

**ROYALTIES IN NAMIBIA: A COMPARATIVE STUDY WITH THE MINING  
REGIMES IN SOUTH AFRICA, TANZANIA AND AUSTRALIA**

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## Abstract

Under the Constitution of Namibia, ownership of natural resources means that unless property is otherwise lawfully owned by another, it belongs to the state. Thus the state as owner of properties rich in mineral wealth has been for decades mining these minerals and even exporting them to an international market. The mining sector is an important component of Namibia's economy. With Africa's fifth largest mining sector, Namibia has a wide range of valuable non-renewable resources including diamonds, gold, pyrite, uranium, copper, semi-precious stones, and base metals.

Before the Legislature of any given State enacts new laws, its policies are compared with similar acts in other jurisdictions. This is a comparative study looking at the payment of royalty system in Namibia, how it is regulated, etc. Countries looked to for comparative purposes include South Africa, our neighbouring country, whom we share the origins of most of our legislation; Tanzania, whose Mining Policy (1997) is deemed as one of the best in SADC; a look will be taken at the Australian system.

Minerals sector regulatory and fiscal systems have been undergoing major reforms across the globe. It has been estimated that during the past 20 years over 110 nations have either replaced their mining law or made major amendments to it.<sup>1</sup> In an era of globalization, competition to attract exploration and mining investment has intensified. The trend has been for nations with relatively high tax to reduce tax levels and, conversely, for nations with low tax to increase theirs. Many nations impose royalty tax, but some nations – as diverse as Chile, Greenland, Mexico, Sweden and Zimbabwe do not. In most nations that impose royalty tax, policy makers are interested in determining whether the level of royalty and its computational method are competitive and efficient.<sup>2</sup> Thus to change with the times and attract more foreign investment, Namibia should adjust its royalty policies.

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<sup>1</sup> Otto, J. Andrews, C. Cawood, F. Dogget, M. Guj, P. Stremole, F. Stermole, J. Tilton, J.(2006). Mining Royalties A Global Study of Their Impact on Investors, Government, and Civil Society. The International Bank for Reconstruction and Development/ The World Bank: Washington DC. p. xiii (15)

<sup>2</sup> Ibid, p. 16.

## List of Abbreviations

CMN- Chamber of Mines Namibia

MME- Ministry of Mines and Energy

GDP- Gross Domestic Product

NSGRP- National Strategy for growth and Reduction of Poverty

EITI- Industries Transparency Initiative

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## DECLARATION

I, Tjitja Harases hereby declare that this dissertation entitled 'Royalties in Namibia: A Comparative Study with the Mining Regimes in South Africa, Tanzania and Australia' is submitted for the purposes of obtaining my degree of LL.B. It is my own original work and has not been submitted to any other institution of higher learning and that I have not used any other sources than those listed in the bibliography and quoted reference.

Signed by \_\_\_\_\_ on this \_\_\_\_\_ of \_\_\_\_\_ 2011

## **SUPERVISOR'S CERTIFICATE**

I, Mr S.K. Amoo hereby certify that the research and writing of this dissertation was carried out under my supervision.

Signature \_\_\_\_\_

Date \_\_\_\_\_

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## CHAPTER I – INTRODUCTION & BACKGROUND

Namibia is an independent constitutional, democratic state. All laws for their validity must be in conformity with the Constitution.<sup>1</sup> Article 100 provides for the sovereign ownership of natural resources. This means that unless property is otherwise lawfully owned by another, it belongs to the state. Thus the state as owner of properties rich in mineral wealth has been for decades mining these minerals and even exporting them to an international market. Namibia gained its independence in 1990 from South Africa. It is a democratically governed Republic that is situated in the south-west corner of Africa; Namibia shares its borders in the north with Angola and Zambia, in the east with Botswana, in the south with South Africa and in the west with the Atlantic Ocean.<sup>2</sup>

The most important economic sectors of Namibia are mining, fishing, agriculture and tourism. Namibia produces gem quality diamonds, uranium, copper, lead, zinc, arsenic, cadmium, antimony, pyrite, silver, gold, semi-precious stones, industrial minerals and dimension stone. More than 50% of export earnings originate from minerals of which 70% from that total originates from diamonds. In total the mining industry presently accounts for some 10% of Namibia's GDP.

The purpose of this paper will be to take a closer look at the royalty system of Namibia. This includes what royalties are, how they are paid and regulated, etc. This study is mainly directed at royalties levied by governments. A comparative study will be done with other countries including, South Africa, Tanzania and Australia and their mining regimes. Regard would be had as to how their system works and provide possible lessons for Namibia and its system.

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<sup>1</sup> Article 1 of the Constitution of Namibia.

<sup>2</sup> Odendaal, W. Tjiramba, S. (2007) *The Case of Namibia. Legal Assistance Centre Land, Environment and Development Project for the Open Society initiative for Southern Africa. The Extractive Industries Transparency Initiative (EITI) of Southern Africa*, p. 5. Available at [http://www.namibianuraniuminstitute.com/joomla/images/stories/eiti\\_namibia\\_nov\\_07.pdf](http://www.namibianuraniuminstitute.com/joomla/images/stories/eiti_namibia_nov_07.pdf) last accessed 26/06/2011.

## 1.1. Mining Today

With the turn of the century with and the advent of modern mining, the face of mining in Namibia was radically transformed. The country acquired roads, railways, dams and power stations. Hospitals and schools were built. As a modern economy evolved, the people learned skills which reduced their dependence on subsistence agriculture, while introducing them to an urban industrial environment.<sup>3</sup> The mining industry surpasses all other sectors in its contribution to the Gross Domestic Product. It is the biggest taxpayer; it accounts for the bulk of merchandise exports its capital investment is second only to that of government.<sup>4</sup>

Due to the injustices of the colonial past Government policies are aimed at initiatives for previously disadvantaged communities. Thus in the mining sector the BEE (Black Economic Empowerment) is one at the forefront of these initiatives. Namibia like any developing country has its difficulties such as too much reliance foreign investment, etc. but which the Epangelo debacle now being discussed in Parliament it is surely a topic of interest soon to be changed.

## 1.2. Royalties

Royalties are a type of tax introduced by governments across the globe as a form of revenue for the state. Mining royalties contribute to the majority of income generated. Thus the purpose of royalties is for governments to generate a source of income from its mineral wealth.

**Royalty** – governments are inventive when it comes to taxation and some tax approaches are not always amenable to easy classification. Such classification will depend on one's point of view, and what constitutes a royalty to an accountant may be different than to a politician or an economist.

A royalty is any tax type that exhibits one or more of the following attributes:

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<sup>3</sup> Mining in Namibia. (1991). Windhoek: Chamber of Mines, p. 2f.

<sup>4</sup> Ibid, p. 3.

- The law creating the tax calls that tax a royalty;
- The intent of the tax is to make a payment to the owner of the mineral as compensation for transferring to the taxpayer the ownership of that mineral or the right to sell that mineral;
- The intent of the tax is to charge the producer of the mineral for the right to mine the minerals produced;
- The tax is special to mines and is not imposed on other industries.

### 1.2.1. Royalty Types, Definitions and Attributes

**Unit-based royalties**- the oldest form of royalty assessment is based on a fee levied per unit volume or weight and is termed a unit-based or specific royalty.<sup>5</sup> For example the royalty may be calculated based on \$A5.00 per cubic meter or \$A2.50 per tonne. Although volume-based unit royalties used to be applied in some nations, primarily to industrial minerals and crude oil, they have largely been replaced by weight-based unit royalties that are easier to monitor and assess.<sup>6</sup> A unit-based royalty is most often applied to minerals that are more or less homogeneous e.g. sand, gravel, cobbles, limestone, dimensional stone or sold in bulk e.g. coal, iron ore, salt, phosphate, potash, sulphur.

**Value-based royalties** – the most common way in which governments assess royalty is to calculate the product of a royalty rate times the value of the mineral. Sometimes referred to as ad valorem royalties. The royalty rate may be uniform for all sales of that mineral or may vary according to a sliding scale based on the volume or cumulative value of material sold.<sup>7</sup> Value-based royalties, like unit-based royalties are payable irrespective of whether the mine is making a profit or losing money. However, unlike unit-based royalties, unit-based royalties fluctuate following commodity prices. Thus when prices are high, the government will enjoy more revenue than when prices are low.

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<sup>5</sup> The latter used mainly in Australia.

<sup>6</sup> Otto, J. Andrews, C. Cawood, F. Dogget, M. Guj, P. Stremole, F. Stermole, J. Tilton, J.(2006). *Mining Royalties A Global Study of Their Impact on Investors, Government, and Civil Society*. The International Bank for Reconstruction and Development/ The World Bank: Washington DC. p.50.

<sup>7</sup> Ibid, p. 51.

**Profit-based and income-based royalties-** most investors favour taxation systems that are based on the ability to pay, that is, some measure of profitability or adjusted income. Distinct from unit-based and ad valorem approaches are a variety of methods that in some way include deducting a broader set of costs including production and capital costs, in the royalty calculation.<sup>8</sup>

**Hybrid systems-** a variety of systems combine the concept of profitability with value- or unit-based royalties. For example, a measure of profits can be calculated and, depending on the measure – perhaps a ratio of costs to sales revenue, a rate of return, or a ratio of price per unit to a reference price – the ad valorem royalty rate is adjusted up or down.<sup>9</sup> This type of system thus takes into account profitability and distinguishes low-profit mines from high-profit mines, while maintaining a royalty flow from all mines.<sup>10</sup>

### 1.2.2. Purpose of Royalties

Although the structure and rates of mineral royalties vary widely, internationally, most are collected for the same reason, that is, payment to the owner of the mineral resource in return for the removal of the minerals from the land.<sup>11</sup> The royalty, as the instrument for compensation, is payment in return for the permission that, first, gives the mining company access to the minerals and the second, gives the company the right to develop the resource for its own benefit<sup>12</sup>. In contrast, in some civil law nations, the legal basis for a royalty paid to the state is a payment for a continued right to mine, with no actual or implied mineral ownership by the state.

The evolution of royalty has become more complex over time as the legal description of mineral rights ownership developed alongside the separate tenure for mineral

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<sup>8</sup> Otto, J. Andrews, C. Cawood, F. Dogget, M. Guj, P. Stremole, F. Stermole, J. Tilton, J.(2006). *Mining Royalties A Global Study of Their Impact on Investors, Government, and Civil Society*. The International Bank for Reconstruction and Development/ The World Bank: Washington DC, p. 53.

<sup>9</sup> Ibid, p. 55.

<sup>10</sup> For example the royalty systems of Ghana and Michigan.

<sup>11</sup> Ibid, p. 41.

<sup>12</sup> Ibid, p.42.

developers under mineral law. The owner of the mineral rights is defined in property law, which varies from country to country. An owner could be a community as a group of people, whose communal ownership stems from ancient customary law; an individual, as is the case in countries where there are traces of civil law; or a government exercising sovereignty over the mineral resources within its territory in terms of international law. The impact of having national sovereignty over natural resources must not be underestimated<sup>13</sup>. As states started to take control of mineral resources, they introduced mineral royalties, which over time were incorporated into the general fiscal regime.

An alternative perspective is the view that a mineral royalty is symbolic of the “willingness to pay for risk reduction”<sup>14</sup>. The concept of risk to both owner and mineral developer is important to consider because the structure and rate of the royalty instrument represent the trade-off between the risks the investor is prepared to accept and those of the owner. More recently, the concept of national sovereignty over natural resources, alongside a growing understanding of sustainable development in the mineral sector, is causing mineral royalties to be viewed as instruments of socioeconomic change. This has prompted some states to introduce mineral development funds, channel a portion of the royalties to lower levels of government, or enforce higher royalty payments for holders of mineral development rights when value is added in foreign economies. In general, the collection of mineral royalties provides governments with a relatively flexible fiscal policy tool. Royalty payments are more amenable to simple, targeted distribution to lower levels of government or affected stakeholders than are general revenues collected under income tax provisions.<sup>15</sup>

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<sup>13</sup> Otto, J. Andrews, C. Cawood, F. Dogget, M. Guj, P. Stremole, F. Stermole, J. Tilton, J.(2006). *Mining Royalties A Global Study of Their Impact on Investors, Government, and Civil Society*. The International Bank for Reconstruction and Development/ The World Bank: Washington DC, p. 42.

