning of authorities is to change the licence award system. Furthermore, in the context of transparency, accountability and anti-corruption, the changing of the licence award system has to be flagged as both oil-rich Angola and Nigeria make use of a licence bidding system and in both cases, according to reports[20], far from improving things, the system has been shown to be highly susceptible to manipulation and corruption. However, the system itself is probably not at fault, but rather its failings and corruption could be put down to legislative and institutional weakness, in the context of a decidedly undemocratic political environment.

RECOMMENDATIONS

The following recommendations have been adapted and condensed from various sources and speak to concerns highlighted throughout this paper.

For the Ministry of Mines and Energy:

- That the review of the licence award dispensation incorporate wide ranging consultations with stakeholders, including civil society organisations;
- That the issue of transparency of decision-making be a central consideration in review processes;
- In the same vein, that secret mining and production contracts with mining companies be avoided;
- To sharpen up on oversight of licence holders in both the minerals and petroleum sectors;
- That appropriate oversight mechanisms, including specific and comprehensive codes of conduct, be put in place to monitor the dealings of licence authorising offices and structures in order to protect the integrity of these offices and structures.

For Government:

- To introduce and enforce codes of conduct for all strategic positions offices, structures and agencies active in various economic sectors;
- To finalise black economic empowerment legislative and policy frameworks;
- To introduce and promulgate access to information legislation as part of the anti-corruption armaments, in keeping with obligations under various treaties and protocols;
- To look to introducing regular life-style audits at strategic offices and levels of state in order to minimise abuse of power, mismanagement, conflicts of interest and corrupt practices.

For the Chamber of Mines in Namibia:

- To continue advocating for coherent and consistent regulation, in terms of existing and coming legislation;
- To advocate for government to move towards finalising black economic and other empowerment mechanism in order to dispel uncertainty in the sector;

For civil society:

- To get involved in activities and launch initiatives aimed at monitoring developments in the extractive sector;
- To push for the installation of mechanisms ensuring greater transparency in decision-making over national natural assets and especially for revenue transparency in the extractive sector.

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APPENDIX A

Publish What You Pay – Eastern and Southern African Meeting: Moving from Transparency to Accountability in the Extractive Industry May 8-11 2012

Communique

We, as coalition members of Publish What You Pay from 12 Eastern and Southern African countries, *Democratic Republic of Congo, Kenya, Lesotho, Madagascar, Malawi, Mozambique, South Africa, South Sudan, Tanzania, Uganda, Zambia and Zimbabwe,* met under the auspices of Publish What You Pay (PWYP), on the theme of moving from transparency to accountability.

Having considered the *challenges and growth of the extractive industries in Africa* and having participated in deliberations, express support and encouragement to the Extractive Industry Transparency Initiative (EITI) process and the various governance strengthening processes at national, regional, continental and global levels. We fully understand that governments and companies need to be held to account for their actions in relation to the extractives industry. Extractive industries generate revenues which fail to contribute to the growth of African economies due to illicit capital flows, which are a result of inadequate monitoring and tracking mechanisms. Therefore, in order to manage and benefit from natural resources, we need strong public institutions and civil society representation. International and local partners are required to support and implement programmes with effects that can be realized at the grassroots level. We acknowledge the importance of information exchange across experiences from the different participating countries.

We, being mindful of the continuous challenges facing the communities in extractive areas who do not benefit from their resource-rich surroundings, seek to highlight a series of recommendations for the various stakeholders - Africa governments, extractive companies, developing partners, civil society – and concerning the EITI.

EITI process and consultation

The EITI requires reporting on revenue flows alone, this omits other areas which are crucial to enabling countries to benefit fully from their natural resources. In order for EITI to achieve its aim and be more meaningful to its citizens, its scope must widen, notably to the allocation of license and contracts, the publications of contracts and greater transparency of government budgets and spending.

