



MANAGING NATURAL RESOURCES IN NAMIBIA

THE MINING AND FISHERIES SECTORS

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Responsibility for errors and omissions rests solely with the authors, and no other person or institution.

METHODOLOGY

This Report was developed through extensive literature review and desk research; interviews in New York, Namibia and elsewhere; and collective group discussion, all under the guidance of Professor Jenik Radon, Esq. From January 2016 to May 2016, a team of seven graduate student authors from the School of International and Public Affairs (**SIPA**) and five from Columbia Law School (**CLS**), at Columbia University, New York, worked to bring the report to fruition.

The Capstone project client is the Institute for Public Policy Research (**IPPR**) in Namibia, a not-for-profit organization focused on producing independent research on social, political and economic issues. The target audiences of the report are stakeholders in Namibia's development including the government, public sector institutions, private sector, media organizations and civil society.

In March 2016, the Capstone team traveled to Namibia for a week, where the members conducted interviews with stakeholders in Windhoek, and fieldwork at mining and fishing sites in Swakopmund and surrounding areas. Fieldwork consisted of interviews and tours of active mining and fishing sites. Data collected firsthand during the trip complemented prior research, and enabled new insights. Interviews were conducted with government officials, legal experts, journalists, academics, members of civil society organizations, mining and fishing company representatives, embassy officials, representatives of donor agencies and community members. Some of the interviewees expressed their wish to maintain anonymity.

The extensive literature review has drawn from reports of government publication and legal documents, national and international organizations, private companies' publications, books and scholarly articles, and credible news sources. The diversity of sources and the engagement of primary and secondary sources are both valuable features of the research. Additionally, the diversity in the background of the authors from varied professional and academic training in human rights, environmental science, investment and trade, civil and common law countries, and their fields, confers rich nuance to this report.

OTHER REPORTS

Managing Natural Resources in Namibia: The Mining and Fisheries Sectors is published by the School of International and Public Affairs (**SIPA**) at Columbia University as part of a series on natural resource management and development in Africa, Asia and Latin America. Other publications include:

- Oil: Uganda's Opportunity for Prosperity (2012)
- Politics and Economics of Rare Earths (2012)
- China, Natural Resources and the World: What Needs to be Disclosed (2013)
- Mozambique: Mobilizing Extractive Resources for Development (2013)
- Colombia: Extractives for Prosperity (2014)
- Tanzania: Harnessing Resource Wealth for Sustainable Development (2014)
- Mining in Peru: Benefiting from Natural Resources and Preventing the Resource Curse (2015)

LIST OF ABBREVIATIONS

ACA	Anti-Corruption Act, 2003
ACC	Anti-Corruption Commission
ACHPR	African Charter on Human and Peoples' Rights
APAI	African Platform on Access to Information
ATI	Access to Information
AU	African Union
BBC	British Broadcasting Corporation
BIT	Bilateral Investment Treaties
BoN	Bank of Namibia
Codelco	Corporación Nacional del Cobre de Chile
Constitution	Constitution of the Republic of Namibia, 1990
CSR	Corporate Social Responsibility
ECC	Environmental Clearance Certificate
EDI	Environmental Democracy Index
EDP	Erongo Desalination Plant
EEZ	Exclusive Economic Zone
EIA	Environmental Impact Assessment
EMA	Environmental Management Act, 2007
EMP	Environmental Management Plan
Epangelo	Epangelo Mining Company (Pty) Ltd
EPL	Exclusive Prospecting License
FIA	Foreign Investment Act, 1990
FIC	Financial Intelligence Centre
FAO	Food and Agricultural Organization
GDP	Gross Domestic Product

HDI	Human development index
ILO	International Labour Organisation
IUU	Illegal, unreported and unregulated fishing practices
IMF	International Monetary Fund
LARRI	Labor Research and Resource Institute
MET	Ministry of Environment and Tourism
MFMR	Ministry of Fisheries and Marine Resources
Minerals Act	Minerals (Prospecting and Mining) Act, 1992
MISA	Media Institute of Southern Africa
MITSD	Minister of Industrialization, Trade and SME Development
MME	Ministry of Mines and Energy
MPMRC	Minerals Prospecting and Mining Rights Committee
MRA	Marine Resources Act
MRF	Marine Resources Fund
N\$	Namibian Dollar
NatMIRC	National Marine Information and Research Centre
NBC	Namibian Broadcasting Corporation
NDP4	Fourth National Development Plan
NEEEF	New Equitable Empowerment Framework
NIC	Namibia Investment Centre
NMT	Namibian Media Trust
NOSAS	Namibia Occupational Skills Assessment Survey
NSX	Namibian Stock Exchange
OMP	Management Plans
PSCE	Corporate Private Sector Credit Extension
SADC	South African Development Community
SIA	Social Impact Assessment
SOE	State Owned Enterprises

Strategy	Namibian Anti-Corruption Strategy 2016-2019
SWAPO	South West African People's Organization
TAC	Total Allowable Catch
UNCAC	United Nations Convention Against Corruption
UNCLOS	United Nations Convention on the Law of the Sea
UNESCO	United Nations Economic, Social and Cultural Organization
USD	United States Dollar

EXECUTIVE SUMMARY

Client

The client for this Capstone project is the Institute for Public Policy Research (IPPR). Launched in 2001, IPPR's mission is to 'deliver independent, analytical, critical yet constructive research into social, political and economic issues that affect development in Namibia.' It is an independent, not-for-profit organization with three core programs:

- Democracy and Governance
- Public Opinion
- Public Policy Analysis

IPPR works extensively on many of the central issues of this project, including good governance, anti-corruption and accountability in Namibia.

Purpose

This report explores how Namibia – a country that has experienced strong economic performance in recent decades due to its natural resource wealth – can avoid the resource curse through proper management of its natural resources, in particular, in the extractives and fisheries sector. The resource curse is a paradoxical phenomenon in which resource-rich countries experience slower economic growth and development than their resource-poor counterparts. The former also suffer from weaker governance and higher social and environmental costs, including higher instability, and are more prone to conflict.

While the resource curse is generally understood in the context of extractives-sector resources, this report also considers governance issues related to fisheries (given the importance of the fisheries' sector to Namibia's economy). Further, as many of the challenges present in Namibia's extractives sector are paralleled in the fisheries sector – for

example, challenges relating to licensing – it is appropriate to consider them within the same report.

The purpose of this report is to identify ways in which Namibia can continue to maximize the benefits of its natural resources to achieve positive development outcomes, while minimizing any costs of exploiting these resources. Throughout the report, we make recommendations to numerous stakeholders on specific measures they should take in order to achieve these goals.

Economics

The Namibian economy is relatively stable compared to many other sub-Saharan African countries. The economy is highly reliant upon mining – in particular, diamonds and uranium – and, to a lesser extent, the fisheries sector. Growth rates have been consistently above 5 percent over the past five years, although this growth is now slowing. Historically, the Namibian government has been fiscally conservative; however, in 2015 it issued a US\$750 million Eurobond, the prospectus of which has not been made public.

Namibia faces high rates of unemployment and inequality, which it must address if it is to improve development outcomes. The government's prioritization within the 2016-17 national budget, however, has been questioned – for example, relatively high expenditure on defense is perceived to be at the cost of more critical development needs, such as housing and water infrastructure.

Given Namibia's heavy economic reliance on mining, the government should promote economic diversification. The most promising future growth prospect for Namibia is to become a 'logistics hub', which is being realized through the upgrading of transport and port infrastructure. Other key sectors that the government can seek to strengthen – especially given their potential contribution to employment – are tourism, agriculture and manufacturing.

Governance, Corruption and Media

Namibia enjoys a higher standard of governance than other countries in Sub-Saharan Africa, and the ruling party SWAPO has enjoyed strong support at the ballot box since Namibia's independence that has led to political stability. Still, Namibia faces many governance challenges, such as the need to reduce inequality and ensure the benefits of development are shared equally. The government also suffers from severe skills and capacity shortages in the civil service, creating challenges for the delivery of government services. The Geingob government has thus far taken a constructive approach to transparency and accountability; however, there is more that should be done.

Namibia fares better on international rankings of corruption than most of its neighbors in Sub-Saharan Africa, but corruption remains a significant concern. The Anti-Corruption Commission mandate set out in Namibia's Anti-Corruption Act is too narrow to pursue many corrupt acts that are perceived to be occurring, and there are gaps in supporting legislation. Further, disincentives are not strong enough to prevent corruption. The Geingob government must continue to display the political will to deal with these issues if Namibia is to continue along its positive development trajectory.

Namibia ranks relatively high in international press freedom indices, but challenges remain. The majority of media publications in Namibia are controlled by the state or owned by people with connections to SWAPO. Namibian media outlets also face considerable financial and human resource constraints.

Environmental and Social Issues

While Namibia has an Environmental Management Act in place, current laws lack important safeguards to protect the environment – in particular, a lack of clear requirements for rehabilitation of the environment following mining activities and financial guarantees to this end. There is also a lack of transparency and public participation in environmental decision-making. The fishing sector too has negative environmental impacts that require

management, specifically marine pollution from effluent and other hazardous substances, and overfishing.

While Namibia is hailed as employing better social practices than Sub-Saharan African counterparts, a number of social issues are brought about by mining and fishing activities. Uranium mining in particular has detrimental impacts on human health and has led to labor grievances. There generally persists a lack of consultation with landholders prior to mining activities taking place. In the fisheries sector, there is a concern that the benefits are enjoyed by too few, with the sector not fulfilling its potential to contribute to much-needed food security. To address these issues, a number of laws need to be introduced or amended, including the framework around Social Impact Analysis and ensuring human rights standards are included in decision making.

The Mining Sector

Namibia faces challenges if it is to maximize the economic potential of its resources sector, especially given low commodity prices. These include revisiting the governance of the state-owned mining company Epangelo, requirements relating to the National Equitable Economic Empowerment Framework (NEEEF), and the need to secure and maintain a social license to operate. Many of the provisions around mining licensing would benefit from reconsideration, such as ensuring that transferees of licenses are subject to the same rights and responsibilities as the original license holder, and ensuring important considerations are taken into account in granting licenses (such as environmental issues).

Additional challenges include the need for greater transparency around beneficial ownership, with a view to improving accountability and reducing corruption. Water scarcity is currently a serious issue in Namibia, and the government must urgently harness the support of the mining industry to ensure desalination plants can be built. The government should also consider liberalizing its policy toward importing foreign labor in order to overcome the severe skill shortages that threaten mining sector investment.

The Fisheries Sector

As with the mining sector, Namibia's fisheries' sector would benefit from extensive reform to the licensing process. Ministerial discretion should be reduced; transparency should be increased; there should be a requirement to report conflicts of interest; and the corporate social responsibility component should be strengthened. It is also essential that transferees of Fishing Rights be subject to the same conditions as the original rights-holder.

Conclusion

As explored throughout this report, Namibia is already one of the most stable and prosperous nations in Sub-Saharan Africa, thanks in no small part to sensible management of its natural resource wealth. But like all countries with strong natural resource sectors, there are challenges that will need to be overcome if Namibia will enjoy an even greater level of prosperity in future. This report explores how Namibia can continue to overcome those challenges.

LIST OF RECOMMENDATIONS

No.	Section	Heading	Recommendation
1	Economics	Debt	Open access of the Eurobond prospectus to the public, and all future bond prospectuses, to ensure transparency in application of proceeds and repayment of debt.
2	Economics	Bank of Namibia	The Bank of Namibia needs to be given independence to set interest rates based on domestic price stability, rather than based on another sovereign's central bank policy rate.
3	Economics	Logistics Hub	Given that strong infrastructure is critical for yielding maximum benefits from natural resources, the government should reallocate expenditure to better reflect priorities in building and/or upgrading rails, roads, energy, ports, water and other infrastructure.
4	Economics	Other Key Sectors: Tourism, Agriculture, and Manufacturing	As the lead stakeholder of NDP4, the Office of the President should continue diversifying mining and fishing activities to allow for more in-country processing, provided there are

No.	Section	Heading	Recommendation
			appropriate incentives through, for example, export processing zones (EPZs).
5	Economics	Foreign Direct Investment and the NEEEF	Conduct a thorough cost-benefit analysis on the NEEEF draft bill to determine its impact on promoting economic growth.
6	Governance and Media	Inequality	The government should focus on reducing economic inequality, not just by focusing on absolute poverty reduction, but also through investing in employment generating sectors and improving delivery of welfare services like healthcare and education.
7	Governance and Media	Government Capacity	The government should undertake long-term capacity planning to adapt economic expansion. Skill-based programs aimed at structural improvement of the labor force should be introduced to increase human resource capacity in the country.
8	Governance and Media	Conflict of Interest	The government should continue its drive to increase accountability through transparency. In this context, the

No.	Section	Heading	Recommendation
			government should introduce the legislation promised in the Harambee Prosperity Plan and streamline conflict of interest laws through consolidated legislation. In addition, government needs to introduce access to information legislation and ensure all government websites are comprehensive and up-to-date.
9	Governance and Media	Definition of Corruption and Mandate of the ACC	The ACA should be amended to clarify the definition of "corruptly".
10	Governance and Media	Gaps in Supporting Legislation	The government should review the need for legislative reform in the area of anti-corruption and should set clear priorities for necessary reforms.
11	Governance and Media	Failure to Dis-incentivize Corrupt Practices	The ACC should finalize and publish the Anti-Corruption Strategy, and it should be effectively integrated into national development plans and strategies.
12	Governance and Media	Ownership	The Ministry of Communication and Information should examine ways to transition NBC from state broadcaster to a

No.	Section	Heading	Recommendation
			public service broadcaster to ensure that this service maintains a separate stature from political and government interests.
13	Governance and Media	Access to Information	The government should adopt an Access to Information law, and ensure adequate and strong drafting of this law as based on the ACHPR model.
14	Governance and Media	Access to Information	The Media Institute of Southern Africa, Namibia Media Trust, and regional and international media development organizations should continue to provide and increase journalism training at both basic and advanced levels. Subject matter training in extractives and finance for more experienced journalists, and theoretical training on the role and importance of journalism in society to new journalists are both needed.
15	Environmental Issues	Namibia's Environmental Legal Framework	Both the government and project proponents should be required to publish environmental documents, such as the approved EIAs and ECCs, online.