<sup>14</sup> Ibid.

<sup>15</sup>Ibid, p. 42.

### **1.2.3. Role Of Government Departments With Regard To Administration, Collection And Apportionment Of Royalties**

Whether the government system of a nation is a federation e.g. Australia, Canada, Malaysia or the United States or not, nations are generally governed at three levels: central or federal; state' province, or autonomous region; and region, county, locale or community. There is no consistency as to which level of government is empowered to manage mineral resources and to legislate and administer royalties.<sup>16</sup>

The simplest administrative systems are found where both legislative and administrative powers are centralized i.e. this is the case for most developing countries in Africa, Papua New Guinea, and Mongolia.

In some federations such as in all states of Australia the central or federal government has little or no constitutional role in managing land and resources. As a result, provisions for mineral royalties are embodied in a number of different state mining acts and related regulations drafted by state legislators and passed by the individual states' parliaments. This does not mean that federal or central governments cannot exercise any power over matters of resources management, but that power is generally exercised indirectly, often through their constitutional power to control imports and exports, customs and excises, foreign investment, exchange rates and increasingly, environmental and indigenous affairs.<sup>17</sup>

“To the extent that the royalty legislation in various states or provinces is different, including different royalty rates and computational methodologies for different minerals, federal systems of government generally result in a very complex and inconsistent conglomerate of regimes at the national level.”

The issue of whether royalties are considered to be taxes or compensation or the right to exploit community resources is in many ways intimately involved with the type of institution empowered with the administration and collection of royalties.<sup>18</sup>

Policy formation and administration of royalties may be primarily the task of the following:

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<sup>16</sup> Otto, J. Andrews, C. Cawood, F. Dogget, M. Guj, P. Stremole, F. Stermole, J. Tilton, J.(2006). *Mining Royalties A Global Study of Their Impact on Investors, Government, and Civil Society*. The International Bank for Reconstruction and Development/ The World Bank: Washington DC, p. 77.

<sup>17</sup>Ibid. p. 78.

<sup>18</sup>For example, under Peruvian tax stabilization agreements, taxes are stabilized but tax fees are not. If the royalty is a tax, most likely they are not liable to pay it, but if it is a nontax fee, they may need to.

- The Ministry of Finance, Treasury and related taxation authorities or
- The Ministry of Mines, in consultation with the above institutions, or
- Integrated natural resources management and economic planning and development departments.

In the case of South Africa where royalties are viewed as excise or complementary taxes, and relevant provisions are embodied within their fiscal codes; the formulation of royalty policy is dominated by their ministries for finance and the administration and collection of royalties by the relevant internal revenue or taxation authorities.<sup>19</sup> In some Australian states, economic planning and development, trade, and resources management are handled by a single mega-department in an attempt to bring about greater coordination and to cut down on the time required for development approval and implementation. Under such regime, the relevant minister for mines tends to have significant influence in the cabinet and strong political support from industry<sup>20</sup>

#### **1.2.4. Private Party Mineral Royalties**

Royalties are not restricted to the levy of a charge on the private sector by government and, in fact, royalties between private parties are common. The principal distinction is that in the first instance the levy is in most cases, a unilateral exercise of a nations' inherent ability to impose taxes, whereas royalties between private parties are the result of a bilateral consensual process. Government royalties tend to be uniform for like types of mineral rights holders, but private party royalties are diverse, reflecting the respective negotiating strengths and objectives of the affected parties.<sup>21</sup>

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<sup>19</sup> Ibid, p. 79.

<sup>20</sup> Ibid, p. 79.

<sup>21</sup> Otto, J. et al. (2006). *Mining Royalties A Global Study of Their Impact on Investors, Government, and Civil Society*. The International Bank for Reconstruction and Development/ The World Bank: Washington DC, p. 124.



## CHAPTER II – MINING LAWS AND POLICY IN NAMIBIA

The mining sector is an important component of Namibia's economy. With Africa's fifth largest mining sector, Namibia has a wide range of valuable non-renewable resources including diamonds, gold, pyrite, uranium, copper, semi-precious stones, and base metals<sup>22</sup>. Currently, Namibia is the fourth largest exporter of non-fuel minerals in Africa, and the world's fifth-largest producer in uranium, with the Rössing and Langer Heinrich Uranium companies accounting for about 10% of the world's uranium<sup>23</sup>. The likelihood of this figure rising is high given many countries increased interest in the Namibian economy, and the fact that Namibia is already undergoing a uranium rush. Renewable resources such as agricultural land, forests and wildlife, and water and fisheries also form part of the natural resources that contribute significantly to the national economy.<sup>24</sup> Therefore royalties form an important part of any taxation system in a country as it is a significant source of income generated from the natural wealth of the country.

After Government services, the industry contributes the most to the Gross domestic Product (GDP). The Chamber of Mines (CMN) Annual Report for 2010 indicates that the mining sector added value of N\$ 7.7 billion. The industry contributed N\$ 10.9 billion to the mining exports, and over N\$ 1.5 billion in taxes and royalties paid and mining investment reaching N\$ 3.3 billion<sup>25</sup>. Mining accounts for 50% of Namibia's foreign exchange earnings, and is the largest private-sector area of employment. At the end of 2007, mining companies belonging to the Chamber of Mines<sup>26</sup> directly employed 7901 permanent employees and 2860 contractors<sup>27</sup>. In 2006, the industry spent N\$ 3.2 billion on fixed investment, contributing 26.5% to Namibia's entire fixed investment portfolio and surpassing investment by the entire central government for

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<sup>22</sup> Legal Assistance Centre/Stanford Law School, (2009). "Striking a Better Balance; An Investigation of Mining Practices in Namibia's Protected Areas". Windhoek John Meinert Printing (Pty) Ltd, p.3.

<sup>23</sup> *Id.*, 67.

<sup>24</sup> National Development Council of Namibia, Third National Development Plan, available at <http://www.npc.gov.na/docs/ndp3info.htm>, last accessed 19/07/2011.

<sup>25</sup> *Chamber of Mines Annual Review 2010*, p. 2.

<sup>26</sup> Representing a little less than half of all mineral licence holders in the country.

<sup>27</sup> *Ibid*, 83.

the fifth year in a row<sup>28</sup>. This Chapter will take a closer look at the system of royalties in Namibia. It is concerned with the type of licences and the rates at which they are charged. Regard will be had to the investor climate and the State's own mining company (Epangelo) which holds exclusive exploration and mining rights.

## 2.1. Government Policies and Programmes

Recognising the importance of the mining industry, the Namibian government created the Ministry of Mines and Energy (MME) at Independence as the government agency charged with "facilitating and regulating the responsible development and sustainable utilisation of Namibia's rich endowment of mineral, geological and energy resources for the benefit of all Namibians".<sup>29</sup> The MME has introduced three major pieces of legislation since 1990.

The basic mining law is the Minerals (Prospecting and Mining) Act, No. 33 of 1992. An accompanying Mining (Taxation) Act set forth revised fiscal and royalty provisions for the industry. The Minerals (Prospecting and Mining) Act of 1992 vests all of Namibia's prospecting and exploitation rights in the State, with the power to grant licences given to the Minister of Mines and Energy. It also gives the Minister the authority to appoint a Mining Commissioner to assist in the licensing process. The Ministry of Mines and Energy was responsible for making and enforcing policies related to minerals and energy. Within the ministry and attached to the Permanent Secretary are the Diamond Board, the mining Advisory Board, and the National Energy Council, all of which have Government and private-sector representation. Namibia Petroleum Co. and NamPower (which is the national electric utility) also are part of the ministry. The four main directorates in the ministry are Geological Survey, Mining, Energy, and Administration and Finance. The three main functions of the Mining directorate are to evaluate and control mineral licence applications, ensure adequate safety standards in mining operations, and collect, analyse and

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<sup>28</sup> Fixed investments refer to capital investments in physical, tangible assets, as opposed to liquid, financial capital investments.

<sup>29</sup> Sherbourne, R. (2010). *Guide to the Namibian Economy 2010*. Institute of Public Policy Research. p. 136.

disseminate production statistics. An Ancillary Rights Commission was set up by the Ministry to handle dispute arbitration.<sup>30</sup>

## 2.2. Policy Issue – Taxation

The introduction of the royalty tax on non-diamond mining companies in November 2004 caused controversy in the industry because of the way it was introduced<sup>31</sup> and because the Minerals Act only allowed such a tax be levied under specific circumstances rather than applied as a blanket tax across the entire industry<sup>32</sup>. The Ministry ended up spending two years consulting with the industry and eventually decided to press ahead, albeit at lower rates than originally proposed. When this remained challenged by Rössing, Government finally changed the primary legislation in December 2008 and re-gazetted in April 2009. The issue has led to a renewed interest in how government should tax the industry and an IMF team was sent to investigate the issue.<sup>33</sup> Calls to waive the royalty tax have naturally come about in the wake of the world economic crisis.

## 2.3. Licensing System

Mining claims, available only to Namibian citizens, provide mineral rights to small-scale operators with limited financial and other resources. A maximum of ten such claims per person may be held for a three-year period, with the possibility of an indefinite of two year extensions.<sup>34</sup> While an operator holds a mining claim, prospecting and mining may take place with minimal restrictions.

All applications for mineral licences must be made on forms distributed by the Ministry, accompanied by payment of a small fee<sup>35</sup>. The information required by these forms varies according to licence. It usually needs information on company

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<sup>30</sup> Coakley, GJ.(2000) *The Mineral Industry of Namibia*, p. 23.1

<sup>31</sup> Without any prior consent.

<sup>32</sup> Sherbourne, R. (2010). *Guide to the Namibian Economy 2010*. Institute for Public Policy research, p. 171f.

<sup>33</sup> This report was however not made public.

<sup>34</sup> Minerals Act, section 37 (1992).

<sup>35</sup> section 47.

ownership, location and geological information on the desired claim area, company technical expertise, timeline for the mining activities, and proof of financial resources. In addition, depending on the particular mineral licence applied for, information regarding existing environmental conditions and the potential for environmental degradation resulting from prospecting or mining operations must be disclosed. Prior to licences (bar NEPL and RL) being issued, all applicants are required to complete an environmental contract with the Department of Environment and Tourism. Environmental impact assessments must be made with respect to air pollution, dust generation, water supply, drainage/waste water disposal, land disturbance and protection of the fauna and flora<sup>36</sup>

Beyond the basic non-exclusive prospecting licence, the system distinguishes between large-scale and small-scale prospecting and mining activities, establishing a simplified system for the latter with the aim of promoting small-scale prospecting and mining<sup>37</sup>. Provision is made in all cases for obtaining prior consent from owners of private land, or for payment of compensation or granting of ancillary rights, before prospecting or mining can take place.

### **2.3.1. Non-Exclusive Prospecting Licences**

These permit any individual person or company to prospect non-exclusively on land open to prospecting. Such holder is allowed to prospect anywhere in the country, including privately owned farms, with the sole exclusion being closed areas such as game reserves. Details of minerals or samples removed must be furnished to the Mining Commissioner. These licences are limited to twelve months, with no provision for renewal.

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<sup>36</sup> *Mining in Namibia- overview* available at <http://www.mbendi.com/indy/ming/af/na/p0005.htm> last accessed 26/06/2011.

<sup>37</sup> Murray, R. (1993). "Mineral Investment in Namibia". Prepared by *Mining Journal Research Services* in co-operation with the Ministry of Mines and Energy, Namibia, p. 20.

### **2.3.2. Mineral Licences**

For the commercial mining sector, four types of licences may be granted.<sup>38</sup> The categories are reconnaissance licences, exclusive prospecting licences, mineral deposit retention licences and mining licences, for which registered foreign and local companies, and individual Namibian citizens are eligible. The Act addresses the administrative framework for licences, including specific agreements.