We entreat our governments to embrace the principles of participation, accountability and transparency in the extractive sector through the Extractive Industry Transparency Initiative (EITI). 2

These principles should also be integrated in the activities of regional bodies such as the East African Community, ECOWAS, Southern Africa Development Community (SADC)and the Common Market for Southern and Eastern Africa (COMESA) to ensure harmonization, consistency and ease of implementation of the different commitments made by our governments.

EITI implementing African governments need to give the EITI a legal basis in order to oblige extractive companies to report on all the expenditures and tax payments. This will also empower the members of parliament, increasing their oversight over the revenues generated by the extractive sector.

We urge the EITI outreach countries to prioritize their becoming EITI candidates, as well as:

- Create a representative multi-stakeholder group that will help spearhead a platform for the discussion of transparency issues relating to extractives;
- Build trust and confidence amongst stakeholders involved in the extractive sector and civil society;
- Have accessible, comprehensive and aggregated data and information on revenues and extractive related information;
- Ensure a process that legitimizes the role of CSOs as watchdogs of government revenue spending and of broader national development goals.

African governments

- In most countries the state holds natural resources in trust for the citizens. Therefore the state has the responsibility to ensure maximal benefits can be obtained from natural resource exploitation. Governments must enact legislation and policies that support transparent mechanisms for the management and collection of revenues obtained from the extractive industry.

- The conference resolves that the negotiation and renegotiation of extractive industry contracts must take into account not only fiscal, but also social, labour, environmental and developmental issues that have an adverse impact on the welfare of the local populace.
- In so doing, the government must guarantee that the process and outcomes of all such negotiations are transparent and accessible to the general public in order to enhance confidence, build trust and promote transparency around extractive issues.
- Overwhelming concerns and evidence of human rights violations by the extractive industries are apparent. For instance, displacement of poor people from their land without adequate compensation, poor working conditions, environmental degradation and pollution. Therefore we implore action by governments to ensure and protect the civil, political, economic, social, cultural and environmental rights of citizens affected by the extractive industries. We, on our part, commit ourselves to monitoring the operations of the extractive industries to adhere to the set standards of human rights.
- As Eastern and Southern Africa Publish What You Pay coalitions, we seek stronger political will and commitment towards the implementation of the Africa Mining Vision developed by the African Union. It seeks to use resource exploitation for transformation, growth and development. This represents a move away from mining for revenue towards mining for development. The vision provides a unique opportunity to secure our inter-generational and intra-generational equity in the extraction of African minerals. However, the Africa Mining Vision needs to be aligned with development objectives at the local level through appropriation. A similar approach for other resource sectors (for example oil and forestry) can be adopted to ensure transparency and accountability.
- Governments need to work towards diversifying the economy rather than solely focusing on investing in natural resource extraction. All African governments need to establish mechanisms to put aside some of the revenue generated by extractive operations for future stability, growth, unforeseen downturns and securing the lives and well-being of the current and future generations.

The development partners

- Donors and the international community should desist from developing and implementing International agreements which reduce and undermine political space, independent continental economic freedom, national development strategies and policies.
- Donors should provide capacity building opportunities to enhance the role of civil society in monitoring the activities of extractive companies.
- Donors need to be fully engaged in order for them to adopt models that suit the different country contexts. We recognize that the model offered by International Financial Institutions has failed to ensure development based on the natural resource endowment and the origin of the vision needs to be questioned.

Extractive companies

We continue to recognise the role of the extractive companies as they contribute to economic growth. We expect the extractive companies to respect the laws and use the best available technologies in relation to human rights issues and environmental management. Extractive companies need to observe national laws and international standards/practices such as the OECD guidelines, ISO 26000, Global Compact Principles, GRI Reporting Guidelines, etc.