No.	Section	Heading	Recommendation
16	Environmental Issues	Namibia's Environmental Legal Framework	The Environmental Commissioner should be required to publish its monitoring/inspection reports online to increase transparency and accountability.
17	Environmental Issues	Namibia's Environmental Legal Framework	The government should increase opportunities for and ensure public participation by amending the EMA and the EIA regulations to remove the registration condition for submitting comments in the public consultation process, require the project proponent or the Environmental Commissioner to prepare a response to public comments, and require the conduct of a public hearing for each ECC application.
18	Environmental Issues	Namibia's Environmental Legal Framework	The Environmental Commissioner should promulgate rules requiring the certification and registration of environmental assessment practitioners to ensure that individuals who conduct EIAs are trained, knowledgeable and can be held accountable for their reports.
19	Environmental	Namibia's Environmental	Impose additional penalties sufficient to deter non-

No.	Section	Heading	Recommendation
	Issues	Legal Framework	compliance. Projects that go beyond the permitted scope of the final EIA should be completely halted, any buildings, infrastructure or improvements therein should be dismantled, and the project owner should be compelled to restore the area to its original state.
20	Environmental Issues	Namibia's Environmental Legal Framework	Environmental officers trained by the government should be made to sign a contract with a restrictive conflict of interest covenant barring them, for a period of two years, from accepting employment with a private individual or entity that had substantial transactions with the Office of the Environmental Commissioner.
21	Environmental Issues	Namibia's Environmental Legal Framework	Project proponents should be required to pay fees for environmental assessments that are proportional to the amount of work and expertise involved. The proceeds should be used by the Office of the Environmental Commissioner to increase its institutional capacity.
22	Environmental	Namibia's Environmental	The capacity of key government agencies should be

No.	Section	Heading	Recommendation
	Issues	Legal Framework	increased, particularly those with environmental mandates that require staff with technical knowledge and skills, by institutionalizing merit-based hiring and promotion, prioritizing training programs and career-development opportunities and maintaining competitive salaries.
23	Environmental Issues	Environmental Impact of the Mining Industry	The Minerals Act should be amended to explicitly require the submission and approval of a detailed Mine Closure and Rehabilitation Plan as part of the mineral license application process and provide for its periodic review and updating. Financial guarantees, such as a rehabilitation trust fund and liability insurance, should also be required to cover the entire cost of rehabilitation and any other environmental damage that may be caused by mining operations at any given time.
24	Environmental Issues	Environmental Impact of the Mining Industry	All applicants for mineral licenses must undergo a thorough background check as part of the application process. Applicants with previous environmental violations in other jurisdictions should not be allowed to operate mines in Namibia.

No.	Section	Heading	Recommendation
25	Environmental Issues	Environmental Impact of Fishing in Namibia	Prioritize the implementation of the Water Resources Management Act, 2013, which prohibits the discharge of effluents and other waste into a water resource without a discharge permit from the government.
26	Social Issues	Context	The government should work with Namibian civil society organizations (as well as with the UN High Commissioner of Human Rights, if necessary) to develop a human rights education and training program suitable to the Namibian context.
27	Social Issues	Uranium Mining and Health Impacts	Businesses in Namibia should be engaging in proper and thorough cost analysis of human rights issues connected to or exacerbated by their corporate activities. The Namibian government must ensure proper and relevant legislation is thus in place and enforced.
28	Social Issues	Land Rights	Ensure that public consultation occurs and communal residents' or landowners' rights are respected and upheld in

No.	Section	Heading	Recommendation
			practice, across all relevant government ministries, especially with the presence of extractive activities.
29	Social Issues	Land Rights	The government should publicly acknowledge and better implement the UN Guiding Principles on Business and Human Rights and sign the International Labour Organisation's Convention on Indigenous and Tribal Peoples.
30	Social Issues	Conclusion	Develop a comprehensive business and human rights plan, ensuring consultation with all necessary stakeholders (community members, civil society organizations, corporate actors, etc.).
31	Social Issues	Conclusion	Implement processes so that Social Impact Assessments are conducted separately from Environmental Impact Assessments; codify that the SIAs and EIAs are independent and involve public consultation; and ensure that all SIAs are publicly available and easily accessible within 30 days of their finalization.

No.	Section	Heading	Recommendation
32	Social Issues	Conclusion	Codify and introduce enforceable penalties for non-compliance with social standards on behalf of corporate activities.
33	Social Issues	Conclusion	Require companies to include thorough analyses of social impacts and their costs, and to include those costs in their overall operating budgets.
34	Social Issues	Conclusion	Consult with Namibian civil society actors and appropriate international organizations (if necessary) to improve and further develop robust human rights data collection methodologies.
35	The Mining Sector	Maximizing the Benefits of the Mining Sector in Namibia	Namibia should revisit the structure of Epangelo including its goals, organization, financial capacity, and management (independence from the government) to ensure its efficiency.
36	The Mining Sector	Maximizing the Benefits of the Mining Sector in Namibia	The government should reconsider the NEEEF requirement for the mining sector and assess prerequisites (such as restrictions

No.	Section	Heading	Recommendation
			on share transferability, and its effects) and potential implications to ensure successful implementation of NEEEF.
37	The Mining Sector	Stakeholder Mapping and Analysis	Establish a clear division of decision-making powers across ministries and agencies.
38	The Mining Sector	Stakeholder Mapping and Analysis	The government should encourage information sharing among government, the mining companies and the community during mine operations to maintain a social license to operate.
39	The Mining Sector	Licensing in the Mining Sector	Undertake a comprehensive review of the Minerals (Prospecting and Mining) Act, 1992, including with respect to section 48 to ensure that the transferee must demonstrate satisfaction of the same conditions as the original license holder in order to be granted a license transfer, as in Annexure 1(a).

No.	Section	Heading	Recommendation
40	The Mining Sector	Licensing in the Mining Sector	Undertake a comprehensive review of the Minerals (Prospecting and Mining) Act, 1992, including with respect to Sections 39 and 47, to ensure that the transferee is subject to the same obligations as the original license holder, and that in the absence of any express agreement to the contrary, the original license holder remains liable for any claims that arose prior to the time of transfer, as per Annexure 1 (b).
41	The Mining Sector	Licensing in the Mining Sector	Undertake a comprehensive review of the Minerals (Prospecting and Mining) Act, 1992, including with a view to reinforcing domestic labor law standards via for example, sections 50 and 91 of the <i>Minerals (Prospecting and Mining) Act</i> (1992), as per Annexure 1(c).
42	The Mining Sector	The Interaction between Licensing and Investment	Where a proposed investor holds or is likely to hold a license under the Minerals (Prospecting and Mining) Act, 1992, ensure that the Minister of Industrialization, Trade and SME Development in approving the proposed investment takes into account, and in consultation with the Minister of Mines,

No.	Section	Heading	Recommendation
			conditions especially pertaining to environmental impact that the prospective investor will need to satisfy in order to be granted a license, as per Annexure 1(d).
43	The Mining Sector	The Interaction between Licensing and Investment	Reconsider the inconsistent dispute resolution mechanism.
44	The Mining Sector	The Interaction between Licensing and Investment	Integrate principles of sustainable development in future investment contracts and agreements, as per the model provision in Annexure 1 (e).
45	The Mining Sector	Corruption and Beneficial Ownership	Make bidding processes for mining licenses and contracts more transparent and competitive by ensuring that all bidding procedures are open to public scrutiny.
46	The Mining Sector	Corruption and Beneficial Ownership	Amend the Minerals Act to clearly define who a beneficial owner is, and add reporting requirements that impose an obligation on companies to report changes of more than 5

No.	Section	Heading	Recommendation
			percent in beneficial ownership prior to the execution of such transaction.
47	The Mining Sector	Corruption and Beneficial Ownership	Amend the Minerals Act to insert deterrent measures that result in an immediate and non-discretionary suspension of all mining rights and licenses if a company or license holder is found to have false or incomplete information regarding its beneficial owners.
48	The Mining Sector	Water Scarcity	The government should harness the support of the mining industry and take steps to ensure that applications for construction of desalination plants are considered as part of a national economic growth plan.
49	The Mining Sector	Lack of Skilled Workforce	Namibia should direct greater resources towards skill development and education as a long-term investment. Greater analyses of demand for labor are required to design and implement education programs that equip people with specific skills.

No.	Section	Heading	Recommendation
50	The Mining Sector	Lack of Skilled Workforce	In the short to medium term, Namibia should liberalize its policy towards importing foreign labor and streamline processes to ensure that mining companies are able to hire foreigners where necessary to fill gaps.
51	The Fisheries Sector	Marine Fisheries Sector	The Ministry of Fisheries and Marine Resources (MFMR) should publish, and make publicly accessible, total allowable catch data – and the data that undergirds TAC decisions – on an annual basis.
52	The Fisheries Sector	Marine Fisheries Sector	The MFMR and NatMIRC should publish and make publicly accessible marine data on an annual basis.
53	The Fisheries Sector	Marine Fisheries Sector	The MFMR should strengthen its corporate social responsibility (CSR) requirements in its fishing quota allocation process.
54	The Fisheries Sector	Marine Fisheries Sector	MFMR should allocate more funding for trainings for the Fisheries Inspectorate Office, specifically to improve understanding of the legal framework of the United Nations.

No.	Section	Heading	Recommendation
			Convention on the Law of the Sea (UNCLOS) as it pertains to Namibian waters.
55	The Fisheries Sector	Legal Framework	The scope of the Minister's discretionary powers should be prescribed and limited by amending the legislation to include a list of mandatory requirements to be considered, and how they are considered, in the process of allocating fishing rights and quotas. Include provisions in Article 33 of the Marine Resources Act (1990), or in future policies of the MFMR, as specified in Annexure 3.
56	The Fisheries Sector	Legal Framework	Include in the MFMR's policy a provision to report conflicts of interest between an applicant and officials of the MFMR, as specified in Annexure 4.
57	The Fisheries Sector	Legal Framework	The MFMR should maintain and publish updated lists of right, quota and license holders.
58	The Fisheries Sector	Legal Framework	The authorizing document that grants rights or quotas should also be public. This would allow stakeholders and the general

No.	Section	Heading	Recommendation
			public to be able to assess whether the allocation of a right or a quota was made fairly by the MFMR.
59	The Fisheries Sector	Legal Framework	Include provisions in Article 42 of the Marine Resources Act (1990), or in future policies of the MFMR, as specified in Annexure 5.

INTRODUCTION

A. SCOPE/TERMS OF REPORT

This report (**Report**) is the final deliverable of a capstone project realized at Columbia University's School of International and Public Affairs (**SIPA**) and Columbia Law School (**CLS**). The capstone team is comprised of twelve graduate students who bring their diverse professional and educational backgrounds to the project.

The Report explores how Namibia can prevent the “resource curse.” The resource curse is a paradoxical phenomenon wherein resource-rich countries experience slower economic growth and development, as compared to their resource-poor counterparts. The former also suffer from weaker governance and higher social and environmental costs, including higher instability and are prone to conflict.

The purpose of the Report is to make recommendations to relevant stakeholders so that Namibia can maximize benefits from use of its natural resources, while minimizing the costs borne by indigenous communities and the environment. We provide recommendations to the government, companies, civil society and media on measures that can be taken to serve this purpose.

The Report also provides a review of the actual and potential impacts of Namibia's dynamic extractives and fisheries sectors on the country's economy, society and natural environment.

B. AN OVERVIEW OF NAMIBIA



Figure 1. Namibia in Africa

Source: <http://www.gov.na/about-namibia>

Namibia was under the administration of South Africa until independence in 1990, whereupon it was established “as a sovereign, secular, democratic and unitary State founded upon the principles of democracy, the rule of law and justice for all”¹ by the Constitution of the Republic of Namibia, 1990 (the **Constitution**). The South West Africa People’s Organization (**SWAPO**) has dominated Namibian politics since independence, which “has resulted in a conflation between party and state.”² The state consists of three main branches: the executive, the legislature and the judiciary. The president, chosen by a direct election, leads the executive branch while the legislature is a bicameral system, comprised of the National Assembly and the National Council. The independent judicial branch includes the Supreme Court of Namibia, the High Court of Namibia and the Lower Courts of Namibia. Civil liberties are generally respected, as the Constitution guarantees fundamental freedoms, such as freedom of speech, freedom of religion and freedom of assembly and association.³ In August 2014, the Third Constitution Amendment Bill was passed, which implemented forty constitutional changes, including increasing the number of legislators, establishing a new vice presidential post and allowing the ruling party to select regional governors.⁴

¹ *Constitution of the Republic of Namibia (1990)*.

² Freedom House, “Freedom in the World Country Report: Namibia, Freedom in the World 2015,” accessible <<https://freedomhouse.org/report/freedom-world/2015/namibia>>.

³ *Constitution of the Republic of Namibia (1990)*.

⁴ Freedom House, “Freedom in the World Country Report: Namibia, Freedom in the World 2015,” above n 2.

Elected in November 2014 for a five-year term, current President Hage Geingob is a member of SWAPO. In his inaugural address, he underscored that his key priority is to address Namibia's socio-economic gaps by lowering poverty rates and decreasing inequality, and by promoting sustainable economic growth, creating more jobs and improving service delivery.⁵



⁵ President Hage G. Geingob, "Inaugural Address" (Speech delivered at Independence Stadium, Windhoek, Namibia: 21 March 2015), accessible <<http://www.namibiahc.org.uk/resources/content/inaugural-speech-by-h-e-hage-geingob-1.pdf>>.