#### **a. Reconnaissance Licence (RL)**

This is a new type of licence to Namibia and is designed to provide an opportunity for broad-based regional airborne appraisals and surveys of prospective mineral provinces and precursors to target selection and more detailed explanation under subsequent exclusive prospecting licences.<sup>39</sup> It is a short, single-term licence allocated in return for specific commitments by the licensee that may be exclusive for up to a maximum of two, one-by-one degree squares. Such exclusivity is only granted where this is deemed justified. Where a reconnaissance licence does not confer exclusivity, more than one licence may be granted, and prospectors may peg claims over portions of the same area. Reconnaissance operations may include aerial sensing techniques, geological surveys, photo geological mapping and aerial imagery. The duration of such licence is six months, renewable for a further six months only in certain circumstances.

#### **b. Exclusive Prospecting Licence (EPL)**

This is a longer term renewable licence that confers exclusive prospecting rights to areas of land up to 1,000km<sup>2</sup> in extent. It is also allocated in return for specific commitments by the licensee. Whilst no other licence may be issued for the mineral or group of minerals concerned, two or more licences may, depending on the circumstances, be granted in the same area for different minerals. The licence is valid for a maximum period of three years initially, with two renewals for two years in exceptional circumstances, for further periods beyond these.

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<sup>38</sup> Collectively known as mineral Licences.

<sup>39</sup> Ibid, p. 21.

### **c. Mineral Deposit Retention Licence (MDRL)**

This is a type of license introduced to resolve problems which may arise when a prospector locates a mineral deposit that is uneconomic to develop immediately. It provides for the retention of rights of discovery without an immediate obligation to mine, giving an element of flexibility in forward planning and may serve as a reward to successful exploration efforts. An MDRL is valid for up to five years, and is renewable subject to certain review procedures.

### **d. Mining Licence (ML)**

Any Namibian citizen or duly registered company may apply for a mining licence, which confers an exclusive right to mine for a predetermined period, initially up to a maximum of 25 years, with provision for renewals up to 15 years at a time.

For land already subject to mineral licence or a claim specific to certain minerals, a mining licence can only be granted to the existing licence holder in respect of those minerals. Once a mining licence has been allocated, no further mining licences in respect of other minerals may be allocated to another licence holder without the express consent of the first mining licence holder. Mining licences are only allocated to applicants possessing the necessary technical and financial capabilities, whilst satisfactory environmental safeguard proposals must be furnished at the application stage.

Today, some 94 companies and individuals hold exploration licences on the land, as well as in the offshore areas. This should ensure that Namibia's diamond potential is well investigated and new geological insight provided for future mining ventures<sup>40</sup>. Almost the entire Namibian coast north of the existing mining licence areas has been covered with diamond prospecting licence areas, with the exception of the stretch between Sandwich Harbour in the south and the Omaruru River mouth in the north, the so-called "diamond gap"<sup>41</sup>.

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<sup>40</sup> Schneider, G. (2008). *Treasures of the Diamond Coast: A Centaury of Diamond Mining in Namibia*. MacMillan Education. Windhoek: Nam Publishers (Pty) Ltd, p. 43.

<sup>41</sup> Id., p. 42.

## 2.4. Foreign Investment

The Government has from the outset invited foreign investors to participate fully in the process of expanding and diversifying the Namibian economy. The 1990 Foreign Investment Act sets out the legal framework within which investors can operate in Namibia. Assuring foreign investors equal legal status and tax treatment with locally owned or domiciled businesses. It also guarantees access to foreign currency for the conduct of business as well as recourse to international arbitration in the case of disputes.

Investors may also be eligible for a Certificate of Status Investment. This certificate may be issued to investors for projects that show particular benefits to the economy through, for example, the provision of training or import replacement. It guarantees the availability of foreign exchange from the Bank of Namibia.<sup>42</sup>

Foreign nationals may invest and engage in any business activity in Namibia. Although the Government encourages active participation by Namibians in new ventures, there is no obligatory minimum equity stake for nationals. Similarly, no foreign investor is obliged to offer participation in any proposed venture to the Government. Exceptions may be made in case where licences or other authorization for the grant of rights over natural resources are required. However, in the case of mineral licences, the 1992 Mines and Minerals Act specifies that a government interest may be acquired only as a result of negotiations for a non-obligatory mineral agreement, entered into solely at the behest of the investor.

### **‘AREVA Is Namibia’s Largest Direct Foreign Investor Ever’**

French nuclear company giant AREVA’s Trekkopie Project remains the largest direct foreign investment ever made in Namibia. AREVA’s integrated portfolio covers every stage of the fuel cycle, reactor design and construction and related services. Despite its fairly recent entry into the country, AREVA has supported the surrounding communities with the development and training of the mining skills, the supply of

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<sup>42</sup> Murray, R. (1993). “Mineral Investment in Namibia”. Prepared by *Mining Journal Research Services* in co-operation with the Ministry of Mines and Energy, Namibia, p. 1.

water, building classrooms and ablution facilities and the donation of a 20-seater bus.<sup>43</sup>

## 2.5. Financial Provisions

Mining taxation is regulated under the 1981 Income Tax Act, as amended, by the Ministry of Finance, which has introduced a revised tax structure and fiscal package for the mining industry. The Act makes provision for dealing with some financial matters, specifically royalties' payable on minerals, and certain powers in relation to mineral pricing. The section dealing with royalties contains only limited provisions that are designed to encourage local processing where feasible.

Royalties are payable on three categories of minerals recovered in the course of mining or prospecting. Essentially, the levying of royalties is limited to the production of rough and uncut precious stones, rough and unprocessed dimension stone and any other exported mineral which might economically be further treated locally to add value. In dealing with non-specified minerals, a series of objective legal tests must be undertaken before any such royalty is imposed, including the right to full consultations. The relevant factors which determine whether a royalty should be levied comprise:

- Whether the mineral concerned can be increased in value through a “practical and economic” process in Namibia;
- Whether the income received is in line with prevailing world market prices; and,
- Whether marketing and any other fees are in line with international rates.

### 2.5.1. Diamonds

In the case of diamonds, the royalty will not impose an additional burden on the industry as it is equivalent to the diamond export duty previously charged. It is also anticipated that the option of a local cutting and polishing factory may prove to be

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<sup>43</sup> *Engineering Review*. (2010) Namibia Engineering. NO.12/2010 p. 167.



attractive to an investor. The output of such value-added efforts would not be liable to the payment of royalties.<sup>44</sup>

The system of taxation on diamond mining consisted of three separate taxes – on income, on diamond profits, and on diamond export duties. The export duty has now been replaced by a 10% royalty. The overall income tax on diamond mining companies is levied at the rate of 55% of taxable income plus a surcharge of 10% on the market value of diamonds shipped and sold.<sup>45</sup> The Income Tax Act provides that this 10% surcharge paid as diamond profits tax be credited against the income tax payable by diamond mines. The Diamond Act<sup>46</sup> regulates and controls the holding, transport, and further processing of diamonds through a system of licences approved by the Diamond Board, a Diamond Board Fund, and a Diamond Evaluation Fund. Diamond exploration and mining licensing will continue to be administered by the Office of the Mining Commissioner.

An expansion of the existing value-adding capacity in the dimension stone industry is considered both desirable and feasible. Most known marble and granite occurrences are reasonably near to existing infrastructure, and the potential benefits of enhanced export and earnings, employment opportunities and skills training are correspondingly high.

### **2.5.2. Oil/Petroleum**

A fiscal regime for oil exploration companies consists of three principle elements – an income tax and an Additional Profits Tax levied in terms of the Petroleum (Taxation) Act, No. 3 of 1991, and a 12.5% royalty levied in terms of the Petroleum (Exploration and Production) Act, No. 2 of 1991. The Petroleum Laws Amendment Act 24 of 1998 amended the 1991 Petroleum (Exploration & Production) Act, No. 2, the 1991 Petroleum (Taxation) Act, and along with the Model Petroleum Agreement of September 1998 was designed to provide additional incentives to attract foreign investment. The Petroleum Laws Amendment Act of 1998 introduced a number of

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<sup>44</sup> Murray, R. (1993). "Mineral Investment in Namibia". Prepared by *Mining Journal Research Services* in co-operation with the Ministry of Mines and Energy, Namibia p. 26.

<sup>45</sup> Coakley, GJ. (2000). *The Mineral Industry of Namibia*, p.23.1.

<sup>46</sup> Enacted September 30, 1999 and came into effect on April 1, 2000.

new incentives, which included reduction of royalties on the value of oil and gas production to 5% from 12.5%, a reduction of the petroleum income tax to 35% from 42%, allowance for full annual write-off for exploration and operating expenditures, and the introduction of three-tiered “additional profits tax” that will become effective only when licensees earn an after-tax real rate of return of 15%, then 20%, and finally after a 25% return<sup>47</sup>

With regard to the general pricing of minerals, a power to intervene applies only where it is believed that minerals have been intentionally sold or disposed of at an amount less than the prevailing rate have been intentionally deduced. In these circumstances, licence holders may be directed to pay the difference between the amounts in either of these cases and those on international markets.

Royalties to the state Revenue Fund are payable on exports of certain rough or semi processed minerals:

- 10% on rough and uncut precious stones
- 5% on rough or unprocessed dimension stone
- 5% on any other mineral which can be economically processed in Namibia <sup>48</sup>

### 2.4.3 Uranium

The past few years have seen a rapid increase in uranium exploration activities in Namibia, and mining activities will continue to make significant and increasing contributions to the economy.<sup>49</sup> The increase in uranium prices in the past few years has led to a significant interest among international mining exploration companies in search of a new uranium deposits worldwide. The upward trend in uranium prices over the last 5 years has been quite remarkable.<sup>50</sup> For example, in January 2002

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<sup>47</sup> Otto, J. et al. (2006). *Mining Royalties A Global Study of Their Impact on Investors, Government, and Civil Society*. The International Bank for Reconstruction and Development/ The World Bank: Washington DC, p. 42.

<sup>48</sup> Available at <http://www.mbendi.com/indy/ning/af/na/p0005.htm> last accessed 26/06/2011.

<sup>49</sup> Rio Tinto- Rössing Uranium Limited Working for Namibia. 2010 Report to Stakeholders Enhancing our Strength. p. 4.

<sup>50</sup> Odendaal, W. Tjiramba, S. (2007) *The Case of Namibia. Legal Assistance Centre Land, Environment and Development Project for the open Society initiative for Southern Africa. The extractive industries transparency initiative (EITI) of southern Africa*, p. 7f. Available at

uranium was selling for US\$ 9.60/pound while in January 2007 it was selling for US\$ 138/pound (Uranium Miner:2007). Historically Namibia has been an important supplier of uranium for over 3 decades. Namibia also has the fifth largest known recoverable uranium reserves in the world. In 2004 Rössing Uranium's open cast pit was the fourth largest mine by output. Local and international companies alike have of late been rushing to the Mine's Commissioner's Office with applications for uranium prospecting and mining licences in Namibia. To date more than 20 mining outfits are prospecting and exploring for uranium; primarily in the arid, environmentally sensitive and water scarce Erongo region. Existing uranium production mainly comes from Rio Tinto's large, granite-hosted Rössing deposit which started production in the early 1970's, while mining at Paladin's Langer Heinrich deposit in the Namib Naukluft nature Park commenced at the ended of 2006. The newly found interest in uranium as an energy sources is arguably the result of both newly emerging (e.g. China and India) and established (e.g. the USA and EU) industrialised countries' demands for nuclear energy.<sup>51</sup>

In 2007 Namibia was the fifth-largest uranium producer. Other minerals and metals exports suffered. Export earnings from gold declined 19% during first quarter of 2009 from N\$ 261 million recorded during last quarter 2008. That was due to volumes exported. Export values for silver and zinc concentrate also decreased significantly over the same period, recording declines of 67% and 46% respectively, the bank of Namibia reported. Royalties levied as portion of gross sales became payable on non-diamond mining operations in 2007<sup>52</sup> so that new uranium mines will significantly increase government revenue from the mining sector. The standard rate for all uranium mines is 3%, apart from Rössing which pays exceptional rate of 6%.<sup>53</sup>

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[http://www.namibianuraniuminstitute.com/joomla/images/stories/eiti\\_namibia\\_nov\\_07.pdf](http://www.namibianuraniuminstitute.com/joomla/images/stories/eiti_namibia_nov_07.pdf) last accessed 26/06/201.