Civil society

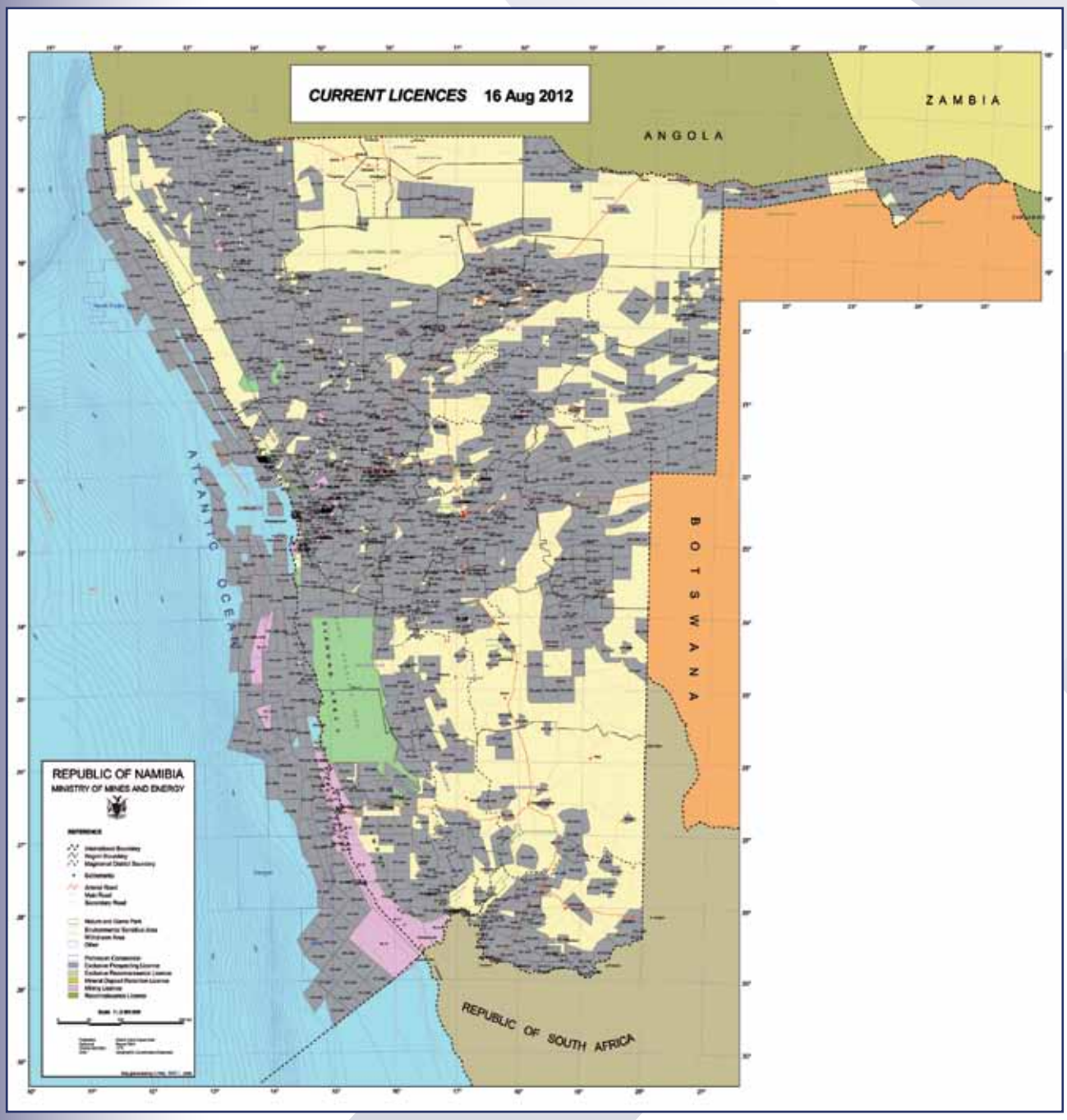
We as civil society affirm our commitment to the Publish What You Pay Campaign and agree to:

- *Continue* strengthening our resolve towards promoting transparency and accountability through continued engagement and capacity building of communities. Consequently, our capacity to articulate and interrogate extractive issues more competently through advocacy work will need to be increased.
- *Ensure* PWYP can speak to the needs of the different coalitions. This conference allows each country to develop their country strategies.
- *Understand* and *appreciate* the different developmental contexts of extractive industries, processes, legislation and conventions that relate thereofand have the self awareness which plays a critical role in the actualisation of the vision at national and continental level to create space for engagement.
- *Support* government efforts that determine that resources should not be extracted if present regulations are reasoned to be onerous by potential investors;