ECONOMICS

The Namibian economy is relatively stable compared to those of other Sub-Saharan African countries, with growth rates consistently above 5 percent over the past five years and appealing foreign investment conditions.⁶ Based on Gross Domestic Product (GDP) by industry, and at current prices, the wholesale and retail trade and repairs sectors contribute the most to economic growth, at 12 percent of GDP, followed by mining and quarrying at 11.9 percent. The fishing and fish processing on board sector comprises 2.9 percent of GDP.⁷ However, the economy is highly reliant upon the extraction of natural resources, particularly minerals such as diamonds, uranium, lead, gold, copper, and zinc; regardless, fishing is a large contributor to the population's livelihood.⁸ Though dependence on mining in particular has decreased over the last twenty-five years, the country continues to rely on the sector for a significant portion of its export earnings.⁹ Despite Namibia's reliance on the mining sector in particular, internal and country-specific conditions – namely restrictions within the national budget related to the underdevelopment of infrastructure – have hindered the efficient management of extractives. For example, the extraction of minerals requires extensive capital inputs, particularly robust water infrastructure.¹⁰ In addition to gaps in its water infrastructure, Namibia needs to improve its transport and electricity

⁶ African Economic Outlook, "Namibia 2015," accessible

<http://www.africaneconomicoutlook.org/fileadmin/uploads/aeo/2015/CN_data/CN_Long_EN/Namibia_GB_2015.pdf>

⁷ Namibia Statistics Agency, "Preliminary Annual National Accounts 2015," accessible

<http://cms.my.na/assets/documents/Preliminary_National_Accounts_2015.pdf>, p. 23.

⁸ African Development Bank, "Namibia Country Strategy Paper 2014-2018," (Published February 2014), accessible

<[http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2014-2018_-](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2014-2018_-_Namibia_Country_Strategy_Paper.pdf)

[_Namibia_Country_Strategy_Paper.pdf](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2014-2018_-_Namibia_Country_Strategy_Paper.pdf)>, p. 9-10.

⁹ Mining's contribution to GDP decreased from 19.6 percent in 1990 to 11.3 percent in 2012. At the same time, however, mining contributed to 37 percent of Namibia's total export earnings and 10 percent of its revenue. (African Development Bank, "Namibia Country Strategy Paper 2014-2018," (2014), above n 8, p. 2). Nevertheless, Namibia is ranked relatively low, at 29.94 out of 100, which indicates complete dependence, on the Extractives Development Index (EDI), given its mining sector's lower revenue and value-added contributions (Degol Hailu and Chinpihoi Kipgen, "The Extractives Development Index," United Nations Development Programme (Published 2014), accessible <http://api.ning.com/files/rq3DVWxENVHziPlo4G124q2y9PAtpmszjOn*GawUuKHxjxvmQpJgvQ6DP*A2aQ6L3C6LLwZLxRuRy1CsM6KTC5CNgcLJ7j/TheExtractivesDependenceIndexNovember2015.pdf>, p. 15, 20). However, the mining sector arguably has an outsized influence given its small contribution to local employment (African Development Bank, "Namibia Country Strategy Paper 2014-2018," (2014), above n 8, p. 2).

¹⁰ Columbia Centre on Sustainable Investment, Perrine Toledano and Clara Roorda, "Leveraging Mining Investments in Water Infrastructure for Broad Economic Development: Models, Opportunities and Challenges," (Published March 2014), accessible <<http://ccsi.columbia.edu/files/2014/05/CCSI-Policy-Paper-Leveraging-Mining-Related-Water-Infrastructure-for-Development-March-2014.pdf>>, p. 2 .

sectors¹¹ in order to better attract investors, strengthen the mining sector, and diversify significant industries. This section will accordingly provide an overview of Namibia's general economic conditions using standard indicators such as GDP, inflation, government debt, unemployment and national budget priorities, followed by key issues affecting natural resource management. It will conclude with an analysis of the government's economic priorities and the impact of both the mining and fisheries sectors on the overall economy.

A. ECONOMIC OVERVIEW

1. OVERVIEW

Namibia's economy has puzzled different stakeholders leading to varying forecasts. The Minister of Finance, together with the World Bank and the International Monetary Fund (**IMF**), predicted a bullish forecast of Namibia's economic growth at around 4.3 percent or above for the fiscal year 2016. On the other hand, the private sector, led by Namibia's leading securities firm IJG Securities and the Economic Association of Namibia, set the forecast for growth for the fiscal year 2017 at about 2.5 percent.

In either case, macroeconomic indicators demonstrate a slowdown of Namibia's 5-plus percent GDP growth each year from 2010 to 2014¹². Consumer confidence in income growth is grim as demonstrated by automobile sales, which particularly have experienced a GDP decrease in sales for three consecutive months ending January 2016.¹³ Corporate Private Sector Credit Extension (**PSCE**) closed in December 2015 with a negative month-over-month growth at 8bps (1bps = 1/100 percentage point). Mortgage loans also expanded at a negligible 0.89 percent in December 2015, in contrast to a 14.93 percent year-over-year growth¹⁴. Fixed asset investment lost momentum and foreign direct investment may encounter a drop as the major mining projects such as the Otjikoto Gold Project (of which a

¹¹ African Development Bank, "Namibia Country Strategy Paper 2014-2018," (2014), above n 8, p. 5.

¹² African Economic Outlook, "Namibia 2015," above n 6.

¹³ IJG Securities, "IJG Namibian Monthly, December 2015", available <<http://www.ijg-research.net/wp-content/uploads/IJG-Monthly-1512.pdf>>.

¹⁴ *Ibid.*

90 percent stake is owned by B2Gold), Tschudi Copper Project (funded by Weatherly International) and Husab Mine (90 percent stake owned by China Guangdong Nuclear Power Corporation) all finished construction with no other large projects planned.

Namibia's international trade consists mainly of commodity exports, and is largely dependent on South Africa for imports. A depreciation of the Namibian Dollar (**N\$**) following the depreciation of the South African Rand (**SAR**) fails to bring an edge of competitive advantage to export since the commodity market is largely price driven, instead of cost-of-goods driven¹⁵. Imports from South Africa – with a potential pass-through effect of higher import pricing from outside the Southern African Customs Union (**SACU**), where custom revenue is collected as a union and distributed based on agreement among SACU members – become more expensive and result in weakened import capacity for Namibia. Since consumption, investment, government spending and net exports are all experiencing a downturn, Namibia's economic growth prospects are not optimistic.

2. KEY FEATURES OF THE NAMIBIAN ECONOMY

i. GDP Contributors

The Namibian economy's two main pillars are the mining and fishery sectors. The mining sector, which leads Namibia's export industry and contributed 11.9 percent to the GDP at the end of 2015, will continue growing and contribute between 17 percent and 20 percent of Namibia's GDP¹⁶ when Tschudi and Husab commence production. The fisheries sector will remain strong as Namibia's biggest import growth sector was "ships and boats" in 2015, growing 108.3 percent to reach 12.075 billion United States Dollar (**US\$**)¹⁷, which will help boost Namibia's fisheries supply.

¹⁵ Commodities are food, metal and other physical substance that are traded in the Futures market. The price movement of commodities Futures reflect the impact of current news and events on commodities price in the future.

¹⁶ Interview with the Chamber of Mine, Windhoek, Interview by Haotian Zhang, 11 March 2016.

¹⁷ Barclays Research, "Sub-Saharan Africa Markets Guide 2016, Namibia."

ii. Inflation Rates

The Bank of Namibia (**BoN**) has so far successfully maintained its inflation target ranges between 3 and 6 percent. However, the international norm among central banks is to target inflation rates at a certain percentage or at a band of volatility of less than 2 percent.¹⁸ Namibia's 3 percent band of volatility for its inflation targeting is too loose to be considered a stringent target.

iii. Debt

Namibia has historically been fiscally conservative. Its debt-to-GDP ratio hovered from 20 percent to 25 percent between 2011 and 2015, with even lower levels before 2011¹⁹. In 2015, after the 750 million US\$ Eurobond issuance in October 2015,²⁰ and a series of domestic issuances, Namibia's debt-to-GDP ratio rose to 37 percent, above the 35 percent fiscal threshold set by Minister of Finance.²¹ The fundamental reason behind the recent increase in debt is that as Namibia's economy expected a slowdown, the government's primary surplus shrunk, inflation flattened and the real interest rate hiked, thereby leading to a spike in debt²².

Recommendation 1: Open access of the Eurobond prospectus to the public, and all future bond prospectuses, to ensure transparency in application of proceeds and repayment of debt.

¹⁸Global hard currencies, including USD, EUR, GBP and JPN all apply this norm. Countries in Emerging Market that focus on inflation targeting also apply such norm, including Korea, Thailand, Brazil, etc.

¹⁹ Bank of Namibia, "List of Government Bond issued", accessible <<https://www.bon.com.na/Bank/Financial-Markets/Announcement-of-new-instruments.aspx>>.

²⁰ Namibia's 750 million USD Eurobond has anticipated buyers and details on the use of its proceeds from Bloomberg, while the full content of prospectus is not available from Bloomberg.

²¹ National Budget Review 2016/17 by IPPR and ENA, Windhoek, 16 March 2016.

²² $\Delta \text{Debt} / \text{GDP} \approx \text{Beginning period Debt} / \text{GDP} (\text{nominal interest rate} - \text{inflation} - \text{growth rate}) - \text{primary surplus}$

iv. Unemployment Rate

No public information about Namibia's unemployment in 2015 is available from the National Budget Review²³, and there were no other indications of significant improvement from the 2014 level of 28.1 percent.²⁴ Barclays Research noted that one of the key challenges for Namibia in accessing more credit from the international capital market is its high unemployment rate, coupled with other problems like high-income inequality and volatile commodity prices, all of which dissuade banks from extending credit to Namibia.

v. Annual Budget 2016-2017

The most recent budget strategy for fiscal year 2016-2017 is a reflection of Namibia's fiscal priorities. Following a period of high economic growth and an expansionary budget, the Ministry of Finance has noted a smaller fiscal space, which has led to cuts in expenditure.²⁵ Civil society believes that some of the cuts are sensible while others reflect concerns that future expenditure has not been appropriately prioritized.²⁶ Notably, the Economic Association of Namibia's budget analysis, shown in Figure 2, reveals high personnel costs for a large civil service, comprising 38 percent of total expenditure. This can be compared to the development budget, which makes up only 13.7 percent of total expenditure. There is room to modify personnel expenditure by increasing efficiency and productivity, as Namibia has the sixth-highest ratio of civil service salary bills as a percentage of GDP in the world.²⁷

²³ Interview with Economic Association of Namibia, Windhoek, Interview by Amy Slipowitz, Haotian Zhang, 15 March 2016.

²⁴ As of the writing of this report, the 2015 labor force survey has yet to be published.

²⁵ "Cycle of abundant money has ended," *The Namibian* (22 March 2016), accessible <<http://www.namibian.com.na/index.php?page=read&id=38598>>.

²⁶ For example, the Economic Association of Namibia agreed with a new cap on government expenditure while criticizing cuts within the development budget ("Cycle of abundant money has ended," *The Namibian* (22 March 2016), above n 25).

²⁷ The countries ahead of Namibia, from highest, to lowest, are Zimbabwe, Lesotho, Swaziland, Mozambique, and Botswana ("Cycle of abundant money has ended," *The Namibian* (22 March 2016), above n 25; Economic Association

Simultaneously, though, the government is competing with the private sector, including mining companies, for skilled workers, with the latter able to offer higher salaries.²⁸ Skilled workers are particularly needed in departments that focus on natural resource management. For example, officials should be adequately trained to carry out effective environmental impact assessments, or set the correct total allowable catch (**TAC**) for a fish species, to better ensure that the country's natural resource stock remains sustainable.

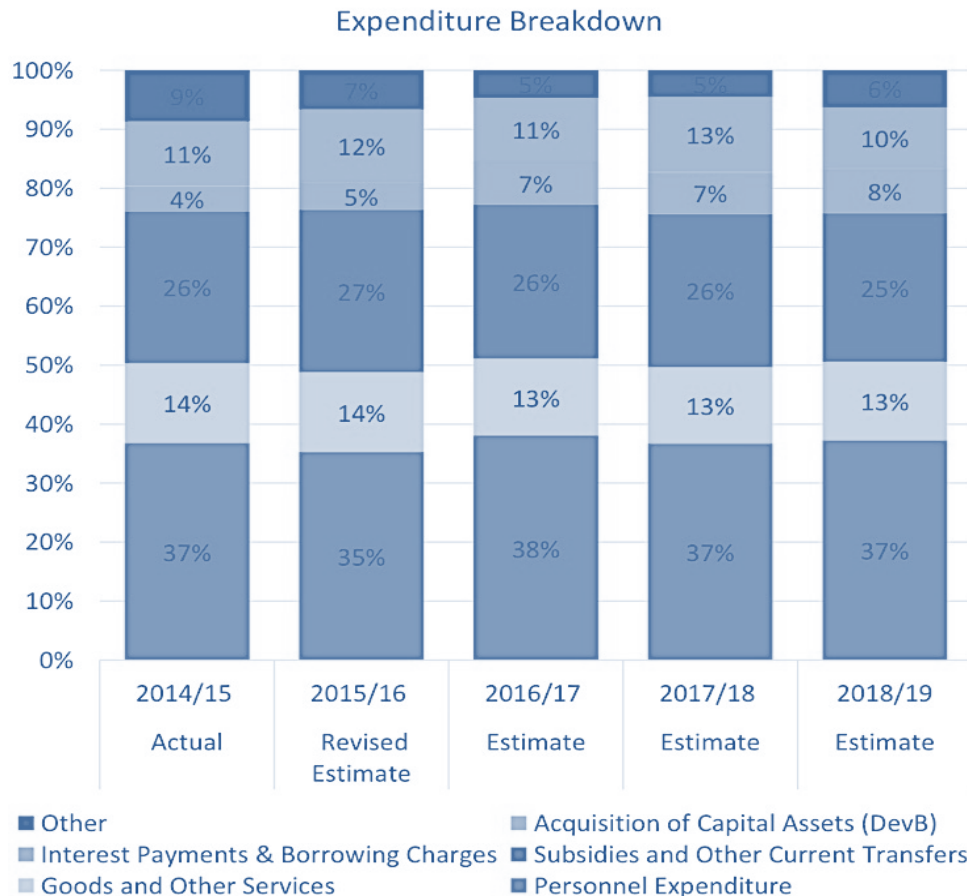


Figure 2. Namibian Budget Expenditure Breakdown²⁹

of Namibia, "The Namibian Budget 2016/17-2018/19," (Published March 2016), accessible <<http://www.ean.org.na/wp-content/uploads/2012/11/Presentation-Budget-Review-Rowland-Brown.pdf>>, p. 18.

²⁸ Interview with the National Marine Information and Research Centre, Ministry of Fisheries & Marine Resources of Namibia, Swakopmund, Interview by Caitlin O'Donnell, Amy Slipowitz, 18 March 2016.