<sup>51</sup> Ibid, p. 8.

<sup>52</sup> A 10% royalty was already in place for diamonds.

<sup>53</sup> Uranium Focus (2010). *Mining Journal: a supplement to the Mining Journal (special publication)*, p.3.

## 2.6. Royalty Concerns?

Investment in mining and exploration has also increased from 3,1% of GDP in the Nineties to an average of 4,7% since 2002. An area of concern that should stymie Namibia's uranium and mining expansion hopes is a controversial new royalty tax on the non-diamond mining sector (royalties on diamonds are 10%).

First gazetted in 2004 at a massive 10% of revenue, it was reintroduced in 2006 after the industry balked at the rates and entered into negotiations with government. In April 2011 new royalty rates came into force under legislation passed at year-end 2009 replacing the rates gazetted in 2006.

The rates remain the same: 3% of gross sales for precious metals, 3% for base metals and rare metals, 2% for semi-precious stones, industrial and non-nuclear fuel minerals. Uranium royalty is also set at 3% - with the one glaring exception of Rössing Uranium, which will pay 6% on gross sales. The higher rate for Rössing has not been explained by government, but it is understood it is because Rössing is the only company that refused to pay royalties since they were introduced on 1 December 2006, claiming they were illegal under the previous legislation, the Minerals (Prospecting and Mining) Act 1992.<sup>54</sup> In all cases royalties are based on the market value of minerals. The Act specifies rates levied on unprocessed precious stones and dimension stone, whilst setting a ceiling on any royalty that may be levied in respect of any other mineral.

As a whole, Namibia's mining industry paid N\$ 1,6 billion in taxes last year (2009), excluding VAT and PAYE, and wages were N\$ 1, 5 billion. Sherbourne says Namibia's dependence on mining will only increase over time but government ownership in the sector is low. Rössing has 3% local ownership, at Namdeb 50% and at Samicor 8% but otherwise it is mostly private owned and overseas owned. Sherbourne says foisting black empowerment shareholders on to companies may be equivalent to taxing it more highly and perhaps there should be a choice.

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<sup>54</sup> Els, F. (2009). "Namibia rises in world uranium ranks". *The Namibian Newspaper*. Available at <http://www.miningmix.com/news/energy/Namibia-rises-in-the-world-uranium-ranks.htm>, last accessed 07/07/2011.

The renewed public debate about the safety of nuclear power plants and the actual costs as well as the decline in prices can have a negative impact on planned investments in Namibian uranium projects in the short and medium term and subsequently affect expected government revenue from company taxes and royalties from the uranium mining industry.<sup>55</sup>

## 2.7. Empowerment/ Epangelo

The mining sector in Namibia is dominated by a number of large corporations, which produce diamonds, uranium and base metals. In addition there are several medium and smaller companies producing a variety of minerals. Most of these are foreign-owned, most Namibians are small-scale mining category, mainly one-man operations producing semi-precious stones and industrial materials. Currently there is no empowerment focus in any mineral legislation and previously disadvantaged Namibian remains mired in poverty<sup>56</sup>. This position hinders Namibian participation in the mining sector and needs to be addressed. The Minerals Policy poses an opportunity to develop an empowerment network. It also presents an opportunity for the disadvantaged majority to participate fully in the development of the mining sector and to benefit from it. As stated in the Minerals Policy of Namibia:

“Government will develop strategies to support Namibian participation in the mining sector to achieve sustainable development and prosperity”.<sup>57</sup>

### 2.7.1. Government Launches Own Mining Company

In accordance with the provisions of the Minerals Act, Namibia’s mineral resources belong to the Namibian State. However, Government adopted a development model for the sector based on private sector mining companies licensed and regulated by the MME. Although it has accepted stakes in mining companies when these have been offered to it (Government inherited a stake in Rössing mine and was offered 50

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<sup>55</sup> IPPR Economy Watch 2/2011, pp.2. [www.ippr.org.na/](http://www.ippr.org.na/) last accessed 07/07/2011.

<sup>56</sup> Minerals Policy of Namibia. Ministry of Mines and Energy: Windhoek, p.15.

<sup>57</sup> Ibid, p. 15.

per cent of Namdeb as part of a longer-term deal to secure mining rights), Government has initially held back from direct ownership. Over time it became increasingly clear that this was set to change as unhappiness with the lack of local participation in the industry grew.<sup>58</sup>

The first state-owned mining company, Epangelo Mining<sup>59</sup> was launched by Minister of Mines and Energy Erkki Nghimtina 03-12-2009. A move he had announced in March this year when presenting the Ministry's budget. The company will receive N\$ 1,5 million start-up capital from the Ministry and will be 100 per cent State owned.<sup>60</sup>

### 2.7.2. Exclusive?

Mines and Energy minister Isak Katali's statement that cabinet has declared uranium, copper, gold, zinc and coal as strategic minerals of which Epangelo holds the exclusive exploration and mining rights is rocking the international investor boat.<sup>61</sup> Investors expressed their concern and confusion about the announcement. Epangelo with a budget of N\$ 5 million for the current financial year, simply does not have the capacity to exercise these rights, they claim. Approached for comment Katali said there should be no confusion "Epangelo will have the exclusive exploration and mining rights, all 100 per cent of it, of all these strategic minerals" he said. Investors interested in these sectors will have to approach Epangelo to become partners in exploration and mining ventures of this nature, he said. Katali said Government is aware that with such a small budget, Epangelo has capacity constraints that is where partners fit in. investors will have to negotiate with Epangelo for a share of the interest in ventures. However the minister did not want to elaborate on how big the shareholding they will be entitled to, but indicated that Epangelo will be the majority shareholder. When he announced Cabinet's decision he said "so that the Namibian citizen can fully reap the benefits arising from the rich

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<sup>58</sup> Sherbourne, R. (2010). *Guide to the Namibian Economy 2010*. Institute of Public Policy research. p. 141.

<sup>59</sup> Meaning 'government' in Oshiwambo.

<sup>60</sup> Weidlich, B. (2009). "Govt launches own mining company". *The Namibian Newspaper*. Available at [http://www.namibian.com.na/index.php?id=28&tx\\_ttnews\[tt\\_news\]=62574&no\\_cache=1](http://www.namibian.com.na/index.php?id=28&tx_ttnews[tt_news]=62574&no_cache=1) last accessed 11/07/2011.

<sup>61</sup> Duddy, J. (2011). "panic in mining over Epangelo". *The Namibian Newspaper*. Available at [http://www.namibian.com.na/index.php?id=28&tx\\_ttnews\[tt\\_news\]=80915&no\\_cache=1](http://www.namibian.com.na/index.php?id=28&tx_ttnews[tt_news]=80915&no_cache=1) last accessed 11/07/2011.

endowment of our mineral resources”. World-renowned mining analyst David Hargreaves said: “Just as you give a nation a clean bill of health, it goes on a foot-shooting spree”. Katali said his Ministry’s priority this year will be to finalise the Minerals Bill and Minerals policy to allow Epangelo to “fully participate in the exploration and mineral development” in the country<sup>62</sup>.

Epangelo expected to play ‘minor role’ in joint ventures – Bannerman Resources, exploring for uranium in Namibia believes state-owned Epangelo Mining Company will expect up to 15 per cent of the shares when it enters into joint ventures with private companies to explore or mine strategic minerals.<sup>63</sup>

## 2.8. Namibia to Amend Royalties Laws?

Currently royalties are only paid on Namibia’s main exports of diamonds, uranium, copper and zinc. The proposed royalty is a tax on sales rather than profits, so it will hit companies regardless of how they are performing.<sup>64</sup> It is suggested that once the amendment is in effect, it will bring an end to the sale and export of Namibia’s mineral resources without royalties having been paid to the state. The amendment follows extensive research on mining royalties operating in other countries, said the Minister<sup>65</sup>. It will allow the minister to impose a windfall levy when mine profits increase significantly because of favourable economic conditions<sup>66</sup>.

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<sup>62</sup> Duddy, J. (2011). “Panic in mining over Epangelo”. *The Namibian Newspaper*. Available at [http://www.namibian.com.na/index.php?id=28&tx\\_ttnews\[tt\\_news\]=80915&no\\_cache=1](http://www.namibian.com.na/index.php?id=28&tx_ttnews[tt_news]=80915&no_cache=1) last accessed 11/07/2011

<sup>63</sup> Marketplace News. (2011). “Epangelo expected to play ‘minor role’ in joint ventures”. *The Namibian Newspaper*. Available at [http://www.namibian.com.na/index.php?id=28&tx\\_ttnews\[tt\\_news\]=81574&no\\_cache=1](http://www.namibian.com.na/index.php?id=28&tx_ttnews[tt_news]=81574&no_cache=1) last accessed 11/07/2011.

<sup>64</sup> Sherbourne, R. (2005). “Shoot first, ask questions later: Slapping an arbitrary tax on mining companies will hit marginal mines and deter investment”. *Insight Magazine* p. 12.

<sup>65</sup> Kaira, C. (2008). *Namibia to Amend Mining Royalties Law to Include All Minerals*. Available at Bloombergnet <http://www.zambianchronicle.com/> last accessed 15/04/2011

<sup>66</sup> Ibid.

The Government Notice from the Ministry of Mines and Energy No.45 of 2009 withdraws Government Notice No.204 of 01 December 2006 and provides for the following royalty rates

<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Group minerals</b>	<b>Percentage of market value of minerals leviable as royalty</b>	<b>Holder</b>
Precious metals	3%	Any
Base and rare metals	3%	Any
Semi-precious stones	2%	Any
Nuclear fuel minerals	3%	Any
	6%	Rössing Uranium Mine Ltd
Industrial minerals	2%	Any
Non-nuclear fuel minerals	2%	Any

### **2.8.1. Royalties Row?**

Some mining companies in Namibia have refused to pay the new mining royalties introduced, despite the fact that the government and the mining industry had reached agreement on the issue at the time. A disappointed Minister of Mines and Energy was quoted<sup>67</sup> "It is disheartening to note that after the Chamber of Mines and the Ministry reached an agreement on the applicability of the Government Notice 2006 imposing payment of royalties by mining companies, there are still a few companies that continue to defy the directive".

<sup>67</sup> *Royalties Row in Namibia*. (2008). Available at Miningreview.com <http://www.miningreview.com/node/13185> last accessed 15/04/2011.



### 2.8.2. Impact on Investor

Introduction of such royalty tax would halve the profitability of mines operating on a 10% profit margin and could push those making losses out of business altogether.<sup>68</sup> The general impression is of a government desperately looking round for some extra sources of cash to plug the gaps in the budget and settling on the mining industry as prey<sup>69</sup>. It is interesting to notice how the regulation coincided with the announcement by Finance Minister Saara Kuugongelwa-Amadhila of the deterioration in the nations' finances that forced her to take an unprecedented step of cancelling the usual additional rounds of spending for the rest of the financial year. The 2003/04 deficit to reach a budget-blowing 7.5% of GDP. Government has a genuine problem when it comes to tax revenue from the mining sector.