- *Promote* a spending of revenues in line with national poverty reduction strategies and participate in ensuring how resources are allocated as well as ensuring resources reach those they are supposed to.
- *Take* an active role in the identification of key action points for implementation and monitoring of the Africa Mining Vision. It is also important to identify key policy engagement issues centered on transparency and accountability focusing on the value chain.
- *Work* with the extractive companies, government and communities to establish synergies in identification and implementation of activities derived from the Africa Mining Vision Workplan

With the above issues in mind, we do hereby beseech, entreat and stress that our governments, as duly elected representatives of all the people, proceed to act with integrity, and without fear and favour to secure an equitable resolution that ensures the well being of the people, and, in so doing, presage a harmonious future for this great continent that is Africa.

Current Licences Map



APPENDIX B

A Citizens' Checklist for preventing corruption in the award of oil, gas and mining licences

From: Rigged? The Scramble for Africa's Oil, Gas and Minerals (A report by Global Witness)

Citizens and their representative community organisations need to be able to hold their governments accountable at the point at which natural resource licences and contracts are issued.

Based on the investigative findings in this report and in discussion with civil society activists, academics, industry and international financial experts and others concerned with corruption issues, Global Witness has compiled a Citizens' Checklist which makes recommendations as to how citizens can hold their governments to account at the crucially important point when extractive companies negotiate for access to rights for natural resources.

The Checklist also forms a blueprint for the policies of governments in resource-rich countries and the international financial institutions that provide them with aid and technical assistance.

It also sets out benchmarks that civil society groups in resource-rich countries can use to assess whether their own governments are doing all that they can to ensure transparency in the natural resource licensing process.

The key feature of the Checklist is a need for clear rules and effective institutions, openness and full public disclosure throughout the allocation of licences, combined with continuous oversight by independent third parties. The aim is to ensure that companies that win licences are qualified to do so, have done so honestly and fairly, do not represent the interests of corrupt officials and will actually meet the terms of their licences, rather than simply squatting on them with the aim of selling on the licences for an easy profit.

We recommend that citizens in Angola, Nigeria and the DRC follow the principles of the Citizens' Checklist to push for the disclosure of the beneficial ownership of companies and to encourage governments to regulate for transparency in the licencing process.

What needs to happen before oil, gas and mineral licences are awarded to companies:

1. A country needs to have a long-term fiscal, contractual and regulatory strategy for managing its potential or available natural resource base to secure the greatest social and economic benefit for its current and future citizens, rather than handing out licences ad-hoc in response to short-term political pressures. To have public legitimacy, this strategy needs to be prepared openly and after public consultations.

The aims of the strategy should be to:

a. gain full information on the country's potential or available resource base, so that the government can negotiate with companies from a well-informed position;
b. evaluate when and if to develop a country's potential or available resource base;
c. develop strategies so that the extractive sector is used as a catalyst for the economy to produce, for example, in-country processing and industries in related services;
d. maximise the longer-term benefits to the country and its citizens, rather than placing undue weight on getting upfront payments by companies (such as signature bonuses) which usually amount to a small fraction of the value of an oil or mineral deposit; and
e. apply the highest standards of social,\ environmental, health, safety and human rights protections and identify regions where extraction should not take place, so as to minimise the damage of resource extraction on local communities and public goods such as the environment.

2. The laws and public institutions to regulate manage and oversee the natural resource sector need to be in place before companies are granted access to the sector. These institutions need to be strong and independent enough to resist corruption and protect the public interest, so they should:

a. have political support for adherence to the rule of law;
b. have distinct roles that are clearly defined in law;
c. have sufficient funds, expertise and regulatory power to fulfil their mandates; and
d. be managed and independently audited in a transparent fashion.

3. The laws governing these public institutions should prevent conflicts of interest and forbid corruption. State-controlled extractive companies should not act as regulators because this concentration of power creates conflicts of interest and invites corruption.