²⁹ Economic Association of Namibia, "The Namibian Budget 2016/17-2018/19," (Published March 2016), above n 27, p. 15.

Prioritization within the development budget has been questioned. For instance, the third largest project listed pertains to defense research and development, possibly at the expense of more critical projects focused on housing and water infrastructure.³⁰

In a review of the 2016-2017 national budget in March 2016, the Minister of Finance Calle Schlettwein stated that the military was important given the history of Namibia's independence, and that instability can negatively impact the economy and thus its growth potential. However, Namibia has been independent for 26 years now and ranks 55th on the Institute for Economics & Peace's Positive Peace Index, the second-highest in Sub-Saharan Africa after Botswana, casting doubt on Minister Schlettwein's rationale.³¹ Furthermore, Namibia shares close ties to South Africa, which spent only 1.1 percent of its GDP on military expenditure compared to Namibia's 4.4 percent, making the latter the eleventh highest spender in the world and the second highest in Sub-Saharan Africa.³²

Costa Rica is a commendable example of a country that has reallocated expenditure away from defense. Its 1949 Constitution abolished the military, and the state now uses a police force to conduct internal and border security. Resources that would have been allocated to the armed forces are instead used for social purposes. While the disbanding of the military was not implemented with the explicit intention of saving money, it has, over time, become a "huge economic asset."³³

³⁰ *Ibid.*

³¹ Institute for Economics & Peace, "Positive Peace Report 2015," (Published 2015), accessible <<http://economicsandpeace.org/wp-content/uploads/2015/10/Positive-Peace-Report-2015.pdf>>, p. 73.

³² The World Bank, "Military expenditure (percent of GDP)," Data, accessible <<http://data.worldbank.org/indicator/MS.MIL.XPND.GD.ZS>>; Namibia's Military Obsession Makes No Sense," *Insight Namibia* (13 April 2016), accessible <<http://www.insight.com.na/namibias-military-obsession-makes-no-sense/>>.

³³ Alberto Trejos, "Country Role Models for Development Success: The Case of Costa Rica," (United Nations University, World Institute for Development Economics Research, 2009), accessible <<http://faculty.nps.edu/relooney/Success-CostaRica.pdf>>, p. 10.

B. MAJOR ISSUES WITHIN THE ECONOMY

1. BANK OF NAMIBIA

While the global macroeconomic environment and South Africa's slowdown are outside of Namibia's control, the BoN had an opportunity to bring about higher growth. As the central bank of the national economy, the BoN has ample monetary tools to address Namibia's credit availability, corporate cost of borrowing and foreign capital investment.

It is not at all promising for the Namibian economy to remain so highly dependent upon South Africa, which is itself an emerging economy. Namibia could explore options that involve de-pegging itself from the SAR, to reduce exposure to shocks such as high currency depreciation. For instance, Hong Kong's economy is also very dependent upon mainland China, but the Hong Kong Dollar remains pegged to the US\$, helping secure the Hong Kong Dollar's liquidity and credibility. If even the Renminbi, China's official currency (that is included in the IMF's Special Drawing Rights as one of the five global reserve currencies), fails to provide assurance to Hong Kong, then the South African Rand is not necessarily the most sustainable peg for the N\$, given its currency risk.³⁴

In addition to concerns about South Africa's economic soundness, Namibia's economy is highly 'commodity exposed' and will become even more so after more foreign mines, particularly the Husab mine, commence production. A commodity-driven economy based on exports coupled with a pegged currency is not a good combination for an economy because currency depreciation no longer remains a powerful tool to boost net exports and reduce a balance of payments imbalance.

Second, the BoN, despite being Namibia's central bank, does not function independently — that is, it does not have the autonomy to set interest rates based purely on economic

³⁴ It is highly unlikely that de-pegging will occur, given Namibia's apparent desire to maintain its close ties to South Africa.

indicators such as on price stability. After the BoN's repo rate³⁵ hike in 2015, the Ministry of Finance exerted influence on the BoN. The BoN's subsequent decision to hike the repo rate again succeeded in appeasing the current housing market demand and stock demand until more government housing plans are completed. However, it was counter-intuitive for BoN to hike the repo rate given the falling credit liquidity level. With Namibia's private and corporate credit environment largely tight, raising repo rates worsened the overall liquidity situation for the economy.

The 'economic trilemma' establishes three things: monetary autonomy on setting interest rate, free flow of capital and exchange rate pricing power cannot all coexist in balance. The presence of all three of these factors will incur severe capital inflow or outflow that leads to asset bubbles or depleted foreign reserves.³⁶ It is common to see central banks globally strive to make full use of two out of these three tools to impact the economy. In the case of BoN, its tools are unavailable or underused, so that it has largely failed to affect the economy in a positive way. With the N\$ pegged to the SAR, BoN cannot widen the spread of its repo to South Africa's repo more than 150 bps³⁷. The only tool that was adopted authoritatively is capital control, which complicates domestic individual and corporate activity to withdraw and use US\$. The automobile tax, while not a policy from BoN, was applied to dissuade luxury car purchases, transactions largely completed in US\$ and Euros. Capital control is the least preferred policy since it only incentivizes the purchase of US\$ and Euros through illegal means. More monetary authority should be given to the BoN to avoid further economic distortions from the government.

³⁵ Repo rate is the rate at which financial institutions receive overnight liquidity. It is a typical short-term funding rate in the capital market.

³⁶ Assume the international real interest rate is higher than domestic real interest rate, capital will flow out of home country and place depreciatory pressure on the home currency. If a country adopted all three things, no depreciation will be allowed on the home currency and no actions can be taken to stop capital outflow. The result will be a depleted foreign reserve.

³⁷ 1 bp = 1/100 percentage point.

Recommendation 2: The Bank of Namibia needs to be given independence to set interest rates based on domestic price stability, rather than based on another sovereign's central bank policy rate.

2. WATER SHORTAGE

Namibia's water shortage, as a result of frequent droughts, presents a significant economic risk. As mentioned in the *Economics* of this report, key sectors of the economy, particularly mining, manufacturing and construction, are heavily dependent on accessing a robust water supply, and are thus facing pressure from the rising price of water services.³⁸ To mitigate exogenous shocks to these sectors, it is therefore critical to strengthen Namibia's water infrastructure. The most recent national budget, however, does not allocate any expenditure towards water infrastructure projects until the 2017-2018 fiscal year, despite Windhoek's potential of running out of water by September 2016.³⁹ Please see the *Environment* and *Mining* sections for a detailed analysis of the water issues that Namibia is facing.

3. HUMAN CAPITAL

As noted above, a common theme regarding the Namibian economy is the country's relative weakness in human capital, particularly a shortage of specialized skill labor and overall low productivity.⁴⁰ These factors, stemming from weakness in the health and education sectors, have created obstacles to business growth.⁴¹ Consequently, highly skilled labor is relatively expensive given its short supply. Furthermore, there are obstacles to obtaining foreign work

³⁸ "Higher inflation expected this year," *The Namibian* (15 February 2016), accessible <<http://www.namibian.com/na/index.php?page=read&id=37153>>; "Water restrictions may affect economy," *The Namibian* (5 February 2016), accessible <<http://www.namibian.com/na/index.php?page=read&id=36817>>; "Not a bleak 2016," *The Namibian* (4 February 2016), accessible <<http://www.namibian.com/na/index.php?page=read&id=36760>>.

³⁹ Economic Association of Namibia, "The Namibian Budget 2016/17-2018/19," (Published March 2016), above n 27, p. 47; "Namibia: Central Towns to Run Dry By September – NamWater," *All Africa News* (13 January 2016), accessible <<http://allafrica.com/stories/201601130754.html>>.

⁴⁰ This theme emerged during interviews conducted from March 14-18, 2016 in both Windhoek and Swakopmund.

⁴¹ US Department of State, Bureau of Economic and Business Affairs, "2015 Investment Climate Statement – Namibia," accessible <<http://www.state.gov/e/eb/rls/othr/ics/2015/241676.htm>>, p. 17.

permits, making it especially difficult for investors to fill essential roles.⁴² Additional concern results from human capital within the public sector, which accounts for 25 percent of total employment and is described as “bloated and inefficient.”⁴³ These conditions combine to inhibit efficiency within both private companies, and government ministries that are mandated to regulate industry. Affected industries include mining, which relies on “knowledge workers,” including engineers, geologists, surveyors and mineral processing technicians.⁴⁴ Thus, to ensure proper management of extractive minerals, government ministries must have employees with adequate skills to regulate mining operations.

4. DIVERSIFICATION OF THE ECONOMY

i. Logistics hub

Given the mining sector’s significant contribution to the Namibian economy, the government should prioritize diversification of other sectors that are relatively less susceptible to external shocks, and move away from initiatives prioritizing natural resources. The country’s Fourth National Development Plan (**NDP4**) lists four economic priorities, the most promising of which is transforming

THE SINGAPORE MODEL

Following independence in 1965, Singapore leveraged its geography, natural harbor and stable government to cement its status as a hub for multinational corporations. Through government initiatives in strengthening and building infrastructure, establishing pioneer tax legislation and creating one-stop shopping, foreign investors and ancillary businesses, including insurance companies and financial institutions, flowed in.¹ The influx generated considerable employment opportunities supported by the government’s investment in health and education.¹ Namibia’s transformation into a logistics hub can yield similar benefits through infrastructure development, investment in human capital and curbing corruption.

⁴² *Ibid.*, p. 10.

⁴³ Shinovene Immanuel, “Public service salary probe completed,” *The Namibian* (18 June 2015), accessible <<http://www.namibian.com.na/index.php?id=138292&page=archive-read>>; African Economic Outlook, “Namibia 2015,” above n 6, p. 9.

⁴⁴ Mining Industry Human Resources Council, “Making the Grade: Human Resources Challenges and Opportunities for Knowledge Workers in Canadian Mining, Executive Summary,” (Published July 2011), <http://www.mihr.ca/en/resources/MiHR_Making_The_Grade_Summary_WEB.pdf>, p. 6.

Namibia into a logistics hub.⁴⁵ The hub would stretch from the port of Walvis Bay to the internal borders, taking advantage of expected growth on the African continent. In the long term, a logistics hub would appeal to new industries and potentially generate new sources of employment.⁴⁶ Thus far, the development of a logistics hub has manifested through the construction and upgrades of transport and port infrastructure.⁴⁷ In addition, the largest development project indicated in the 2016-2017 Budget is for railway network upgrading.⁴⁸ However, critics argue that the government still is not allocating enough expenditure towards infrastructure, such as water, roads, rails, and energy.⁴⁹

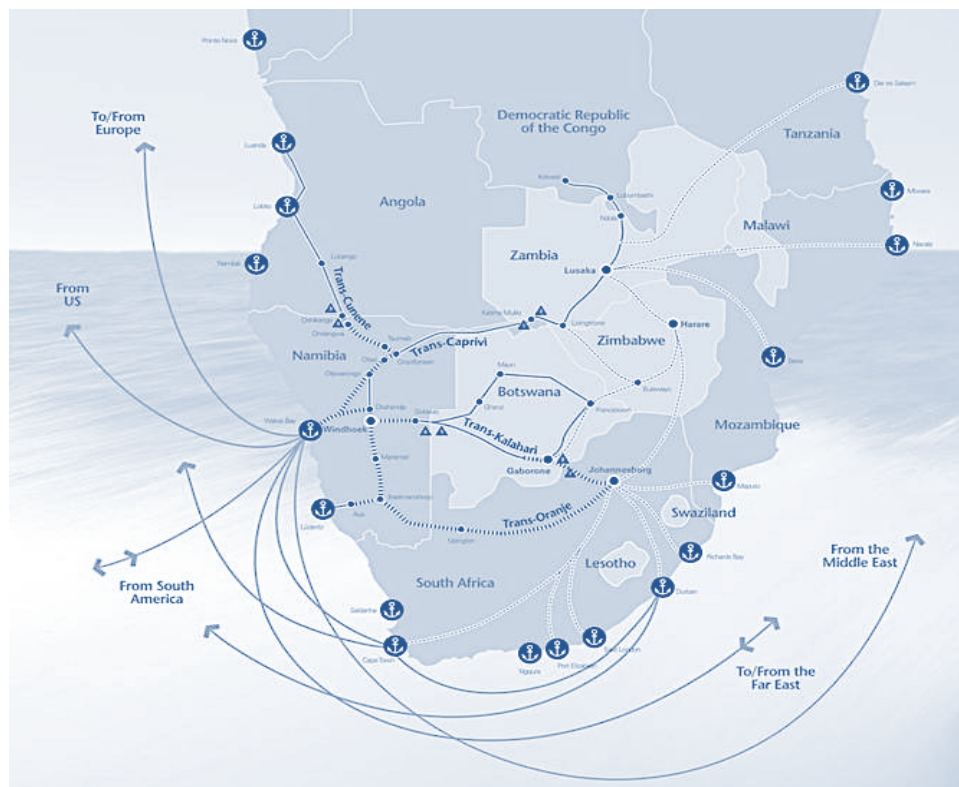


Figure 3. Namibia as a Logistics Hub
Source: <http://www.wbcg.com.na/>

⁴⁵ Office of the President of Namibia, National Planning Commission, “Namibia’s Fourth National Development Plan 2012/13 to 2016/17,” accessible <http://www.gov.na/documents/10181/14226/NDP4_Main_Document.pdf/6a57bd4f-a1ff-4aa5-9bd1-264e4a3e1e1a>.

⁴⁶ Office of the President of Namibia, “National Planning Commission, “2014/2015 Annual Report,” accessible <http://www.npc.gov.na/?wpfb_dl=231>.

⁴⁷ It should be noted that construction could be further affected by the water shortage. For example, the cited report reveals that two road upgrades could not be completed due to “water shortages and administrative obstacles.” (Office of the President, “National Planning Commission 2014/2015 Annual Report,” above n 46, p. 68-69).

⁴⁸ Economic Association of Namibia, “The Namibian Budget 2016/17-2018/19,” (Published March 2016), above n 27, p. 23

⁴⁹ *Ibid*, p. 52.