The whole episodes raise important issues for policy, government cannot just spring a tax surprise on an industry and expect there to be no negative consequences. One conclusion investors can draw from this is that Namibia's tax environment cannot be trusted. To conclude in the words of Mr Sherbourne "although government might have every legal right to raise taxes, it should not do so unexpectedly and without good reason".<sup>70</sup>

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<sup>68</sup> Sherbourne, R. (2005). "Shoot first, ask questions later: Slapping an arbitrary tax on mining companies will hit marginal mines and deter investment". *Insight Magazine*, p. 12.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

## CHAPTER III – THE LAW IN OTHER COMMON LAW JURISDICTIONS

When the Legislature of a given state wants to amend or enacts pieces of legislation it will look to the laws of other states for guidance. This process of comparison is not compulsory but gives insight to the trends followed by other states. The countries looked to for comparative purpose include South Africa, our neighbouring country, whom we share the origins of most of our legislation; Tanzania, whose Mining Policy (1997) is deemed as one of the best in SADC; a look will be taken at the Australian system. The purpose of this chapter is for comparative purposes. It will look at other jurisdictions and their mining regimes, i.e. how royalties are charged, regulated, paid, etc. and any possible lessons for Namibia.

### 3.1. South Africa

In the past four years South Africa has been undergoing a change in its mining regime. The commencement of the Minerals and Petroleum Resources Development Act (MPRDA) radically transformed the law governing rights to mineral resources in South Africa and has caused a significant increase in the transactions in this sector. The new legislation creates a “use it or lose it” principle, that has seen a huge upsurge in foreign companies seeking foothold in the lucrative South African mining sector as well as the number of Black Economic Empowerment companies given an opportunity to acquire a stake in the wealth of South Africa’s natural resources.<sup>71</sup>

#### 3.1.1. New Mining Regime

Immediately prior to May 1 2004, the principal legislation governing mineral rights in South Africa was the Minerals Act, which came into effect in 1991. The MPRDA that came into effect on May 1 2004, replaced the Minerals Act. The Minerals and Petroleum Resources Development Act (MPRDA) contains certain transitional measures with regard to mineral rights, prospecting permits and mining authorizations (old order rights) obtained prior to May 1, 2004. The MPRDA

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<sup>71</sup> Tucker, C. Muleza, T. (2008). “New order mining rights four years into a new mining regime”. Available at Bowman Gilfillan Attorneys <http://www.bowman.co.za/LawArticles/Index.asp#articles> last accessed 26/06/2011.

endorsed the view that South Africa's mineral and petroleum resources belong to the nation, and accordingly established the State as the custodian of South Africa's mineral resources, through the Minister of Mines and Energy. The State therefore has the power to grant, control, administer, or refuse prospecting rights, mining rights, mining permits, retention permits, permissions to remove or dispose of any minerals and other related rights under the MPRDA.

In this regard the MPRDA replaced the common law position which provides that the land owner is the owner of the whole of the land, including the air space above the surface and everything below it. The common law position was supported by the Minerals Act, 1991 which has been replaced by the MPRDA.

### **3.1.2. Transitional Provisions**

While the MPRDA clearly regulates the acquisition of new order rights, it also provides certain transitional provisions aimed at protecting security of tenure in respect of prospecting and mining operations that were taking place immediately before the MPRDA commenced; giving the holders of certain rights under the Minerals Act an opportunity to comply with the MPRDA. Thus, promoting equitable access to the nation's mineral and petroleum resources. The transitional provisions of the MPRDA accordingly provide for the:

- continuation of the older order prospecting rights;
- continuation of the old order mining rights;
- processing of unused old order rights (i.e. rights entitlements, permits or licences in respect of which no prospecting or mining was conducted immediately before the MPRDA came into effect);
- continuation of reservations, and permission for the right to use the surface of land; and
- Continuation of environmental management programmes.

### **3.1.3. South African Mining Royalties**

South Africa is one of the world's most important mining countries in terms of variety and quantity of mineral produced. The economic and strategic importance of the country's mining industry is beyond dispute. The industry contributed R135,5 billion or 7,7 per cent of the Gross Domestic Product (GDP) in 2007 from 119,4 billion in 2006.<sup>72</sup>

#### **a) The Mineral and Petroleum Resource Royalty Act**

The Mineral and Petroleum Resources Royalty Act came into effect on March 1, 2010. Implementation of the act was suspended by the then finance minister Trevor Manuel to give companies a reprieve from the global economic downturn that threatened company margins and tens of thousands of jobs.

Under the legislation passed in 2008, companies will have to pay extra taxes proportional to their profitability. The law requires all companies extracting minerals in South Africa to pay royalties at a rate between 0.5% and 7% based on gross sales, less their allowable deductions. An emerging market economist at Nomura, Peter Montalto, said the royalties tax would affect South Africa's competitiveness in global mining when the act becomes effective. He is quoted as saying "This is important for local equities. It will be negative and further erodes South Africa's competitiveness in global mining, but is an important revenue generating measure"<sup>73</sup>.

#### **b) South Africa's Royalties Act – More To It Than Meets The Eye**

The new legislation introduces a great deal of administrative complexity. "It is new and untested legislation and one can see issues arising"<sup>74</sup>. This royalty legislation was always going to be applied and is argued as compensation to the state for the extraction of non-renewable resource. It covers all minerals, from aggregate stone to

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<sup>72</sup> Department of Mines and Energy Republic of South Africa. MB Bulletin. Directorate of Mineral Economics. July 2008 Vol. 21 Issue 2 of 3 for 2008. P. 10.

<sup>73</sup> Mpofu, B. (2010). "South Africa: Mining Royalties Law Takes Effect on March 1". Available at <http://www.sarwatch.org/>, last accessed 15/04/2011.

<sup>74</sup> Mining Review Africa. Issue 1 Jan 2010. Ed Ruffini, A. : Adele Eloff, p. 17

Platinum Group Metals (PGMs), and while it is moderated on the amount to be paid before the actual profitability of the mining operation is taken into account, there remains a percentage that will be paid irrespective.<sup>75</sup>

The Act stipulates that a minimum of 0.5% royalty be paid and a maximum of between 5% and 7% based on a calculation of gross sales and earnings and Earnings before Interest and Tax (EBIT). The maximum of 7% of 5% depends on whether the mineral is deemed to be refined or unrefined, with the lower cap applying to the former. The formula for royalty rate is  $0.5 + \frac{EBIT}{\text{gross sales}} \times (12.5 \text{ for refined or } 9 \text{ for unrefined}) \times 100$ .<sup>76</sup>

One of the decisions companies need to make is whether they produce refined or unrefined minerals, or some combination of both. An example of the dilemma it will pose is with gold. Gold per schedules is always a refined mineral, the relevant schedule referring to the condition for gold as the mineral refined and smelted to 99.5% purity. Uranium which is produced by many gold mining companies in South Africa, is always defined as unrefined, the condition per the schedule being 80% uranium in concentrate.<sup>77</sup>

- The issue that the mineral is not disposed of in a specific condition,
- The point at which royalties tax must be paid

It is obvious there is more to the royalties legislation than meets the eye, and not everyone is aware of this yet. “On the face of it, the legislation is simple, but it does raise a number of issues and it remains to be determined how these will be resolved” Myburgh says.

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<sup>75</sup> *Mining Review Africa*. Issue 1 Jan 2010. Ed. A Ruffini, Pub: Adele Eloff. p. 17.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid*, p. 18.

### 3.1.4. Lessons to Namibia

The new mining legislation MPRDA changed from the common law position of ownership of property. The State has the power to grant, control, administer, or refuse prospecting rights, mining rights, mining permits, retention permits, permissions to remove or dispose of any minerals and other related rights. Under the legislation passed in 2008, companies will have to pay extra taxes proportional to their profitability. This is an important measure in terms of revenue, but could affect South Africa in the competitive mining stakes. With the new legislation comes a formula for calculating royalties' tax. This has been deemed as too complex and comes with its own dilemmas i.e. whether a mineral is refined or unrefined?

To conclude, South Africa has introduced new mining legislation. It has also provided for a new formula for the calculations of royalties. This might be a complex process but regard must be had to the intention in providing this i.e. transparency of the system and no bias whatsoever.

## 3.2. Tanzania

The SADC mining coordinating unit had among others identified Tanzania's Mining Policy (1997) as containing the best practice. Economic Commission for Africa, 2002:12<sup>78</sup>. Tanzania is Africa's third largest gold producer, but also has reserves of uranium, nickel and coal. Gold exports alone earned it \$US1.076 billion in 2009, up from \$US932.4 million the previous year<sup>79</sup> making the mining industry the second fastest growing sector of Tanzania's economy after tourism. With the changing times Tanzania too is facing a mining regime change.

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<sup>78</sup> Angula, L. S. (2007). The Environmental Impacts of small-scale Mining in Namibia: A Case study of Uis Small Scale Mining Site- Erongo Region. A research paper submitted in the partial fulfillment of the requirements for the degree of Masters of Arts in Public Policy and Administration, p. 20.

<sup>79</sup> "Tanzania increases royalties in new mining law". (2010). Available at Business Spectator, <http://www.businessspectator.co.au/bs.nsf/Article/UPDATE-2-Tanzania-increases-royalties-in-new-mining-4tfxn?OpenDocument&src=srch> last accessed 15/04/2011.

The Mineral Policy of 1997 provided a blue print for development strategies for the Mineral Sector in Tanzania. The Minerals Policy of 2009 is expected to continue with reforms introduced in the Mineral Policy of 1997. The 2009 Mineral Policy is formulated as a result of an evaluation conducted during the ten years of implementation of the Mineral Policy of 1997. This Policy aims at strengthening integration of the mineral sector with other sectors of the economy; improving economic environment for investment; maximising benefits from mining and improving the legal environment; strengthening capacity for administration of the mineral sector; developing small scale miners; promoting and facilitating value addition to minerals; and strengthening environmental management. Moreover, the Government will remain the facilitator and regulator of the sector; participate strategically in mining projects; and promote private sector investments in the mineral sector. In the implementation of the above objectives, the Government will continue to give priority to the mineral sector in the National Strategy for growth and Reduction of poverty (NSGRP) and contribute to the achievement of the National Development Vision 2025.<sup>80</sup>

The Mining Act of Tanzania is aimed at deterring information hoarding on new discoveries, freezing of exploration acreage for speculative purposes, transfer pricing and tax evasion. The fiscal incentive provided to exploration and mining activities includes the following:

- exemption of import duty and value added tax (VAT) on equipment and essential materials up to the anniversary of start of production, thereafter 5 % seal applies;
- depreciation allowances of 100%;
- repatriation of capital and profit directly related to mining; and
- Non-mandatory government participation.<sup>81</sup>

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<sup>80</sup> *Project Description Sustainable management of Mineral Resources Tanzania*. Available at [http://www.mem.go.tz/modu/es/documents/index.php?action=downloadfile&filename=SMMRP\\_Project%20Description.pdf&directory=Projects/SMMRP&](http://www.mem.go.tz/modu/es/documents/index.php?action=downloadfile&filename=SMMRP_Project%20Description.pdf&directory=Projects/SMMRP&) last accessed 01/07/2011.

<sup>81</sup> *Mining*. Available at Tanzania National Web, <http://www.tanzania.go.tz/mining.html> last accessed 01/07/2011.

### 3.2.1. Royalties in Mining Act 2010 – Key Provisions

- a) Mineral rights and licences for dealing in minerals will be reserved exclusively to Tanzanian citizens and corporate bodies under the exclusive control of Tanzanian citizens. The main point of note is that the Amendments significantly mitigated the Tanzanian control issue in respect of general mining licenses, and the restrictions will apply only to “primary mining licences”, which are licenses with respect to small scale mining operations involving capital expenditure of less than US \$ 100,000 (section 8 and section 73)
- b) licenses to mine for gemstones are only to be granted to Tanzanians, regardless of the size of the operation, except where the Minister determines that the development is most likely to require specialised skills, technology or a high level of investment in which case the license may be granted to an applicant so long as the non-Tanzanian participation element is no more than 50% (section 8(4))
- c) The Act gives the Minister the power to prescribe a standard model form Mining Development Agreement for all projects exceeding US\$100m. Thus far, no standard form has been prescribed. (Section 8(4))
- d) The Act gives the Minister the power to make regulations authorising the Government of Tanzania to participate in the conduct and financing of mining operations and give the government a free carried interest, the level of which is not set by statute but rather by negotiation between the government and the relevant mineral rights holder (section 10)
- e) It amends the method by which the government royalties are calculated so that they will in future be levied on the gross value of minerals, rather than the present method of calculation which refers to the net value (section 87)
- f) Sections 87- provides that every miner shall pay a royalty to the government on the gross value of the minerals produced under such licence. These rates include:



- uranium – 5%
  - gemstone and diamond 5%
  - metallic minerals such as copper, gold, silver and platinum group metals – 4%
  - gem – 1%
  - Other minerals, including building materials, salt, all minerals within the industrial minerals group – 3%.<sup>82</sup>
- g) The Act imposes an obligation for mining companies to list on the Dar es Salaam Stock Exchange, whilst the Act does refer to the Minister having the right to make regulations relating to a public offering, provisions for doing so are not contained within the Act itself (section 109).
- h) The Act requires a greater degree of disclosure by the holders of mineral rights in respect of reports, records and general information. (Section 100 and Second Schedule).