4. The strategy, laws, institutions and policies on the extractive sector should be crafted through open debate and discussed and approved by the country's legislature. All resulting documentation should be easily available to the public in an accessible form.

5. Laws should have a strong bias in favour of promoting openness, preventing public officials from favouring companies in which they or their relatives and proxies may have a financial interest, and against confidentiality and secrecy.

The awarding of oil or mineral rights:

6. Open and competitive bidding, based on equal treatment of bidders and observable or verified bid variables, should be the norm for awarding oil, gas and mining rights. This rule should also be applied in cases where bidders offer investments in downstream industries, or in public infrastructure, as part of their bids. There should be dispensation for sole source contracts for legally pre-defined reasons, including proprietary skills. It should be acknowledged however, that competitive bidding might not work for small scale or artisanal mining

7. In exceptional cases like small scale or artisanal mining where open bidding may not be feasible, the public agency responsible for the award of rights should be required by law to justify the exception to both the legislature and the public.

8. Countries should make survey work and geological conditions on oil, gas and mining rights available to bidders.

9. The same terms should be offered to all companies. No prospective bidder for the same licence should be offered preferential rights, access to information or other preferential treatment.

10. The terms governing contracts to be awarded should be as clear and simple as possible to ensure that the public can oversee and monitor the awarding of licences. The terms should be set out in law or regulation to the greatest extent possible, because more complex contracts are harder to oversee and monitor. For example, model contracts that have been subject to a detailed legal review could be used as a template for negotiating bids during the allocation process.

11. Where negotiation is allowed for particular contract terms, the parameters for what can be negotiated should be published beforehand.

12. The public agency responsible for awarding oil, gas or mining rights should not allow any company to pre-qualify to bid for such rights, whether as a sole operator or a member of a consortium, until this agency has confirmed that the company has:

a. published its ultimate beneficial ownership and audited accounts;
b. proved its technical competence and financial capability to fulfil the terms of the contract;
c. proved that it can obtain sufficient funds, from legitimate sources, to meet the terms of the contract;
d. not previously been responsible for corruption, human rights abuses or the illegal destruction of the natural environment or any other criminal activities;
e. identified the key personnel who will oversee its work under the contract; and
f. identified the terms of negotiation for any foreseeable subcontract that is needed.

Any companies found to be involved in collusion with public officials to obtain a licence should be disqualified from the process.

13. The same rules should apply to all companies seeking to acquire oil, gas or mining rights, including domestic companies that take part in bidding under "local content" rules.

14. The public agency responsible for awarding oil, gas and mining rights should keep companies informed as to the physical security in the licence area.

15. The right to exploit, post-exploration phase, should be dependent on the completion and review of social and environmental impact assessments by an appropriately skilled and independent third party.

16. Companies that buy into oil, gas or mining rights that have already been acquired by other companies, for example via "farm-ins" or corporate mergers, should also be required to provide the information in points 12 a-f above.

17. The pre-qualification of bidders should be cross-checked by an independent third party to confirm that the above requirements are fully met.

18. Bidding should take place against a reasonable timetable which is disclosed to the public, and bidding outside such a timetable should not be allowed. In cases where unforeseen external factors mean that an extension is reasonably necessary, the government should publicise this, and explain why such an extension is needed.

19. The fullest possible information should be published through broadcast and open media.
The following information should be published:

a. tender documents;
b. lists of pre-qualified companies, accompanied by evidence of 12 a-f above;
c. successful and unsuccessful bids;
d. contracts, subcontracts, other agreements signed with extractive companies and their associated data;
e. independent audit reports of financial transactions related to licencing and sales; and
f. confirmation from the agency overseeing the award of rights (see Continuous Oversight, below) that all pre-qualified companies have complied with all the rules.

20. Companies should publish their payments to governments in an accessible database on a project-by-project basis, in each country where they have any oil, gas or mineral exploration, development, production, transport, refining, or marketing activity. A project is defined as one that originates at the level of the licence, production-sharing agreement, lease or other such agreement. Payments that originate at the country or entity level such as corporate income tax should be reported at that level.