The likelihood of Namibia's success in establishing a logistics hub is debatable.⁵⁰ For instance, Namibia has a natural advantage in becoming a center for logistics, as its ports, which currently experience a higher demand than supply, are more efficient than Angola's.⁵¹ A counter argument, though, is that becoming a regional logistics hub may prove difficult given that the country is situated on the wrong side of the continent; current foreign trade in the region is focused primarily on India and China. Moreover, while numerous bays can be transformed into harbors, development would come at the cost of preserving environmentally important areas such as the Skeleton Coast National Park.⁵² Additional challenges include the ambition of every country in the region to become a logistics hub. Countering this, though, is the opinion that Namibia is "ahead of the game" in this regard.⁵³ To harness its competitive edge and minimize potential challenges, the government should focus on strengthening its infrastructure, especially through the private sector and/or public-private partnerships. A logistics hub will allow for more diversification in the economy, while strengthening the mining and fishing industries. More robust infrastructure will increase these sectors' appeal to foreign investors, as exports of extractive materials, import of capital inputs and other operating requirements will become easier to facilitate.⁵⁴

⁵⁰ This has been inferred through a series of interviews in Windhoek and Swakopmund from March 14-18, 2016.

⁵¹ Interview with Economic Association of Namibia, Windhoek, Interview by Amy Slipowitz, Haotian Zhang, 15 March 2016. Key to Namibia's competitive advantage in establishing a logistics center is the quality of its transport and communications infrastructure relative to others in the region. The Port of Walvis Bay, for example, "saves shipping companies up to five days for goods transported within the SADC region, Europe and the Americas" (Office of the President of Namibia, National Planning Commission, "Namibia's Fourth National Development Plan 2012/13 to 2016/17," above n 45, p. 84).

⁵² As noted by Institute for Public Policy Research on 10 May 2016.

⁵³ The Japan International Cooperation Agency (JICA) completed a plan, drafted at the request of Namibia's National Planning Commission, for Namibia to become a logistics hub for the region; Interview with U.S. Embassy Namibia, Windhoek, Interview by Amy Slipowitz, 14 March 2016.

⁵⁴ At the same time, to ensure a successful logistics hub, there must be a strong foundation of human capital. As addressed in earlier sections, Namibia can improve on this front. The government should work to strengthen education and build a higher skilled workforce, to support ancillary businesses required for a logistics hub, including insurance, banking, and other administrative organizations.

Recommendation 3: Given that strong infrastructure is critical for yielding maximum benefits from natural resources, the government should reallocate expenditure to better reflect priorities in building and/or upgrading rails, roads, energy, ports, water and other infrastructure.

ii. Other Key Sectors: Tourism, Agriculture, and Manufacturing

The other three key sectors of Namibia's economy, according to the NDP4, are tourism, manufacturing and agriculture. Like the logistics hub, Namibia has a natural advantage for tourism, given its national parks and relative stability. Furthermore, tourism currently has a 15.5 percent impact on GDP and comprises 19 percent of total jobs, including direct and indirect contribution to both GDP and total jobs.⁵⁵ The depreciating N\$ may also appeal to foreign visitors.

However, the advantages of the remaining sectors are not immediately apparent. Agriculture makes for difficult policymaking given Namibia's arid climate and its susceptibility to droughts.⁵⁶ The final sector, manufacturing, which focuses primarily on meat processing, fish processing, other food and beverages and mineral beneficiation,⁵⁷ has both costs and benefits: the sector has accounted for 25 percent of total exports since 2007 on average, and the NDP4 lists as one of its development strategies increasing mineral beneficiation for products including diamonds, copper, gold, uranium and zinc. It also calls for manufacturing more mining inputs, as well as promoting more agro- and fish processing.⁵⁸ However, the promotion of local mineral beneficiation and fish processing may have an adverse impact on

⁵⁵ Office of the President of Namibia, National Planning Commission, "Namibia's Fourth National Development Plan 2012/13 to 2016/17," above n 45, p. 92.

⁵⁶ African Economic Outlook, "Namibia 2015," above n 6, p. 2.

⁵⁷ In general, beneficiation refers to mineral extraction, processing, and upgrading. In Namibia, mineral beneficiation "largely represents the smelting of copper and zinc ore, and the cutting and polishing of rough diamonds" (Office of the President of Namibia, National Planning Commission, "Namibia's Fourth National Development Plan 2012/13 to 2016/17," above n 45, p. 98).

⁵⁸ Office of the President of Namibia, National Planning Commission, "Namibia's Fourth National Development Plan 2012/13 to 2016/17," above n 45, p. 98.

foreign investment.⁵⁹ An export levy bill that imposes up to a 2 percent fee on mineral commodities, fisheries, gas, crude oil and forestry products will likely be implemented later this year.⁶⁰ While Namibia should, in the long-term, focus on moving up the value chain through increased beneficiation, current investors may view this as a troubling policy shift in the short-term, especially given the forthcoming export levy bill. Therefore, this initiative should be implemented gradually to retain, and promote, investment.

Recommendation 4: As the lead stakeholder of NDP4, the Office of the President should continue diversifying mining and fishing activities to allow for more in-country processing, provided there are appropriate incentives through, for example, export processing zones (EPZs).

C. MINING SECTOR

1. OVERVIEW

Namibia's mining sector mainly consists of metals such as uranium, gold and copper. The mining industry is dominated by foreign capital — led by Husab Mine from China, Langer Heinrich from Australia, Rössing from Australia, B2Gold from Canada and Tschudi from the UK. The Husab mine is expected to contribute 5 percent to Namibia's GDP once it commences production in 2016. The Otjikoto mine held by B2Gold is expecting 1,000 ounce increase in gold production in FY 2016⁶¹ The mining industry is the economic driving force for Namibia's economy, and is expected to contribute between 17 percent and 20 percent of GDP when the three newly constructed mines reach full production.⁶²

⁵⁹ See **Section II.D.1**, Fisheries Sector: Contribution to the Economy for a brief overview of the policy's impact on the fishing industry.

⁶⁰ Chamwe Kaira, "Govt to levy unprocessed exports," *The Namibian* (28 April 2016), accessible <<http://www.namibian.com.na/Govt-to-levy-unprocessed-exports/40040/read>>.

⁶¹ Interview with the Chamber of Mine, Windhoek, Interview by Haotian Zhang, 11 March 2016.

⁶² Interview with the Chamber of Mine, Windhoek, Interview by Haotian Zhang, 11 March 2016.

2. MULTIPLIER EFFECT

The mining industry not only contributes to Namibia's GDP on its own, it has also helped create an entire supply chain that has fostered Namibia's infrastructure, industrial construction and financial service sector. Investments in maintenance and new infrastructure are needed on an ongoing basis to support the extractive activities of the mining sector. However, as Namibia's economy is facing a downturn, and the fiscal deficit is widening, the Namibian government has cut down government spending in development projects. This is in part due to pro-cyclical⁶³ policies that were executed through Namibia's golden development period of the past five years. This left limited savings to sustain proper investment in development projects⁶⁴. Further analysis of the National Budget can be found in the *Economics* section of this Report.

3. FOREIGN DIRECT INVESTMENT AND THE NEEEF

The National Equitable Economic Empowerment Framework (NEEEF) draft bill proposes to, inter alia, "bring about socioeconomic transformation in order to enhance equity, social justice and empowerment of the previously disadvantaged majority."⁶⁵ One of the bill's proposals, which has raised concern from the private sector, is to restrict new private businesses from operating unless they have at least 25 percent ownership "by a racially disadvantaged person or persons or such higher percentage as may be determined by notice in the *Gazette*."⁶⁶ This requirement may dissuade foreign investment inflows, including in the mining sector, and lead to some capital flight. Additionally, the bill in general will likely result in a significant loss of jobs for low income Namibians, as well as dis-incentivizing the creation of new businesses and thus limiting the creation of new jobs.⁶⁷ Furthermore, the policy has no additional advantages because it will only benefit current owners of capital, or

⁶³ The Namibian government launched infrastructure investment projects and housing construction projects during economic boom period.

⁶⁴ Interview with Economic Association of Namibia, Windhoek, Interview by Amy Slipowitz, Haotian Zhang, 16 March 2016.

⁶⁵ *Draft, National Equitable Economic Empowerment Bill* (2015).

⁶⁶ *Draft, National Equitable Economic Empowerment Bill* (2015).

⁶⁷ Interview with Economic Association of Namibia, Windhoek, Interview by Amy Slipowitz, Haotian Zhang, 15 March 2016.

people with access to capital.⁶⁸ Thus, “those actually in need of empowering would be unlikely to gain from the legislation” while the wealthy, albeit previously disadvantaged, Namibians would benefit.⁶⁹ The NEEEF will be discussed in more detail in Section: Mining Section of this report.

Recommendation 5: Conduct a thorough cost-benefit analysis on the NEEEF draft bill to determine its impact on promoting economic growth.

D. FISHERIES SECTOR

1. CONTRIBUTION TO ECONOMY

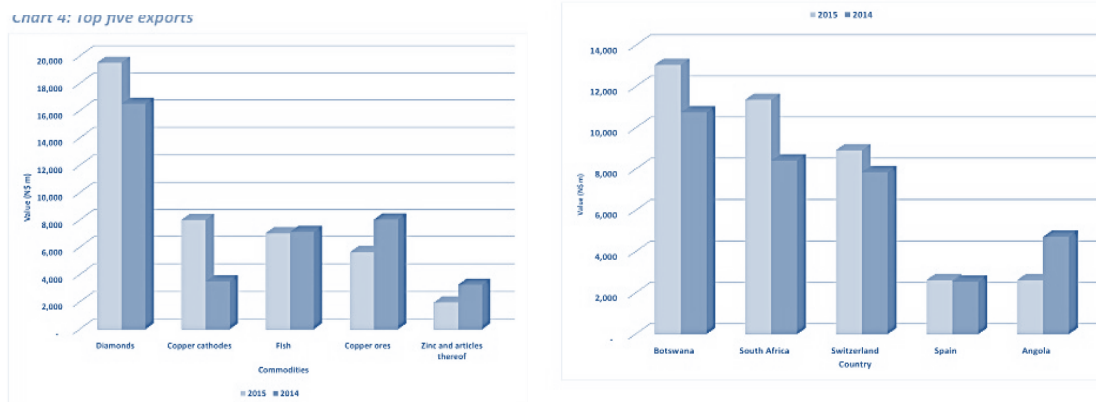


Figure 4. Namibia Statistics Agency, “Annual Trade Statistics Bulletin,” (Published 2015), accessible http://cms.my.na/assets/documents/Annual_Trade_Statistics_Bulletin_2015.pdf.

⁶⁸ Interview with anonymous source, Windhoek, 14 March 2016.

⁶⁹ Interview with Economic Association of Namibia, Windhoek, Interview by Amy Slipowitz, Haotian Zhang, 15 March 2016.

The fisheries sector is an important contributor to Namibia's economy through its impact on GDP, employment and trade.⁷⁰ For example, in terms of trade by value, fish is one of the top five export commodities, comprising 12.1 percent of total commodities exported in 2015.⁷¹ Spain is the single largest importer of these products, most of which are shipped in frozen or in chilled form.⁷² During a March 2016 review of the 2016-2017 national budget, the Minister of Finance noted the government's desire to process more fish in Namibia, rather than merely catching, freezing and then shipping the product. However, it is possible that the promotion of processing will dis-incentivize foreign companies from investing in Namibia.⁷³ As discussed earlier, in Section B.4.ii, Other Key Sectors, current investors focused on exporting raw fish for processing abroad may initially be wary of shifting these processes in-country, even when the export levy bill goes into effect. At the same time, though, the push for more processing is cited as one of the drivers in boosting the manufacturing sector's contribution to GDP.⁷⁴

Going forward, the key species' ecosystems have a stable outlook; growth in the sector will also be driven by lower costs due to a reduction in diesel prices and higher export earnings given the depreciating Namibian Dollar.⁷⁵ Hake, as the most valuable species for commercial fisheries, will play a major role in the sector's overall economic contribution. With an increase in the TAC for hake in 2015, the sector is expected to grow by 1.6 percent in 2015 before declining to 0.7 percent growth in 2016, following a reduction in the hake TAC, and

⁷⁰ There is a lack of updated information on the sector's contribution to the macroeconomy; as discussed on page 4 fishing and fish processing on board contributed a preliminary estimate of 2.9 percent of GDP in 2015. Employment contribution is included within the wider agriculture sector; in 2012, agriculture, forestry, and fishing made up 31.4 percent of total employment (Namibia Statistics Agency, "The Namibia Labour Force Survey 2014 Report" (Published March 2015), accessible <<http://cms.my.na/assets/documents/9b8e77842e3dec459407c2a76b9d79ab.pdf>>, p. 9). However, another report states that the sector increased its labor demand to 14,823 people in 2013, up from 10,894 in 2012, and is an important employer of youth (Office of the President of Namibia, National Planning Commission, "2014/2015 Annual Report," above n 46, p. 37).

⁷¹ Namibia Statistics Agency, "Annual Trade Statistics Bulletin," (Published 2015), accessible <http://cms.my.na/assets/documents/Annual_Trade_Statistics_Bulletin_2015.pdf>.

⁷² Confederation of Namibian Fishing Associations, "Market Access to the EU for the Namibian Fisheries Sector," (Published November 2012), accessible <http://trade.ec.europa.eu/doclib/docs/2013/january/tradoc_150223.pdf>, p. 6

⁷³ Interview with Economic Association of Namibia, Windhoek, Interview by Amy Slipowitz, Haotian Zhang, 15 March 2016.

⁷⁴ African Development Bank, "Namibia Country Strategy Paper 2014-2018," (2014), above n 8, p. 2

⁷⁵ Bank of Namibia, "Economic Outlook Update," (Published December 2015), accessible <<https://www.bon.com.na/CMSTemplates/Bon/Files/bon.com.na/f4/f41c7fe8-c53d-40a2-b0f5-dff7399a724c.pdf>>, p. 16.

thus in total output.⁷⁶ Additional consideration should be given to the fishing sector's exposure to external risk: for instance, due to the slowdown in European markets, fishing and fish processing contracted in 2014, as did total investment in 2013.⁷⁷

2. REVENUE

As detailed in Section X: Fisheries section of this report, the Ministry of Fisheries & Marine Resources charges various fees and levies to commercial fisheries. The income garnered from these activities, though, is negligible relative to overall government revenue. An analysis of the most recent national budget, as shown in Table 1 revealed that the estimated revenue from all fishing fees aggregates to only 0.21 percent of total revenue for 2016-2017, 0.08 percent for 2017-2018, and 0.20 percent for 2018-2019.