### 3.2.2. Regime Change?

As any sector of the economy in Tanzania, mining has been turned to economic reforms and restructuring undertaken by the government from the mid-1980s to the 1990s which have marked a clear shift in favour of private sector development and market-oriented economic management. With this effect the government has commenced on setting up constructive partnerships to promote private sector enthusiasm and accelerate economic growth. With these changes, therefore, the roles of the government has been redefined from that of owning and operating the mines to that of providing a clear policy guidelines, stimulating private investment and providing support for investors. The reform is in line with the Mineral Policy of Tanzania 1997, Mineral Act 1998 and Fiscal Package 1998<sup>83</sup>.

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<sup>82</sup> The Act increases the rates of royalties levied by the Government of Tanzania on the gross value of minerals.

<sup>83</sup> *Mining*. Available at Tanzania National Web, <http://www.tanzania.go.tz/mining.html> last accessed 01/07/2011.

Tanzania's parliament has passed a new mining law that increases the rate of royalty paid on minerals like gold from 3% to 4% and requires the government to own a stake in future mining projects. As part of the new legislation, Tanzania will not issue new gemstone mining licences to foreign companies. "This bill makes comprehensive provision for prospecting for minerals, mining and dealing in minerals, for the granting, renewal and termination of mineral rights, for payment of royalties fess and other charges and for any other relevant matters" said part of the legislation. "The bill is a response to challenges faced and experience gained during 12 years of the implementation of the Mining Act that was enacted in the year 1998."

African Barrick Gold has four gold mines in Tanzania while Australia's third largest gold miner, Resolute Mining and South Africa's AngloGold Ashanti also have gold operations there. British mining company African Eagle Ltd is raising funds for its nickel project in Tanzania. Gemstones identified by the new law include diamonds, tanzanite, emerald, ruby, sapphire, turquoise, topaz, and others. Gemstone producer Tanzanite One will not be affected by the new ownership rules.

### **3.2.3. Investor Concerns**

While Tanzania has been successful in attracting investments, the mineral sector has continued to face challenges. The sector's rapid growth, particularly in small-scale and artisanal mining, swiftly outstretched the Government's institutional capacity. Existing institutions lack adequate tools, expertise, and the organizational setup required to oversee and support a modern, market-driven mineral sector. Other challenges of the sector include low integration with other sectors of the economy; low contribution to the GDP compared to administer the sector; low level of value addition of minerals; and environmental degradation; lack of diversification of minerals from gold and gemstones into base metals and other minerals.<sup>84</sup>

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<sup>84</sup> *Project Description Sustainable management of Mineral Resources Tanzania*. Available at [http://www.mem.go.tz/modu/es/documents/index.php?action=downloadfile&filename=SMMRP\\_Project%20Description.pdf&directory=Projects/SMMRP&](http://www.mem.go.tz/modu/es/documents/index.php?action=downloadfile&filename=SMMRP_Project%20Description.pdf&directory=Projects/SMMRP&) last accessed 01/07/2011.

“The government will increase revenues a lot; thanks to the new mining legislation...But, it might send a negative signal to investors and might impact foreign investment. I’m worried on that”, opposition party Chadema member of parliament Zitto Kabwe was quoted.<sup>85</sup> The MP who was a member of a commission appointed in 2007 to review Tanzania’s mining sector, said the new legislation would bring significant changes to mining policy. “We were supposed to pass a new law that balances benefits of the people and the interests of mining companies. The mood of the day in Tanzania is that foreign investors are stealing from the country and this might not necessarily be the case all the time”.

Tanzania earned \$US57 million from mining royalties in 2009, but is expected to double this amount after the new mining law comes into force. Mr Kabwe is further quoted as saying “The main highlight of this new legislation is that it makes gemstone mining the preserve of Tanzanians. It also changes the method of calculating royalties by using the gross value of mineral instead of the net value”.

The Act is more restrictive than its predecessor and is consistent with other recent legislation which seeks to concentrate on greater interests in the hands of Tanzanian nationals with increased regulation in key sectors whilst continuing to encourage inward investment. Some of the publicly expressed concerns were due to the restrictions contained in the Initial Reading (such as reservation of mineral rights and licences for dealing in minerals being reserved to Tanzanian citizens and corporate bodies under the exclusive control of Tanzanian citizens) which were subsequently relaxed by the provisions of the amendments. However, the Act does not materially increase the levels of the royalty payable to the government and places restrictions on non-Tanzanian participation in small scale mining, dealing in minerals and gemstone operations.<sup>86</sup>

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<sup>85</sup> “Tanzania increases royalties in new mining law”. (2010). available at Business Spectator, <http://www.businessspectator.co.au/bs.nsf/Article/UPDATE-2-Tanzania-increases-royalties-in-new-mining-4tfxn?OpenDocument&src=srch> last accessed 15/04/2011.

<sup>86</sup> Bates, K. Gray, P. (2010). “Tanzanian Mining Act 2010”. Available at <http://www.clydeco.com/knowledge/articles/tanzanian-mining-act-2010.cfm> last accessed 01/07/2011.

There are concerns within the industry that the restrictions will have a negative impact on the Tanzanian mining industry both in terms of its competitiveness and as a magnet for foreign investment. Arguably the changes introduced by the Act will consequently affect Tanzania's ability to attract foreign investment and indeed some of the provisions may reduce its competitiveness. However, if sector participants take a holistic view as to the mining investment parameters (including by reference to not only royalties levied but also income tax rates, withholding tax rates, capital deduction allowances, the right to carry forward losses and import/custom duties) as against Tanzania's regional competitors, Tanzania is relatively comparable in its investment regime.<sup>87</sup>

#### **3.2.4. Lessons for Namibia**

With the 2009 Minerals policy the Government will remain the facilitator and regulator of the sector; participate strategically in mining projects; and promote private sector investments in the mineral sector. The Government will continue to give priority to the mineral sector in the National Strategy for growth and Reduction of poverty (NSGRP) and contribute to the achievement of the National Development Vision 2025. As per the 2010 Act, mining rights and licences are granted exclusively to Tanzanian citizens. Royalty rates are also provided for and are to be paid to government, but are charged as a percentage of the gross value of minerals. A clear shift in favour of private sector development and market-oriented economic management. Therefore, the roles of the government have been redefined from that of owning and operating the mines to that of providing clear policy guidelines, stimulating private investment and providing support for investors.

With the new mining legislation come new royalty rates, which affect investors. Concerns include that the Act is more restrictive, i.e. it makes gemstone mining the preserve of Tanzanians. Concerns within the industry are that the restrictions will have a negative impact on the Tanzanian mining industry both in terms of its competitiveness and as a magnet for foreign investment. These concerns too were brought up by opposition party members, so that due caution must be practised as

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<sup>87</sup> Bates, K. Gray, P. (2010). "Tanzanian Mining Act 2010". Available at <http://www.clydeco.com/knowledge/articles/tanzanian-mining-act-2010.cfm> last accessed 01/07/2011.

they may have their own agendas in bringing such challenges. The Act does not materially increase the levels of the royalty payable to the government and places restrictions on non-Tanzanian participation in small scale mining, dealing in minerals and gemstone operations.

To conclude, the Namibian situation can take a lesson here in that introducing higher rates and giving exclusive rights to nationals only for example, Epangelo will deter foreign investment. This too must be weighed against the global competitiveness of the sector, income tax, and other factors.

### 3.3. Australia

Royalty is payable to the Crown on all minerals recovered from mineral land where the mineral is:

- Sold or intended for sale; or
- Utilised, or to be utilised, for any commercial or industrial purposes. (mining Act 1971) and the Mining Regulations 1998)

The two major mining states in Australia are Queensland and Western Australia. Both states have very similar legislation in respect of mining royalties and both are heavily dependent on the mining industry for export income and government revenue. In Western Australia (WA), two of the major remaining sources of State revenue are mining and petroleum royalties. During 1996 the WA Government paid \$327 million (up from \$258 million in 91-92) from the mineral industry and \$142 million (\$58 million in 92-93) from petroleum producers into Consolidated Revenue. This represented approximately 10% of all state Government revenue. During 1997, the Western Australian government introduced for the first time a royalty rate on gold producers, thus removing gold as the sole mineral exempted from royalties in the State.<sup>88</sup>

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<sup>88</sup>Calzada, M. (2009). "State Government Mining Royalties: Required Taxes or Duties of Excise?". *Murdoch University Electronic Journal of Law*. Volume 7, Number 3. Available at <http://www.murdoch.edu.au/elaw/issues/v7n3/calzada73.text.html> last accessed 15/04/2011.

Royalty rates are an important factor in making decisions about mining projects, including, determine which State provide the best operating environment for new investments in resources projects. If, as been suggested, the Federal Government looks to replace state government royalty regimes with a federal resource rent tax, it may be timely to review how mining royalties are charged and the royalty rates that are payable across Australia.<sup>89</sup>

Royalties on minerals are charged by the state and territory governments, as the owners of minerals in the ground, for the right to extract a mineral resource<sup>90</sup>. In most cases, royalties are payable on an ad valorem (i.e. a percentage of value) or a quantum (i.e. flat rate per unit) basis, depending on the mineral, except the Northern Territory where profit-based royalty regime applies. Under this system the net value of a mine's production is used to calculate the applicable royalty. Many small mining operations are effectively exempt from this regime because no liability applies to the first \$50,000 of net value.

### 3.3.1. Royalty Rate

The current Queensland system also has a unique feature that allows a person to elect whether to pay royalties at a fixed rate of 2.7% or a variable between (1.5% and 4.5%) calculated on the price of the mineral. The ability to choose applies only to 'prescribed minerals'<sup>91</sup> and will cease from 1 January 2011, after which the variable rate will apply. In its 2008-2009 Budget, the Queensland Government essentially introduced a two-tier royalty rate structure for coal. The new structure would increase royalty from 7% to 10% where the value of coal produced by a mine exceeds \$100 per tonne. So, for example, if the average value of coal is \$150 per tonne in a

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<sup>89</sup> Bowie, C. (2009). "A review of mining royalties in Australia". Available at <http://www.minterellison.com/public/connect/Internet/Home/Legal%2BInsights/Newsletters/Previous%2BNewsletters/A-ERU3%2Bmining52Broyalties%2B> last accessed 15/04/2011.

<sup>90</sup> Ibid.

<sup>91</sup> Cobalt, copper, gold, lead, nickel, silver, zinc.

particular quarter, the royalty rate would be 7% on the first \$100 and 10% on the remaining \$50<sup>92</sup>.

The worsening global economic climate has called for stable and predictable royalty charges. In Queensland, prior to the recent election, both sides of politics committed not to further increase resource sector royalties and taxes.

The New South Wales coal royalty regime was overhauled in 2004 resulting in significant changes, including the introduction of an ad valorem royalty to replace the old volume-based calculation with three different royalty rates applying to different types of mines<sup>93</sup>. This structure has attracted criticism from the New South Wales Minerals Council for being complex and awkward to administer. As Queensland raised royalty rates for coal over \$100, the New South Wales Government likewise increased their royalty rates for coal by 1.2% across the board as of 1 January 2009<sup>94</sup>.