21. Companies must make the above payments for oil and mining rights into bona-fide government accounts, which are linked to the national budget.

22. Countries' receipts of such payments should be independently audited and disclosed in an accessible database to the public in full, for example through the Extractive Industries Transparency Initiative (EITI).

23. To reduce the risk of bidders paying bribes to corrupt officials via third parties such as subcontractors, companies should be required to publicly disclose their relationships with any agents, consultants, local partners or other third parties that help them to win access to oil or mining rights. Disclosures should include: a. the identities of the ultimate beneficial owners of the third party and the nature of its expertise; the reasons why the company chose to work with the third party and the nature of the helpthat the company is receiving from it; and full details of any payments or other benefits provided to the third party by the company.

24. Contracts, licences and other agreements signed between companies and governments and between companies and third parties should be published in full, so the public can see that they are fair and have been honestly obtained. Redactions should only be allowed for specific information, for time-limited periods, in cases where companies or the government can demonstrate to the public that the need for confidentiality genuinely outweighs the public interest in disclosure.

25. There should be a comprehensive and regularly updated list, easily accessible to the public, of which companies hold which rights in each project, as defined in 20, in each country.
This list should name all the partners in a licence and note any changes of ownership.

Continuous oversight:

26. There needs to be continuous oversight by an independent public agency of the award of rights and the implementation of contracts and subcontracts by companies. This is to ensure that bidding has been honest and fair and that companies are meeting the highest standards of transparency, public accountability, and social and environmental protection. This agency needs sufficient authority, resources and expertise to carry out its task and should make regular and timely public reports.

27. Independent civil society groups should be actively involved in the oversight of the oil, gas or mining sectors at all stages of the resource value chain, for example by working with public oversight agencies, or through their role in the multi-stakeholder groups of the EITI.

28. Countries, whether through the host government, extractive companies or local not-for-profit organisations, should also build capacity for independent civil society groups through offering training and workshops.

29. Countries rich in oil, gas or minerals should implement the EITI and their multi-stakeholder groups should agree to extend its remit to the allocation of exploration and exploitation rights, as has already happened in Nigeria and Liberia.

30. A country's legislature, oversight and law enforcement agencies should have a right of access to all information on the award of oil, gas and mining rights.

31. Credible allegations of corruption should automatically lead to independent investigation. Proven corruption should bring serious civil and criminal penalties for any companies, company employees and government officials who are implicated, including the cancellation of contracts and publication of findings. If local laws allow the ownership by a government official of a company participating in the bidding of oil, gas or mineral licencing, any government official found to be the ultimate beneficial owner of such a company must provide evidence that he or she is not using his or her position to benefit from the allocation of such licences.

32. All contracts and other agreements governing oil, gas and mining rights should explicitly forbid corrupt acts, human rights violations and environmental offences as defined in national and international law.

33. The shareholders of multinational extractive companies should insist that these companies adopt the highest ethical standards in their bidding for oil, gas and mining rights and ensure that their affiliates and local partners in resource-rich countries do the same.

Actions for home governments of extractive companies:

34. The home governments of multinational companies that seek access to oil, gas or mining rights should work to combat corruption by:

a. using their fiscal and regulatory powers to ensure that such companies disclose their revenue payments to governments around the world, on a country-by-country and a projectby- project basis;
b. implementing and consistently and proactively enforcing bribery laws that cover bribing another person or entity, being bribed
c. full details of any payments or other benefits provided to the third party by the company.

International actions to curb corruption:

35. International donors (governmental and private sector) should jointly evaluate whether development assistance is still needed, and for what timeframe, in light of the findings of point 1a.