Table 1. Estimated Fisheries Revenue, 2016-2019

Estimated Fisheries Revenue, 2016-2019 (as a percentage of total revenue) ⁷⁸				
<u>Revenue Type</u>	<u>Source</u>	<u>2016-17</u>	<u>2017-18</u>	<u>2018-19</u>
Non-tax revenue	Hunting and fishing licenses	0.0021%	0.0020%	0.0026%
	Fishing boat licenses	0.0003%	0.0003%	0.0004%
	Quota fees	0.2124%	0.0814%	0.1962%
Total		0.21%	0.08%	0.20%

⁷⁶ Ministry of Finance of Namibia, "Fiscal Policy Strategy for the 2016/17 to 2018/19 Medium-Term Expenditure Framework," (Published February 2016), accessible <<http://www.mof.gov.na/documents/27827/235390/2016+Fiscal+Strategy.pdf/9fe84546-c11b-4aba-8a22-103bcdacf257>>, p. 33

⁷⁷ Office of the President of Namibia, National Planning Commission, "2014/2015 Annual Report," above n 46, p. 37

⁷⁸ Ministry of Finance of Namibia, "Estimates of Revenue, Income and Expenditure 01 April 2016 to 31 March 2019," accessible <<http://www.mof.gov.na/documents/27827/235390/estimates.pdf/dd4590ce-3208-4f0a-a100-64184cd9da2d?version=1.0>>, p. 10-11.

E. CONCLUSION

While Namibia appears to be economically stable, making it an attractive destination for foreign investment, there are a number of areas which can be improved upon in order to maximize gains from both the mining and fisheries sectors. These industries, dependent on effective natural resource management, are notable given their contribution to GDP, employment, total exports, investment, and government revenue. Currently, though, Namibia faces challenges within the mining and fisheries sectors through areas such as the water supply and other types of infrastructure, human capital, expenditure priorities, and macroeconomic policies, making it more difficult to fully, and sustainably, take advantage of the country's natural resources. Key to improvement is, inter alia, a commitment to infrastructure investment and a review of the relevant policies' impacts on economic growth.

GOVERNANCE AND MEDIA

A. OVERVIEW OF GOVERNANCE

According to comparative rankings, Namibia enjoys a higher standard of governance than other Sub-Saharan countries, which is one of the main reasons for its robust economic growth.⁷⁹ Namibia has been endowed with vast natural resources and the extractive industry has been the engine of economic growth. The African Development Bank has highlighted that deeper structural reforms are required to intensify added value in agriculture and broaden non-mineral diversification.⁸⁰ Diversification is important not just in the context of economic resilience, as explained previously in Section X: Economics Section of this Report, but also in the context of overall structural development and reduction of economic and social inequality.

The population places high levels of trust in the government and this is reflected in the consistent support of the ruling party in the elections.⁸¹ But the performance of a government is only as good as the benefits it confers upon its citizens. Namibia's progress in the Human Development Index (**HDI**) compared to its regional counterparts such as Botswana and Mauritius, that have enjoyed similar levels of economic growth and good governance highlights that a policy shift is needed to ensure that economic prosperity translates into better living standards for the people.⁸²

⁷⁹ Afro Barometer, Data Analysis, R6 2014/2015, Country : Namibia, "Institutions and Leaders", (2015), accessible <<http://afrobarometer.org/online-data-analysis/analyse-online>>.

⁸⁰ African Development Bank (Martha Phiri) and United Nations Development Programme (UNDP) (Ojijo Odhiambo), "Namibia 2015, African Development Bank Economic Outlook" (2015), accessible <http://www.africaneconomicoutlook.org/fileadmin/uploads/aeo/2015/CN_data/CN_Long_EN/Namibia_GB_2015.pdf>.

⁸¹ Afro Barometer, Data Analysis, R6 2014/2015, Country : Namibia, "Institutions and Leaders", (2015), accessible <<http://afrobarometer.org/online-data-analysis/analyse-online>>.

⁸² United Nations Development Programme (UNDP), "Briefing note for countries on the 2015 Human Development Report", (2015), accessible <http://hdr.undp.org/sites/all/themes/hdr_theme/country-notes/NAM.pdf>.

1. INEQUALITY

Namibia has been described by UNDP as a “middle-income country with one of the most unequal income distributions in the world”⁸³. While the country’s economy has grown over the past 26 years, the population still suffers from acute economic inequality.⁸⁴ Such high levels of inequity are unhealthy for lasting development.⁸⁵

It is important to note that the government has been targeting poverty and has undertaken major development initiatives recently. However, even though absolute poverty has been reduced, inequality remains consistently high. Hence, priorities should be set using holistic development indicators such as Human Development Index, GINI coefficient, etc. as well as the qualitative assessment of wellbeing of people by independent observers such as UNDP and other NGOs. Absolute poverty should not be applied as the only policy standard. The fact that benefits of the economic expansion are disproportionately distributed amongst the population highlights the need for targeted measures to adjust the income distribution.

Sources of wide-scale socio-economic inequity can be partly traced to sectoral differences. 31 percent of the workforce is engaged in agriculture, forestry or fishing,⁸⁶ which typically provides low-skilled and low-earning jobs in rural areas, while the sector only contributes about 7.1 percent to the GDP.⁸⁷ Meanwhile, the mining sector contributes around 11.9 percent⁸⁸ to the GDP and employs only 2 percent.⁸⁹ The situation is similar for higher earning sectors like manufacturing and financial services that employ less than 7 percent in

⁸³ United Nations Development Programme (UNDP), “Understanding Poverty Data in Namibia”, (2016) accessible <<http://www.na.undp.org/content/namibia/en/home/ourwork/povertyreduction/successstories/undrstndngpovinNam.html>>.

⁸⁴ Office of the President of Namibia, National Planning Commission, “A Review of Poverty and Inequality in Namibia” (October 2008), accessible <http://www.undp.org/content/dam/undp/documents/poverty/docs/projects/Review_of_Poverty_and_Inequality_in_Namibia_2008.pdf>.

⁸⁵ UN Special Rapporteur on extreme poverty, Magdalena Sepúlveda highlighted this after her fact-finding mission to Namibia in 2012: “Namibia must bridge yawning gaps in inequality, says UN independent human rights expert”, *UN News Centre* (8 October 2012), accessible <<http://www.un.org/apps/news/story.asp?NewsID=43230#.VxIlxfkrIdU>>.

⁸⁶ Namibia Statistics Agency, “The Namibia Labour Force Survey 2014 Report” (March 2015), above n 70.

⁸⁷ United Nations Food and Agriculture Organization (FAO), “Namibia at a glance” (2016), accessible <<http://www.fao.org/namibia/fao-in-namibia/namibia-at-a-glance/en/>>

⁸⁸ *Ibid.*

⁸⁹ Namibia Statistics Agency, “The Namibia Labour Force Survey 2014 Report” (March 2015), above n 70.

total, while the rest of the population is engaged in mostly low-income services sector.⁹⁰ Additionally, the population is geographically dispersed, with the majority living in underdeveloped rural areas engaged in low-skilled activities.⁹¹ In this context, greater focus should be on the sectors that affect most people. Efforts to modernize primary sector activities such as the agricultural industry are part of President's Harambee Prosperity Plan.⁹²

In this situation, it becomes the responsibility of government to ensure that benefits of economic growth are shared proportionally. The government needs to do more to ensure that low-income earners do not suffer from inadequate social services. The first step is investing in social welfare and capacity-building sectors such as healthcare, education, unemployment benefits, skill building employment services and social infrastructure to improve the fundamentals of the economy. By investing in these sectors the state can ensure that the social effects of the inequality are minimized. Investment in capacity building such as education and technology sectors, particularly aimed at modernizing the primary industries, will increase the skill level of the workforce and strengthen the foundations of the society. Special efforts should be made so the development and welfare programs are designed to have increased geographical access to adequately cover dispersed population.

It is important to note that the current administration has taken positive steps to address this area. The recent budget, despite overall spending cuts, shows increased allocation for public services and education.⁹³ Nevertheless, the Budget is also characterized by reduced expenditure for vital sectors like 'urban and rural development', 'agriculture, water and forestry' and 'labour and social welfare'.⁹⁴

⁹⁰ *Ibid.*

⁹¹ Urbanization in Namibia stands at 41 percent after a significant rise over the past decade: see United Nations, Department of Economic and Social Affairs (DESA), "World Urbanization Prospects 2014", (2014), accessible <<http://esa.un.org/unpd/wup/Country-Profiles/>> .

⁹² Office of the President of Namibia, "Harambee Prosperity Plan 2016/17-2019/20", accessible <<http://www.op.gov.na/documents/84084/263874/HPP+page+70-71.pdf/3a9241a2-2f17-4626-a4c4-56ab30aba0e4?version=1.2>>, especially "Chapter 5: Social Progression."

⁹³ Price Waterhouse Coopers, "Road to Prosperity: Namibia Budget Review 2015/2016", (2016), accessible <https://www.pwc.com/na/en/assets/pdf/budget_review_dinner_2015_-_brochure.pdf>

⁹⁴ *Ibid.*

Recommendation 6: The government should focus on reducing economic inequality, not just by focusing on absolute poverty reduction, but also through investing in employment generating sectors and improving delivery of welfare services like healthcare and education.

2. GOVERNMENT CAPACITY

Namibia's civil service staff has been consistently depleting over the years. According to the Public Service Commission, almost 8 percent of employees resigned in 2013.⁹⁵ The worst affected sectors were health and education, compounding the government's challenges in addressing welfare and service delivery issues. While the scale of the problems is increasing, the capacity to expand is limited. Human resource shortages are prevalent across all sectors. This is partly a consequence of the small population with high levels of inequality and skill shortages that keep employment opportunities out of reach for a significant portion of the population.⁹⁶ The situation was highlighted in the National Human Resources Plan 2010-2025, which proposes targeted training programs for unemployment and skill deficit.

The other aspect of the problem is anticipation of the scale of the demand for government services and adequate future planning.⁹⁷ As a result of economic development and subsequent urbanization following independence, the demand for government services increased. As Figure 5 shows, growth after independence was highly volatile. This volatility made it harder to adapt to the growth. This can be seen in the case of services directly linked to the economy, such as energy infrastructure, which is currently experiencing supply shortages.⁹⁸ These shortages have been attributed to increasing demand and supply shortages

⁹⁵ "Over 5 500 quit civil service", *New Era*, (20 February 2015), accessible <<https://www.newera.com.na/2015/02/20/67271/>>.

⁹⁶ Namibia Statistics Agency, "The Namibia Labour Force Survey 2014 Report" (March 2015), above n 70.

⁹⁷ Take the example of National Petroleum Industry, the Managing Director Obeth Kandjoze, noted that the economy has grown fifteen-fold and the existing model does not fit its requirements: Lea Thompson, "Namibia Leaders Look to San Antonio for Investment", *Rivard Report* (19 September, 2015) <<http://therivardreport.com/namibia-leaders-look-to-san-antonio-for-investment/>>.

⁹⁸ Ndama Nakashole, "Namibia Struggles With Energy Demand", *The Namibian*, (30 October 2015), accessible <<http://allafrica.com/stories/201510301014.html>>.

in South Africa, from whom Namibia already imports 25 percent of its electricity. However, the fact remains that only 47.3 percent (2012) of the population has access to electricity. With growing urbanization and expanding economic activity, demand will continue to increase.^{99 100} This highlights that long term future planning with a less reactive and a more proactive approach is required to adequately respond to high variance in growth rates.



Figure 5. Namibia GDP Annual Growth Rate

Recommendation 7: The government should undertake long-term capacity planning to adapt to economic expansion. Skill-based programs aimed at structural improvement of the labor force should be introduced to increase human resource capacity in the country.

⁹⁹ World Bank, World Development Indicators, “% Access to Electricity”, (2016), accessible <<http://data.worldbank.org/indicator/EG.ELC.ACCS.ZS?display=graph>>

¹⁰⁰ *Ibid.*

3. TRANSPARENCY AND ACCOUNTABILITY

Transparency in government has been a high priority for President Geingob. The Harambee Plan recognizes transparency as a major tenet of effective governance. The Plan includes several measures to make government more transparent including a policy to standardize and update government websites by July 2016, Electronic Procurement system by December 2016 and a Whistle Blowers Protection Act by September 2016. In addition, the government intends to include civilian feedback through an annual citizen satisfaction survey and a mid-year ad hoc feedback mechanism¹⁰¹. The government has also committed to increase public access to information though this commitment is restricted to what government deems to be the ‘permissible’ level of access.¹⁰²

Implementation of these measures is vital to increasing accountability and ensuring that government resources are effectively used to provide services needed by citizens. Moreover the data collection and civilian feedback is crucial for formation of prudent policy and its subsequent evaluation as it helps identify areas of most immediate need. According to the World Bank, Namibia’s data collection capacity falls far behind the average for upper-middle-income countries, as well as Sub-Saharan African developing countries.¹⁰³ Thus, there is a pressing need for these measures to be effectively implemented.

Over the past few years, monitoring and evaluation of staff has been increased progressively throughout the government. The new performance agreements are a positive step toward creating greater accountability and a performance-based culture throughout the government. Nevertheless, efforts are needed for better utilization of the performance information. Government should improve the publication of the performance agreements. In 2016, after being reviewed by the President’s office, these agreements were made public. However, they were never published online and were only available at the PM’s offices at the Parliament

¹⁰¹ Republic of Namibia, Harambee Prosperity Plan 2016/17-2019/20, above n 92, “Chapter 3: Effective Governance and Service Delivery”, p. 20.

¹⁰² *Ibid*, p. 18.

¹⁰³ World Bank, World Development Indicators, “Overall level of statistical capacity”, (2016), accessible <<http://data.worldbank.org/indicator/IQ.SCI.OVRL/countries/NA-ZF-XT?display=graph>>

Building from 8h00 until 17h00 on weekdays.¹⁰⁴ It is important to note that the performance agreements are not accompanied by a reward or punishment mechanism to incentivize good performance and discourage inefficiency. In order to create an effective performance-based culture the government needs to integrate performance with incentives.