Western Australia and South Australia have also reviewed their mineral royalty rates in recent years. Changes to the Western Australian regime were limited to increasing from 1 July 2005, the 30 cent per tonne and 50 cent per tonne flat rates to take into account increased commodity prices. After 1 July 2010 these flat rates will be calculated with reference to the Non-Metallic mineral Products Price Index<sup>95</sup>.

In South Australia a royalty rate of 3.5% applies to all mineral leases, except those with 'New Mine Status'. Newly approved mining leases can apply for 'New Mine' status which means a reduced royalty rate of 1.5% will apply for five years. The table below summarises the current royalty rate for several important minerals across several States and Territories, demonstrating the differing royalty calculations and rates across Australia.

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<sup>92</sup> Bowie, C. (2009). "A review of mining royalties in Australia". Available at <http://www.minterellison.com/public/connect/Internet/Home/Legal%2BInsights/Newsletters/Previous%2BNewsletters/A-ERU3%2Bmining52Broyalties%2B> last accessed 15/04/2011.

<sup>93</sup> Deep underground mines, other underground mines and open cut mines.

<sup>94</sup> Currently 6.2% deep underground mines, 7.2% other underground mines and 8.2% open cut mines.

<sup>95</sup> Ibid.

Mineral	State	Royalty Rate	Basis of Calculation	Last review/change
<b>Coal</b>	QLD	7% where the value of the coal produced does not exceed \$100/tonne  10% on the value of the coal exceeding \$100/tonne	Ad valorem	2008 – <i>Mines and Energy Legislation Amendment Regulation (No 2) 2008</i>
	NSW	<b>Open cut mining</b> 8.2%  <b>Underground mining</b> 7.2%  <b>Deep underground mining</b> 6.2%	Ad valorem	2008 – <i>State Revenue and Other Legislation Amendment (Budget Measures) Act 2008</i>
	VIC	<b>Brown Coal</b> \$0.0588 per GJ, adjusted in accordance with the consumer price index  <b>Other than Brown Coal</b> 2.75%	Ad valorem with quantum rate for brown coal	2006 – <i>Mineral Resources Development (Amendment) Regulations 2006</i>
	WA	<b>If exported</b> 7.5%  <b>If not exported</b> \$1/tonne (adjusted each year at 30 June in accordance with comparative price increases)	Ad valorem and quantum rate	2000 – <i>Mining Amendment Regulations (No. 4) 2000</i>



	SA	3.5%	Ad valorem	2005 – <i>Mining (Royalty No 2) Amendment Act 2005</i>
	SA	3.5%	Ad valorem	2005 – <i>Mining (Royalty No 2) Amendment Act 2005</i>
<b>Iron Ore</b>	QLD	2.7%  \$100,000 threshold  Discount of 20% if processed in Qld and metal content is at least 95%	Ad valorem	2008 – <i>Mines and Energy Legislation Amendment Regulation (No 2) 2008</i>
	NSW	4%	Ad valorem	No change since the introduction of the <i>Mining Regulation 2003</i>
	VIC	2.75%	Ad valorem	No recent change
	WA	<b>Beneficiated Ore</b> 5%  <b>Fine Ore</b> 5.625%  <b>Lump Ore</b> 7.5%	Ad valorem	No recent change
	SA	3.5%	Ad valorem	2005 – <i>Mining (Royalty No 2) Amendment Act 2005</i>
<b>Petroleum</b>	QLD	10% of wellhead value	Ad valorem	2008 – <i>Mines and Energy Legislation Amendment</i>

				<i>Regulation (No 2) 2008</i>
	NSW	Nil for the first 5 years and increasing to 10% of wellhead value at the end of the 10th year	Ad valorem	No change since 2002
	VIC	10% of wellhead value	Ad valorem	No recent change
	WA	10% of wellhead value for primary licences. 12.5% for secondary licences.	Ad valorem	No recent change
	SA	10% of wellhead value	Ad valorem	No recent change
<b>Oil Shale</b>	QLD	The lesser of 10% or a percentage of the average crude oil price	Ad valorem	No change since the introduction of the <i>Mineral Resources Regulation 2003</i>
	NSW	4%	Ad valorem	No change since the introduction of the <i>Mining Regulation 2003</i>
	VIC	2.75%	Ad valorem	No recent change
	WA	5%	Ad valorem	No recent change
	SA	.5%	Ad valorem	2005 – <i>Mining (Royalty No 2) Amendment Act 2005</i>

### **a) 'New Mine Status' – Reduced Royalty rate**

'New Mine status' is an initiative included with the 2005 Royalty Act Amendments to promote investment and development of new mines in South Australia<sup>96</sup>. New mine status allows for a discounted royalty rate of 1.5% of the value of the minerals for a period of five years commencing on the date of paying the first royalty payment. In accordance with Section 17A of the Act, a person or company liable to pay royalty for minerals (other than extractive minerals) may apply for 'New Mine Status'. The Minister may, by notice in the gazette, then declare that a mine will be taken to be a 'new mine'. The discounted royalty rate does not apply automatically to a new mine and application must be in writing outlining all relevant details. All applications are thoroughly assessed to ensure the criteria outlined in Section 17A of the Mining Act have been met.

Pursuant to Section 17 of the Act, certain prescribed costs may be deducted from the market value of a particular mineral in order to determine the ex-mine gate value of the mineral. Prescribed costs are defined in the Regulations as:

#### 6A- Prescribed costs (Section 17)

For the purposes of Section 17(8) of the Act, the costs of the following kinds are prescribed:

- a) Costs (including GST) genuinely incurred in transporting the minerals from the relevant tenement to a port (including, for example packaging, storage, loading, permit fees and insurance costs);
- b) Costs genuinely incurred in shipping the minerals from a port to a genuine purchaser in a sale at arm's length.

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<sup>96</sup> Government of South Australia Primary Industries and Resources SA (PIRSA Minerals). "Mineral Royalties". Available at [http://outernode.pir.sa.gov.au/minerals/licensing\\_and\\_regulation/fees\\_rents\\_and\\_royalties/minerals\\_royalties](http://outernode.pir.sa.gov.au/minerals/licensing_and_regulation/fees_rents_and_royalties/minerals_royalties) last accessed 15/04/2011.

### 3.3.2. Duties of Excise vs. Mining Royalties

In 1994 Professor McLeod<sup>97</sup> argued that much State taxation avoiding proper scrutiny – particularly in respect of compliance with section 90 of the Constitution – and that the then current interpretation of section 90 was not capable of sensible application to State laws. In effect, professor McLeod predicted the decision in *Ha*, which provided his argument regarding the unconstitutional nature of franchise fees essentially correct.

In 1997 High Court decision in *Ha*<sup>98</sup> represented a severe blow to the ability of the States to raise revenue through licence fees for tobacco, alcohol and petrol, and required the Commonwealth to take on the responsibility of rising what were always disguised taxes on behalf of the States. The High Court agreed to re-open *Parton*<sup>99</sup> quoting Dawson J in *Capital Duplicators (No.2)*<sup>100</sup> “The divergence of opinion upon the scope of an excise duty for constitutional purposes would, I think, in itself justify a review of the authorities”. In holding for the appellant, the majority High Court indicated its preference for the broad interpretation of the meaning of duties of excise, dealing a blow to franchise fee legislation across Australia and substantially narrowing the tax base of the States. This required the Federal Government to pass urgent legislation to – in effect – collect taxes on alcohol, tobacco and petrol on behalf of the States.

Certain mining royalties could be deemed duties of excise on the basis of the principles held by the High Court in *Dennis Hotels, Bolton, Parton* and *Matthews* that a certain tax on a step of production is a duty of excise. This view was reinstated by Brennan J in *Phillip Morris*<sup>101</sup> along the terms that “If there be any rock in the sea of uncertain principle, it is that a tax on a step of production or distribution of goods to the point of receipt by the consumer is a duty of excise”, and Brennan CJ [for the majority] in *Ha* that:

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<sup>97</sup> N. McLeod, *State Taxation: Unrequited Revenue and the Shadow of Section 90*, *Federal Law Review*, Vol. 22 (1994).

<sup>98</sup> *Ngo Ngo Ha and Anor v the State of New South Wales and Ors, Matter No S 45 of 1996*, High Court of Australia, handed down 1997.

<sup>99</sup> *Parton v Milk Board (vic)* (1949) 80 CLR 229.

<sup>100</sup> *Capital Duplicators Pty Ltd v ACT [No 1]* (1992) 177 CLR 248.

<sup>101</sup> *Phillip Morris Ltd v Commissioner of Business Franchises (vic)* (1989) 167 CLR 399.

The proposition that was not clearly established before Phillip Morris was the character of the tax required a consideration of the substantive operation as well as the text of the statute imposing the tax.

### **3.3.3. Lessons to Namibia**

In Australia each State has different mining legislation. Royalties on minerals are charged by the state and territory governments and royalty rates differ accordingly. Many small mining operations are effectively exempt from this regime because no liability applies to the first \$50,000 of net value. The Federal Government looks to replace state government royalty regimes with a federal resource rent tax. It may be timely to review how mining royalties are charged and the royalty rates that are payable across Australia. In the different states an overall feeling has been to increase the royalty rates. Concern here is not so much on the impact of foreign investors, but the calculation of such royalties in the different states.

To conclude, Namibia follows one system of royalties under one government unlike Australia. The trend though, seems to be for an increase of royalties internationally. The issue here would be the calculation of such rates i.e. ad valorem, gross mineral value or even by using a formula as in Tanzania. Namibia is thus not too far off with its new royalty rates and is on par competitively. As with the Tanzanian situation the introduction of such new rates is peculiar as to the reasons of the government of the day i.e. new rates were introduced so as to fit into budgets of parliament.

The major point of concern with the introduction of such new royalties is the impact on the investor. Namibia's legislation on mining taxation is clear, so too is the newly introduced royalty rates, all of which have been paid by mining companies, except for Rössing. It is true that in the African context investors are important but their interests must be weighed up against other factors such as income tax, withholding tax, etc. Finally, Namibia can benefit financially with these new royalties and better its mining competitiveness.

## CHAPTER IV – CONCLUSION AND RECOMMENDATION

According to the Chamber of Mines Annual Review for 2010, mining is one of Namibia's biggest earners. For the period of review alone it gained over N\$ 1.5 Billion in taxes and royalties. Mining value added N\$ 7.7 billion, whilst mining investment N\$ 3.3 billion and exports in mining reached N\$ 10.9 billion.

Minerals sector regulatory and fiscal systems have been undergoing major reforms across the globe. It has been estimated that during the past 20 years over 110 nations have either replaced their mining law or made major amendments to it.<sup>102</sup> In an era of globalization, competition to attract exploration and mining investment has intensified. The trend has been for nations with relatively high tax to reduce tax levels and, conversely, for nations with low tax to increase theirs. Many nations impose royalty tax, but some nations – as diverse as Chile, Greenland, Mexico, Sweden and Zimbabwe do not. In most nations that impose royalty tax, policy makers are interested in determining whether the level of royalty and its computational method are competitive and efficient.<sup>103</sup>

Across the globe, no type of tax on mining causes as much controversy as royalty tax. It is a tax that is unique to the natural resources sector and one that has manifested itself in wide variety of forms, sometimes based on measures of profitability but more commonly based on the quantity of material produced or its value.<sup>104</sup>

### 4.1. Transparency

The issue of transparency is important and gaining international momentum. The final communiqué of the Gleneagles G-8 Summit in July 2005 included a call for improved governance in general. In terms of extractive industries, major initiatives have been launched within the past five years such as Publish What You Pay, the

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<sup>102</sup> Otto, J. Andrews, C. Cawood, F. Dogget, M. Guj, P. Stremole, F. Stermole, J. Tilton, J.(2006). *Mining Royalties A Global Study of Their Impact on Investors, Government, and Civil Society*. The International Bank for Reconstruction and Development/ The World Bank: Washington DC. p. xiii (15).