36. International financial institutions and bilateral donors that work with resourcerich countries should use their aid, loans and technical assistance to ensure that the practices listed in this Checklist are in place before these countries grant access to their oil, gas or mineral reserves.

continued over

Additional notes to Citizens' Checklist

The oil, gas and mining industries are vastly complex, including many thousands of companies from giant multinationals to tiny local firms. There can be big differences in licencing and contractual arrangements, not just between oil, gas and mining but within each sector, between one country and another and between different generations of contracts in the same country. Very little information is revealed to the public on how resource rights are won and who benefits. Because the oil, gas and mining industries are so complex, any set of principles has to be general in nature and the findings of the Checklist may need to be adapted to specific circumstances. For example, licences to explore for oil and gas (which can then be converted into production rights) are often awarded on the basis of auctions. In mining countries, by contrast, a "first-come-first-served" system is more usual.

Mining exploration often takes place across vast areas where the chance of finding commercially exploitable mineral deposits may be quite small. For this reason, it may be difficult to attract enough bidders at one time to offer exploration rights by auction. But where a commercial-sized mineral deposit is already known to exist, bidding is appropriate. Therefore, it is important to take into account that the design of the allocation mechanism may differ across resource types and geological conditions. The recommendations of the Checklist could also be adapted to resources-for-infrastructure deals. For example, a government could present bidders with a list of public infrastructure projects that it wants built, all of them with cost estimates provided by independent experts. Bidders could then compete on the basis of which projects they will undertake in return for being granted oil or mineral exploitation rights. The volume of oil or minerals that can be exported by winning bidders, along with benchmark prices, need to be publicly disclosed so citizens can be sure that these deals are fair. The important point is that rights be awarded in a transparent and rule-bound way, subject to independent oversight by third parties.

About the Author

Frederico Links has been a Research Associate with the Institute for Public Policy Research (IPPR) since 2009, working primarily on governance and democracy-related issues. In 2010 he researched and wrote the IPPR briefing paper Corruption Prevention: Strengthening Systems, Procedures and Practices. In 2010 Links was the IPPR's Research Coordinator for the Crinis Namibia Research Programme – a Transparency International (TI) backed project researching political party funding/financing in Namibia. The Namibian section of the study, authored by Links, was published in late 2010. In 2009 Links researched and wrote articles for the IPPR's Election Watch newsletter.

His previous published work includes We Write What We Like: The Role of Independent Print Media and Independent Reporting in Namibia (Namibia Institute for Democracy 2006) and Parliamentary Reporters' Handbook (Namibia Institute for Democracy 2006).

Since 2004 Links has worked as a journalist and sub-editor for a number media outlets including *Insight Namibia* magazine, Reuters news agency, *The Namibian* newspaper, *Informanté*, and Katutura Community Radio. From 2009 to 2010 Links researched and wrote *Insight Namibia's* monthly Corruption Tracker bulletin. He has been the editor of Insight Namibia since mid 2011.

He has won Namibia Media Awards for his sports journalism (2005), tourism reporting (2006) and articles on education (2006). He holds a National Diploma in Journalism and Communication Technology (2007) from the Polytechnic of Namibia.

About the IPPR

The Institute for Public Policy Research (IPPR) is a not-for-profit organisation with a mission to deliver independent, analytical, critical yet constructive research on social, political and economic issues that affect development in Namibia. The IPPR has been established in the belief that development is best promoted through free and critical debate informed by quality research.

About the Anti-Corruption Research Programme

The IPPR's Anti-Corruption Research Programme will focus on strengthening anti-corruption regulations, procedures and practices.

The Programme will provide a stocktaking of anti-corruption efforts so far, examine policy options for the future and recommend ways in which Namibia can ensure that the anti-corruption campaign retains public confidence and political support and is ultimately successful in reducing corrupt practices in Namibia.

The programme will pursue the following objectives.

1. Produce rigorous, detailed and accessible research on issues that contribute to the strengthening of anti-corruption systems, procedures and practices in Namibia
2. Raise awareness and debate among Namibian policymakers, politicians, civil society activists, students, journalists, the business community and interested members of the public about effective anti-corruption strategies and policies that could be deployed in Namibia.
3. Seek to partner with agencies involved in tackling corruption in Namibia, in particular the ACC, other civil society groups active on the issue and policymakers who can play a role in ensuring anti-corruption mechanisms in Namibia are effective.

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