4. CONFLICT OF INTEREST

President Geingob has demonstrated his commitment to transparency by declaring his and his family's assets.¹⁰⁵ This gesture was applauded and generated calls for other politicians to follow suit. However, that has proved to be a much more difficult task as the National Assembly is trying to create a comprehensive system for asset declaration that is acceptable to the parliamentarians.¹⁰⁶ As of the time of writing Members of Parliament have managed to achieve the consensus. The inability to identify and prevent possible conflict of interest poses a major issue for effective governance. An effective system of asset disclosures would be a step in the right direction. But there is also a need for comprehensive legislation regarding conflict of interest issues. Current coverage of conflict of interest is scattered over provisions in Constitution of Namibia, 1990 and Public Office-Bearers Commission Act, 2005, the Public Service Act, 1995 and the Powers, Privileges and Immunities of Parliament Act, 1996.¹⁰⁷ Consolidated legislation would help promote greater transparency.

Recommendation 8: The government should continue its drive to increase accountability through transparency. In this context, the government should introduce the legislation promised in the Harambee Prosperity Plan, and, streamline

¹⁰⁴ Ndanki Kahiurika and Tuyeimo Haidula, "Performance agreements made public", *The Namibian*, (25 January 2016), accessible <<http://www.namibian.com.na/index.php?page=archive-read&id=146552>>.

¹⁰⁵ President Hage G. Geingob, "Declaration Of Personal Assets By His Excellency Dr Hage G. Geingob And Madam Monica Geingos President And First Lady Of The Republic Of Namibia", (May 20 2015), accessible <<http://www.gov.na/documents/10181/22710/DECLARATION+OF+PERSONAL+ASSETS+BY+HIS+EXCELLENCY+DR+HAGE+G.+GEINGOB+AND+MADAM+MONICA+GEINGOS+PRESIDENT+AND+FIRST+LADY+OF+THE+REPUBLIC+OF+NAMIBIA/0cada7a5-e38a-44ab-9b80-33777fb5fd84>>.

¹⁰⁶ Theresia Tjihenuna and Ndanki Kahiurika, "Pressurise ministers to declare assets," *The Namibian* (21 May 2015), accessible <<http://www.namibian.com.na/index.php?id=137135&page=archive-read>>

¹⁰⁷ Transparency International, "FAQs on corruption" (2015), accessible <http://www.transparency.org/whoweare/organisation/faqs_on_corruption>

conflict of interest laws though consolidated legislation. In addition, government needs to introduce access to information legislation and ensure all government websites are comprehensive and up to date.

B. CORRUPTION

1. CORRUPTION IN NAMIBIA

Corruption is generally understood to be “the abuse of entrusted power for private gain”.¹⁰⁸ Corruption harms economies by reducing government revenues, undermines the delivery of government services, weakens democracy and the rule of law, and even threatens human security and the environment.¹⁰⁹ Corruption takes many forms. For the purposes of this paper, a useful distinction can be drawn between petty corruption, which can be defined as the “everyday abuse of entrusted power by low- and mid-level public officials in their interactions with ordinary citizens...”¹¹⁰ and grand corruption, which is “acts committed at a high level of government that distort policies or the central functioning of the state, enabling leaders to benefit at the expense of the public good”.¹¹¹¹¹²

Namibia fares better on international rankings of corruption than most of its neighbors in sub-Saharan Africa.¹¹³ In 2015, Namibia ranked forty-fifth out of a hundred and sixty eight countries in Transparency International’s Corruption Perception Index with a score of fifty-three.¹¹⁴ Namibia was ranked fifth in sub-Saharan Africa on the Ibrahim Index of

¹⁰⁸ World Bank, “Helping Countries Combat Corruption: The Role of the World Bank”, accessible <<http://www1.worldbank.org/publicsector/anticorrupt/corruptn/cor02.htm> >.

¹⁰⁹ *United Nations* General Assembly Resolution, *United Nations Convention Against Corruption*, A/58/422 (31 October 2003), accessible <http://www.refworld.org/docid/3b00f22544.html> Foreword (iii).

¹¹⁰ Transparency International, “FAQs on corruption” (2015), above n 107.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ By its very nature as a secretive act corruption is difficult to measure, and any study that attempts to compare relative levels of corruption in different countries should be treated cautiously.

¹¹⁴ Transparency International, “FAQs on corruption” (2015), above n 107.

Governance, with a score of 70.4.¹¹⁵ And according to the 2015 Global Corruption Barometer, 7 percent of Namibian public service users surveyed had paid a bribe in the preceding twelve months, well below the regional average in sub-Saharan Africa of 22 percent.¹¹⁶ Despite this, corruption remains a significant concern in Namibia. The 2015 Global Corruption Barometer found that 63 percent of Namibians surveyed thought that corruption had increased in the past year (compared to the African continental average of 58 percent).¹¹⁷ Many stakeholders interviewed by the authors agreed with this perception, with several expressing real concern about Namibia's corruption trajectory. According to Graham Hopwood of IPPR, "[t]he perception about Namibia arising from these various surveys and rankings is that while corruption is not endemic in Namibia, it is still a serious problem which has the potential to grow apace unless firm action is taken".¹¹⁸ Evidence of corruption among politicians and public servants is constantly reported in the Namibian media.¹¹⁹ Specific examples of corruption in the extractives and fisheries sectors will be discussed later in this report within the *Mining* and *Fisheries* sections of this Report respectively. International experience from a range of countries, such as Singapore, has shown the strong correlation between reduced corruption and development;¹²⁰ as such, combating corruption is essential if Namibia is to reach its development potential.

2. NAMIBIA'S EFFORTS TO COMBAT CORRUPTION

i. Legislative and Institutional Framework

The heart of Namibia's anti-corruption framework is the Anti-Corruption Act, 2003 (**ACA**). The ACA allows for the establishment of the Anti-Corruption Commission (**ACC**) and

¹¹⁵ Mo Ibrahim Foundation, "IIAG Data Portal" (2015) accessible <<http://www.moibrahimfoundation.org/iiag/data-portal/>>

¹¹⁶ Transparency International, Coralie Pring, "People and Corruption: Africa Survey 2015" (2015), accessible <http://www.transparency.org/whatwedo/publication/people_and_corruption_africa_survey_2015>, p.14.

¹¹⁷ *Ibid.*

¹¹⁸ Institute for Public Policy Research (IPPR), Graham Hopwood, "Namibia and the United Nations Convention Against Corruption," (2013), accessible <http://www.ippr.org.na/sites/default/files/undp_na_demgov_UNCAC%20Gap%20Analysis%20report.pdf>, p.8.

¹¹⁹ See, for example, Insight Magazine's Corruption Tracker; and regular reporting by *The Namibian*.

¹²⁰ Jenik Radon, "Namibia as the Singapore of Southern Africa," *The Namibian* (19 June 2015), above n **Error! Bookmark not defined.**; OECD, "Issues Paper on Corruption and Economic Growth," accessible <<http://www.oecd.org/g20/topics/anti-corruption/Issue-Paper-Corruption-and-Economic-Growth.pdf>>.

criminalizes a number of acts. The ACC is a statutory agency with primary responsibility for combating and preventing corruption in Namibia, as well as educating the public.¹²¹ The ACC currently has ninety-eight staff, although not all of these are directly responsible for investigations. The head of the ACC is appointed by the president subject to National Assembly approval for a period of five years, which can be renewed.¹²² Because the ACC acquired powers that were originally under the jurisdiction of the Ombudsman, the Constitution was amended in 2010 to include an explanation of the role of the ACC.¹²³



Namibia Capstone Adviser and Team Members with ACC Officials

When the ACC has finished investigating a corruption allegation, it can refer the case to the Office of the Prosecutor-General, which has responsibility for prosecution of corruption as well as other crimes. Other key institutions involved in fighting corruption in Namibia are the Prime Minister's Office, the National Assembly, the Ministry of Justice, the Namibian Police Force, the Public Service Commission, the Financial Intelligence Centre (**FIC**) and the judiciary.¹²⁴ Namibia also has a number of other statutes that support its anti-corruption

¹²¹ Anti-Corruption Commission, "About" (2015), accessible <<http://www.accnamibia.org/about>> .

¹²² *Anti-Corruption Act (2003)*, ss 4(1) and 7(1).

¹²³ *Constitution of the Republic of Namibia (1990)*, Article 94A.

¹²⁴ United Nations Office on Drugs and Crime (UNODC), "Country Review Report of the Republic of Namibia" (2016), p. 3.

efforts, including the Prevention of Organised Crime Act, 2004; the Financial Intelligence Act, 2012; the Criminal Procedure Act, 1977; the Banking Institutions Act, 1998; the Public Service Act, 1995; and the Companies Act, 2004. The Public Procurement Act, 2015 was recently passed, which seeks in part to address concerns about corruption in tendering.

ii. Issues with implementation of the anti-corruption framework in Namibia

a. *Definition of Corruption and Mandate of the ACC*

A key criticism of Namibia's anti-corruption efforts was that the ACC's mandate — investigating any of the offences listed in Chapter 4 of the ACA, which sets out “Corrupt Practices and Penalties” — is too narrow to pursue many corrupt acts that are perceived to be occurring in Namibia. The practices that many stakeholders are concerned about, such as the broad discretion used in awarding licenses, and the awarding of jobs through patronage relationships, are ironically not illegal under the law and thus the ACC cannot investigate them.

Efforts to determine what does and does not constitute corruption in Namibia became more difficult in 2011 due to a High Court decision. “Corruptly” is defined in the Act as meaning “in contravention of or against the spirit of any law, provision, rule, procedure, process, system, policy, practice, directive, order or any other term or condition pertaining to – (a) any employment relationship; (b) any agreement; or (c) the performance of any function in whatever capacity”.¹²⁵ In 2012, the High Court of Namibia held that this definition was “unduly vague” and failed to “meet the text of indicating with reasonable certainty” what was required of those bound by it.¹²⁶ On this basis, the definition was struck down as not according with the constitutional requirement of legality.¹²⁷ The judge held that the act still

¹²⁵ *Anti-Corruption Act (2003)*, s 32.

¹²⁶ *Teckla Lameck and Jerobeam Mokaxwa v Namibia*, A 54/2011 (High Court of Namibia, 20 February 2012), accessible <<http://www.saflii.org/na/cases/NAHC/2012/31.pdf>> , p. 46.

¹²⁷ “Namibia High Court declares anti-corruption act provision unconstitutional,” *Global Legal Monitor* (23 February 2012), accessible <<http://www.loc.gov/law/foreign-news/article/namibia-high-court-declares-anti-corruption-act-provision-unconstitutional/>>.

has legal effect, but where the word “corruptly” appears in the legislation, it is to be interpreted in accordance with its “ordinary meaning” rather than with reference to the legislation.¹²⁸ Stakeholders agreed that this was the current state of the law in Namibia.¹²⁹ However, as there no agreement between experts on what “corruption” is, this legal principle could have the potential to be problematic to apply in practice.¹³⁰

Recommendation 9: The ACA should be amended to clarify the definition of “corruptly”.

b. Gaps in Supporting Legislation

Apart from the gaps in the ACA (proposed legislative changes to which are enumerated in the Namibia Anti-Corruption Strategy 2016-2019),¹³¹ stakeholders expressed concern about legislative gaps in the framework that supports the ACA (for example, the Criminal Procedure Act, 1977).¹³² As discussed later in this Report, Namibia’s lack of whistleblower protection and access to information legislation were also seen to be problematic from the perspective of fighting corruption. Amending legislation is no quick process — indeed, the introduction of an Access to Information Act has been the subject of discussion in Namibia for over a decade now. But the Geingob government has shown itself to be committed to the reform of essential laws, for example, with the introduction of the new Public Procurement Act, 2015.¹³³ Hopefully, this dedication to delivering on legislative reform priorities will continue over the course of the Geingob presidency to address the supporting legislation required to effectively combat corruption in Namibia.

¹²⁸ *Teckla Lameck and Jerobeam Mokaxwa v Namibia*, above n 126, p 48.

¹²⁹ Anti-Corruption Commission, *National Anti-Corruption Strategy and Action Plan: 2016-2019*, p. 8.

¹³⁰ Leslie Holmes, *Corruption: A Very Short Introduction* (Oxford University Press: 2014).

¹³¹ Anti-Corruption Commission, *National Anti-Corruption Strategy and Action Plan: 2016-2019*, above n 129, p. 25.

¹³² Interview with the Office of the Prosecutor-General, Windhoek, 18 March 2016; Interview with the Anti-Corruption Commission of Namibia, Windhoek, 15 March 2016.

¹³³ Institute for Public Policy Research (IPPR), Frederico Links, “The Public Procurement Bill: A lot of good, some significant bad, but certainly not ugly,” (Special Briefing Report No. 9, 2015) < http://www.ippr.org.na/sites/default/files/Special_Briefing_no_9.pdf > p.17.

Recommendation 10: The government should review the need for legislative reform in the area of anti-corruption and should set clear priorities for necessary reforms.

c. Failure to Dis-incentivize Corrupt Practices

Another issue raised by civil society stakeholders was that the anti-corruption authorities have not succeeded in dis-incentivizing corrupt practices. Stakeholders have leveled criticisms including that anti-corruption efforts are focused on minor offenders and not the so-called “big fish”; sentences are too light, with those convicted rarely serving jail time; and a lack of political repercussions in the case of corruption convictions. In the extreme example, Members of Parliament convicted on multiple counts of corruption and issued fines remain in office, as there is no prohibition against holding office unless you have been sentenced to more than twelve months imprisonment.¹³⁴ The most common criticism was that even when acts of corruption are exposed and/or reported to the ACC for investigation, they do not result in prosecution.