<sup>103</sup> Ibid, p. 16.

<sup>104</sup> Ibid, p. 23.

Extractive Industries Transparency Initiative and the Global Reporting Initiative.<sup>105</sup> The movement to enhance transparency and governance of the extractive industries is the result of serious questioning by reputable observers. Critics have cited many problems regarding the economic contributions of extractive industries and their impacts on human well-being in many developing countries, which Namibia is.

According to 2006 Transparency International Corruption Perceptions Index (CPI), Namibia ranked at position 55 together with Costa Rica compared to South Africa ranked at 51 and Botswana ranked at 37. The index defines corruption as the abuse of public office for private gain and measures the degree to which corruption is perceived to exist among a country's public officials and politicians. It is a composite index, drawing on a number of polls and surveys from several independent institutions, which gathered the opinions of business people and country analysts.<sup>106</sup>

Many nations have reformed or are now reforming the ways in which they regulate and tax the mining sector, and as part of that effort, royalty concepts are being re-examined. That examination may be emotive, as when politicians strive to defend and uphold principles that relate to the nation's permanent sovereignty over the national mineral endowment, or when companies strive to maintain reasonable profits for their shareholders.<sup>107</sup>

## 4.2. Comparison of Royalties in Selected Nations

**4.2.1. Africa.** The following observations have been made on royalty systems in African countries:

1. In most African countries it is standard practice to include royalties as part of the legal framework. Two notable exceptions being South Africa and Zimbabwe.

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<sup>105</sup> Otto, J. Andrews, C. Cawood, F. Dogget, M. Guj, P. Stremole, F. Stermole, J. Tilton, J. (2006). *Mining Royalties A Global Study of Their Impact on Investors, Government, and Civil Society*. The International Bank for Reconstruction and Development/ The World Bank: Washington DC. p.239.

<sup>106</sup> Odendaal, W. Tjiramba, S. (2007) *The Case of Namibia. Legal Assistance Centre Land, Environment and Development Project for the open Society initiative for Southern Africa. The extractive industries transparency initiative (EITI) of southern Africa*, p. 5f. Available at [http://www.namibianuraniuminstitute.com/joomla/images/stories/eiti\\_namibia\\_nov\\_07.pdf](http://www.namibianuraniuminstitute.com/joomla/images/stories/eiti_namibia_nov_07.pdf) last accessed 26/06/2011.

<sup>107</sup> Otto, J et al supra, p. 23/(1).

2. Many African countries that impose ad valorem-type royalty taxes allow some costs to be deducted from sales revenue when determining the royalty base.
3. Ad valorem royalty rates vary from 0 to 12 per cent.
4. Most countries with older mining laws have different royalty rates for different minerals.
5. Although it is not standard practice to design royalty regimes for different scales of investment, it seems that holders of artisanal and small-scale (ASM) mining rights are treated differently.
6. Standard practice in the selected countries allows for deferment or reduction of royalties in difficult times. Such as Tanzania

**4.2.2. Australia** – the following observations have been made on royalty systems in Australia and its provinces:

1. Most royalties are levied at the provincial level
2. The royalty systems tend to be highly detailed with different minerals being subject to different valuation methods or rates.
3. Western Australia imposes higher royalties on raw materials (ore) than on products with value added (metal) in an effort to induce local processing.
4. Some states allow for deferment or reduction of royalties; others do not.

### 4.3. The Investment Climate

A mining country that relies on private firms to find and exploit its mineral resources must compete with other countries for investment. Its investment climate, which reflects how attractive the country is to domestic and foreign investors, depends on two considerations: first, the expected rate of return the country offers investors on their investments in domestic projects, and second, the level of risk associated with those projects. These two critical determinants in turn vary with a host of factors, including the county's' geological potential, political stability, level of corruption, tax



regime, and government regulations.<sup>108</sup> Namibian economist Robin Sherbourne<sup>109</sup> on the Namibian government's own mining company states "The creation of Epangelo adds further uncertainty to Namibia's mining investment climate since it is not clear whether government will in future allocate EPLs and MLs to Epangelo rather than the private investors who have borne the cost and risk of bringing projects to exploitation stage".

#### **4.3.1. Country With Favourable Investment Climate – E.G. Australia**

Australia has considerable experience with mineral royalties. Under the Australian constitution, States have the right to collect royalties, and the governments of the six Australian states and the Northern Territory have done so for most minerals for many years. These royalties take a variety of forms- unit-based, ad valorem and profit-based.<sup>110</sup> This is in relation to the gold royalty imposed on Western Australia. The questions posed here are: to what extent did the royalty undermine the investment climate in the gold mining industry? And did the royalty ultimately promote or undermine the welfare of the state? There is no clear downward trend following the introduction of a "reasonable" royalty on gold production in Western Australia in 1997. This suggests that the gold royalty has not seriously undermined the industry's investment climate in the state.<sup>111</sup> It is true that the royalty has had little impact on the states' investment climate, and then the royalty has given the share and in turn its citizens a larger share of the pie<sup>112</sup> created by its gold mining industry without significantly reducing the size of the pie.

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<sup>108</sup> Otto, J et al supra, p. 183.

<sup>109</sup> Sherbourne, R. (2010). *Guide to the Namibian Economy 2010*. Windhoek: Institute for Public Policy Research, p. 141.

<sup>110</sup> Ibid, p. 189.

<sup>111</sup> Otto, J et al supra, p. 190.

<sup>112</sup> Of rents or profits.

### **4.3.2. Country Where Taxation May Have Negatively Affected The Investment Climate – E.G. South Africa**

The investment climate is less favourable, particular to the extent to which the recently announced royalty changes have contributed to the negative perception toward the country's climate and how successful those changes have been in promoting the welfare of South African.

Historically, royalties in South Africa have been determined by on an individual mine basis by direct negotiations between the private investor and the owner of the mineral rights. In most cases the owner was a private individual or company, but in some cases, primarily at mines on state-owned lands, it was the state, represented by the Department of Minerals and Energy. The result has been a variety of different royalty rates and bases, with lack of consistency across types of mineral commodities, kinds of ore bodies, and mine profitability.<sup>113</sup>

The government has however changed this situation. With the introduction of its new mining law, the state took custodianship of minerals and along with its new mining law, released a draft royalty bill in 2003. Nothing in the Act takes away common-law ownership of mineral rights. Instead, by claiming custodianship, the state controls access to mineral properties, rather than ownership, which implies expropriation.<sup>114</sup> The new regime is unclear and untested, culminating in a higher risk premium for mineral development in South Africa, particular compared to Australia and Chile<sup>115</sup>.

## **4.4. Conclusion**

Majority of the world's nations have started a process of policy reform of their mineral sector, with Namibia not being an exception to this. In designing mineral sector taxation systems, policy makers must carefully seek to balance tax types, rates, and incentives that satisfy the needs of both the nation and the mining investor.<sup>116</sup> Such systems must be both equitable and globally competitive.

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<sup>113</sup> Otto, J et al supra, p. 190.

<sup>114</sup> Ibid, p. 196.

<sup>115</sup> Also deemed a country with a favorable investment climate.

<sup>116</sup> Otto, J et al supra, p. 266.

Where royalties are imposed, the methods and rates vary widely and the justification for such tax may be to either obtain compensation for the permanent loss of a non-renewable resource<sup>117</sup> or generate revenue in return for the government's permission to mine<sup>118</sup>.

#### 4.5. Recommendations

The major conclusions are that the geological, economic, social and political circumstances of each nation are unique, and an approach to royalty taxes that is optimal for one nation may be impractical for another. Whether royalties are good or bad depend on the circumstances of the parties involved. The issue of transparency in the management of revenue streams is increasingly a focus of international attention. Though one approach to royalty taxation siting all nations is not possible, certain recommendations can apply in most situations. These include:

1. When designing a tax system policy makers should be aware of the cumulative effect taxes have on mine economics and on potential levels of future investment. When determining which taxes and level of taxes to apply to the mining sector, policy makers should not only consider ways to achieve individual tax objectives, but also take into account the cumulative effect of all taxes.<sup>119</sup> Such awareness must recognise the importance of each type of tax in achieving specific objectives. The overall tax system should be equitable to both the nation and the investor and be globally competitive.
2. Nations should carefully weigh the immediate fiscal rewards to be gained from high levels of tax, including royalty, against the long-term benefits to be gained from sustainable mining industry that will contribute to long-term development, infrastructure and economic diversification. For example with AREVA and its building of ablation facilities and training people to have the necessary mining skills.

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<sup>117</sup> That is an ownership transfer tax.

<sup>118</sup> To use tax.

<sup>119</sup> Otto, J et al supra, p. 2f.

3. Mining companies should play a role. Governments will be able to arrive at a better-reasoned decisions if they are provided with quantitative assessments by companies on the effects of royalty taxes on issues such as potential overall investment, closure of marginal mines, and the implications of those closures on the national mineral reserve base. This in turn would better the relationship with foreign investors, as it is true that in Namibia most mining companies are dominantly foreign-owned.
  
4. A nation with a strong desire to attract investors should consider either forgoing a royalty tax and relying on the general tax system or recognising investors' strong preference to be taxed on their ability to pay<sup>120</sup>.
  
5. Governments that impose royalty taxes should do the following<sup>121</sup>:
  - Consult with industry to assess the effects that changes to the royalty system will have on the mining industry.
  - Implement a system or systems that are transparent and provide a sufficient level of detail in the relevant law and regulations that make it clear how the tax basis is to be determined for all minerals.
  - Select a royalty method or methods that are suitable for efficient and effective administration within the capacity of the tax-collecting authority.
  - Give a high priority to strengthening both financial reporting and the institutional capacity of administrative agencies responsible for levying and collecting mineral sector taxes. The government would thus be able to consider the complete range of royalty options rather than be limited to the simplest methods.
  - Carefully consider all royalty options based on ability to pay (profit-based systems).

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<sup>120</sup> Otto, J et al supra, p. 3.

<sup>121</sup> Ibid, p. 3f.

- Avoid excessively high unit- or volume-based royalty rates that will significantly affect production parameters such as cut-off grade and mine life.
  - Provide a means whereby mines experiencing financial duress may apply for a deferral or waivers of royalty, provided that clearly predefined criteria are met.
  - Allow royalty payments to be deducted from income subject to income tax or allow royalty to be credited against income tax.
  - Impose alternative measures on artisanal and small-scale operators in cases in which the general royalty scheme would not be enforceable.
6. Policy makers and companies should consider the following means whereby affected communities can share directly in the benefits of the mines<sup>122</sup>:
- Balancing the overall mineral taxation system, including the royalty tax in such a way that provides an incentive for companies to invest in sustainable development initiatives at the community and regional levels.
  - Requiring mining companies to pay a share of royalty (or other mining taxes) directly to communities without the funds moving through the central tax authority, or alternatively, setting up a system in which the designed community share is paid centrally but is distributed in a transparent and timely manner.
7. Policy makers and companies should bear joint responsibility for treating royalty payments in a transparent manner that promotes public accountability<sup>123</sup>. Overall, the aim should be for revenues generated by the mining sector to contribute to economic growth and social development. Particularly in developing countries, a lack of accountability and transparency in such revenues often exacerbates poor governance and contributes to corruption, conflict, and poverty. To that end the extractive Industries Transparency Initiative (EITI) which is gaining international support is a process by which countries and companies voluntarily agree to systematically

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<sup>122</sup> Otto, J et al supra, p. 4.

<sup>123</sup> Ibid.

record and disclose the revenues paid by extractive industry companies and received by the governments.

8. From a macroeconomic governance perspective, the optimization goal should be to maximize the net present value of the social benefits flowing from the mineral sector over the long term, including government tax receipts. This approach implies a balance, because if taxation is too high, investment and the tax base will decrease as investors shift their focus to other alternatives, and if taxation is too low, the nation will lose revenue useful to serve public welfare<sup>124</sup>.

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<sup>124</sup> Otto, J et al supra, p. 5.

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