As can be seen from Figure 6, the vast majority of the 4,740 investigations undertaken or considered by the ACC between 2009 and 2013 did not result in a conviction.¹³⁵ When asked about this issue, the agencies with responsibility for implementing the anti-corruption agenda noted the unrealistic expectations of the public, resource constraints, and the difficulty of securing the required level of evidence for

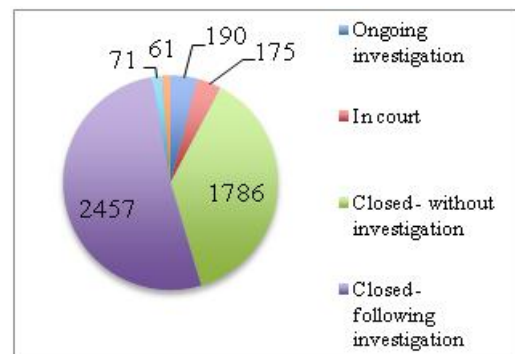


Figure 6. Outcome of Anti-Corruption Commission Investigations 2009-2013

¹³⁴ *The Constitution of the Republic of Namibia (1990)*, Article 47; “Corruption convict heads to Parliament”, *Namibian Sun*, (20 January 2015), accessible <<http://www.namibiansun.com/politics/corruption-convict-heads-parliament.75802>> .

¹³⁵ United Nations Office on Drugs and Crime (UNODC), “Country Review Report of the Republic of Namibia” (2016), p. 214-215.

conviction.¹³⁶

While there is undoubtedly truth in these concerns, many stakeholders also claim that there is simply a lack of political will for change to be effected. This is exemplified by the delays in adopting the Namibian Anti-Corruption Strategy 2016-2019 (**Strategy**). The Strategy, which lays out a whole-of-government approach to “develop, establish and maintain an effective system of integrity, transparency, ethics and accountability in all sectors of society in Namibia”,¹³⁷ is yet to be finalized despite the process having been initiated in 2013.¹³⁸ Civil society actors interviewed expressed concern about this delay.¹³⁹

The Geingob government has made positive statements about the importance of eliminating corruption. In the 2015 State of the Nation address, Geingob stated that “As a rules-based nation, we must capacitate and allow our institutions such as the Anti-Corruption Commission, the Namibian Police and our Courts to investigate and prosecute cases of corruption without fear or favor”.¹⁴⁰ This is a laudable position, and there are certain steps that the government could take to demonstrate that the stated commitment to pursuing a strong-anti-corruption agenda is genuine. The Strategy— now over a year overdue — should be finalized and made public on the ACC website. Once public, efforts should be made to integrate it into national development plans and strategies. Further, a number of stakeholders raised concerns that the accountability agenda had been reprioritized due to a focus on poverty eradication.¹⁴¹ This is short-sighted given that corruption is a key driver of poverty, and a failure to dis-incentivize corruption may mean the government is missing out on badly needed revenue. The example of Singapore shows the significant difference that tackling

¹³⁶ Interview with the Office of the Prosecutor-General, Windhoek, 18 March 2016; Interview with the Anti-Corruption Commission of Namibia, Windhoek, 15 March 2016.

¹³⁷ Anti-Corruption Commission, *National Anti-Corruption Strategy and Action Plan: 2016-2019*, above n 129, p. 8.

¹³⁸ *Ibid.*, p. 4.

¹³⁹ Interview with the Institute for Public Policy Research, Windhoek, 14 March 2016.

¹⁴⁰ President Hage G. Geingob, “State of the Nation Address 2015” (Speech delivered at Parliament Building, Windhoek, Namibia: 21 April 2015), accessible <<http://www.gov.na/documents/10181/22710/STATE+OF+THE+NATION+ADDRESS+2015+BY+HIS+EXCELLEN+CY+DR.+HAGE+G.+GEINGOB+PRESIDENT+OF+THE+REPUBLIC+OF+NAMIBIA/5d50418d-7b14-434c-9257-02db06945f58>>, p. 6.

¹⁴¹ Interview with the Anti-Corruption Commission of Namibia, Windhoek, 15 March 2016; Interview with Ombudsman of Namibia, John Walters, Interview by Joanna Capones, Erika Piquero, Lauren Waugh, Windhoek, 18 March 2016.

corruption can make to a country's development prospects.¹⁴² The transformative potential of improvements in anti-corruption and rule-of-law frameworks is also acknowledged in Sustainable Development Goal 16: Peace, Justice and Strong Institutions.¹⁴³ Namibia would benefit from a strategic, coherent, approach to corruption — which must start with the executive government.

Recommendation 11: The ACC should finalize and publish the Anti-Corruption Strategy, and it should be effectively integrated into national development plans and strategies.

C. MEDIA

*"The only way to do something meaningful, is to put your focus on it."*¹⁴⁴

The role of the media in promoting accountability in governance and uncovering corruption is well documented. The African Union Convention on Combating Corruption "calls on countries to actively promote the involvement of civil society and the media to raise public awareness of corruption".¹⁴⁵ The Universal Declaration of Human Rights as well as the International Convention on Civil and Political Rights affirms the rights of individuals "to receive and impart ideas of all kinds... through any media of his choice".¹⁴⁶ The United Nations Economic, Social and Cultural Organization (UNESCO) maintains that "the role media can play as a watchdog is indispensable for democracy".¹⁴⁷

The large role that mining plays in Namibian society and economy underscores the need for

¹⁴² Jenik Radon, "Namibia as the Singapore of Southern Africa," *The Namibian* (19 June 2015), above n **Error! Bookmark not defined.**

¹⁴³ United Nations Development Programme (UNDP), "Goal 16: Peace, Justice and Strong Institutions", accessible <<http://www.undp.org/content/undp/en/home/sdgoverview/post-2015-development-agenda/goal-16.html>>.

¹⁴⁴ Interview with Tangeni Amupadhi, Windhoek, Namibia, Interview by Katherine Sullivan, 18 March 2016.

¹⁴⁵ *AU Convention on Combatting Corruption* 2003, Article 5.9.

¹⁴⁶ *International Convention on Civil and Political Rights* (Signed 16 December 1966, entry into force 23 March 1976); *International Chamber of Commerce Guidelines for International Investment* (2012), Article 19.2.

¹⁴⁷ United Nations Educational, Scientific, and Cultural Organization (UNESCO), "Communication and Information - Investigative Journalism," accessible <<http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/investigative-journalism/>>.

in-depth journalism that fosters understanding of and accountability in this sector. As Anya Schiffrin and Erika Rodrigues of Columbia University emphasize, “[t]here is a great deal of scope for journalists to do investigative reporting on the extractive sector.”¹⁴⁸

1. STATUS AND ROLE OF THE MEDIA

The Constitution guarantees freedom of the press and freedom of expression as one of several “Fundamental Freedoms”.¹⁴⁹ Namibia has also outlined its commitment to maintaining and supporting a free press in international declarations. The 1991 Windhoek Declaration, signed by journalists from across the continent and supported by UNESCO, outlines the “establishment, maintenance and fostering of an independent, pluralistic and free press” as “essential to the development and maintenance of democracy in a nation, and for economic development”.¹⁵⁰ According to the survey organization Afrobarometer, 63 percent of Namibians support the media’s “watchdog role” and 67 percent say that it is “somewhat effective” in “checking government: revealing government mistakes and corruption”.¹⁵¹ These numbers show that a majority of Namibians expect and trust the news media to play a role in keeping government accountable.

2. CHALLENGES

Namibia ranks relatively high in international press freedom indices¹⁵² as compared with many other countries in Africa and their neighbors in the SADC. But challenges remain if the media is to fulfill the role that the majority of Namibians expect it to. Freedom House’s

¹⁴⁸ Anya Schiffrin and Erika Rodrigues, “Covering the Extractives Industry: Big Data, New Tools, and Journalism,” *Global Investigative Journalism Network* (2014), accessible <<http://gijn.org/2014/03/05/covering-the-extractives-industry-big-data-new-tools-and-journalism/>>.

¹⁴⁹ *Constitution of the Republic Of Namibia* (1990), Article 21.1.a.

¹⁵⁰ *Declaration of Windhoek* (1991), Article 1.

¹⁵¹ Afro Barometer, Thomas Bentley, Kangwook Han, and Mina Okuru, “African publics back rights, responsibilities of media watchdogs”, (Dispatch No. 27, April 2015) accessible <http://afrobarometer.org/sites/default/files/publications/Dispatch/ab_r6_dispatchno27.pdf>.

¹⁵² Namibia is the best ranked African country in Reporters Without Borders Press Freedom ranking, and second (behind Ghana) in Freedom House’s ranking. See below n 155.

Press Freedom Index rates Namibia as “partly free”, citing the political concentration of media ownership and the lack of legal protections as barriers.¹⁵³

i. Ownership

State ownership impacts the media’s ability to maintain an editorial stance free of influence. Freedom House notes, “[t]he majority of print publications are either controlled by the state or owned by business people closely connected to SWAPO.”¹⁵⁴

The national state owned broadcaster, Namibian Broadcasting Corporation (**NBC**), is the main provider of radio and television services in the country. As a result, many Namibians — especially those in the rural areas — receive only state-produced news. The previous head of NBC, Albertus Aochamub, was appointed Presidential Spokesperson last year, directly after his five-year tenure at NBC,¹⁵⁵ raising concerns as to the relation between NBC leadership and the executive branch.

The non-profit trust-owned newspaper *The Namibian* stands apart in its ownership structure and its efforts to create a designated investigative unit. Editor-in-Chief Tangeni Amupadhi created the investigative unit to focus on “reporting on the intersection of business and politics” and “to make society understand that link.”¹⁵⁶ *The Namibian* is owned by the non-profit Namibian Media Trust (**NMT**).

The Namibian Broadcasting Act of 1991 that established the NBC puts the broadcaster firmly under the auspices of the Ministry of Information and gives the Minister direct control over much of the broadcaster’s governance.¹⁵⁷ It does not provide for independence. In a report for UNESCO, The World Radio and Television Council defined Public Service

¹⁵³ Freedom House “Freedom Of Press Country Report: Namibia, Freedom of the Press 2015,” accessible <<https://freedomhouse.org/report/freedom-press/2015/namibia>>.

¹⁵⁴ *Ibid.*

¹⁵⁵ Shinovene Immanuel, “Expensive Team,” *The Namibian* (30 June 2015), accessible <<http://www.namibian.com.na/index.php?id=138746&page=archive-read#close>>.

¹⁵⁶ Interview with Tangeni Amupadhi, Windhoek, Namibia, Interview by Katherine Sullivan, 18 March 2016.

¹⁵⁷ *Broadcasting Act* (1991).

Broadcasters, such as the British Broadcasting Corporation (**BBC**) in the UK, as “neither commercial nor State-controlled” and existing solely to serve the interests of all citizens.¹⁵⁸

The BBC’s current governance and structure is provided by the Royal Charter of 2007 (first established in 1927 and periodically renewed). The Royal Charter created the independent body of the BBC Trust to provide strategic direction and oversight to the broadcaster.¹⁵⁹ The BBC Trust appoints the Executive Board, which carries out the daily services of delivering news. The BBC Trust first and foremost represents the interests of the license fee payers (the British public) from which the BBC directly receives funding, and not those of the government. The BBC also pursues commercial revenue through online services and the World Service. Creating distance between the Ministry of Information and NBC could help transition NBC from a state broadcaster to a Public Service Broadcaster.

Recommendation 12: The Ministry of Communication and Information should examine ways to transition NBC from state broadcaster to a public service broadcaster to ensure that this service maintains a separate stature from political and government interests.

ii. Financial Constraints

While *The Namibian*’s creation of an investigative unit is an important step in covering corruption, it faces challenges. Investigative journalists still must file stories daily for the main newspaper, leaving them little time to dedicate to investigations.¹⁶⁰ Investigative

¹⁵⁸ World Radio and Television Council, “Public Broadcasting: Why? How?” (May 2000), accessible <http://portal.unesco.org/ci/en/files/18796/11144252115pb_why_how.pdf/pb_why_how.pdf>.

¹⁵⁹ British Broadcasting Corporation (BBC), “Copy of Royal Charter for the continuance of the British Broadcasting Corporation”, Department for Culture, Media, and Sport, October 2006, accessible <http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how_we_govern/charter.pdf>.

¹⁶⁰ “There are always problems with investigative units being tied to the strings of a daily newspaper”, Interview with Drew Forrest, Amabhungane Centre for Investigative Journalism in Johannesburg, South Africa, Interview by Katherine Sullivan, 21 March 2016; “If I had it my way, the investigative team would move out of the main newsroom”, Interview with Tangeni Amupadhi, Windhoek, Interview by Katherine Sullivan, 18 March 2016.

journalism in the public interest is difficult to sustain financially, even in the most developed economies. Small budgets at media houses mean that journalists are paid little and expected to produce much. Financial insecurity, additionally, can put firms at risk for self-censorship, for fear of retaliation from advertisers.¹⁶¹

iii. Human Resources

Uncovering wrongdoing in government and in the natural resource industries is no easy task:

“The financial and technical aspects of the extractive sector are complex... Many reporters lack sufficient training, resources and/or journalistic freedom to publish accurate, well-researched, in-depth coverage. As a result, what are arguably some of the most critical industries on the continent operate in relative freedom from public scrutiny”.¹⁶²

Some editors expressed disappointment that journalism is not considered a respectable or sought-after profession in Namibia, and is often thought of as a “last resort” job.¹⁶³ Media Ombudsman Clement Daniels sees that many complaints against the media relate to issues of professionalism and that journalists do not take the time to verify quotes or get sources from both sides of an issue.¹⁶⁴

Even Namibia’s most reputable journalists expressed the desire for more specialized training, specifically in finance and business, so as to better investigate the private sector.¹⁶⁵ *The Namibian* has sent five of its journalists to receive training in South Africa with the Amabhungane Investigative unit at the *Mail and Guardian’s* offices.

¹⁶¹ Gwen Lister, “Managing Media in Times of Crisis”, *Nieman Reports*, (14 September 2004), accessible <<http://niemanreports.org/articles/managing-media-in-times-of-crisis/>>.

¹⁶² James Christian Canonge, Matthew Purcell, Michael Behrman, "Watchdog or Lapdog: Limits of African Media Coverage of the Extractive Sector" (Columbia University Academic Commons), (2010) accessible <<http://hdl.handle.net/10022/AC:P:15048>>

¹⁶³ “...very few reporters who have a passion”, Interview with NAMPA subeditors, Windhoek, Namibia, Interview by Katherine Sullivan, 16 March 2016.

¹⁶⁴ Interview with Clement Daniels, Windhoek, Namibia, Interview by Katherine Sullivan, 19 March 2016.

¹⁶⁵ Interviews with Tileni Mongudhi and Shinovene Immanuel, Windhoek, Namibia, Interview by Katherine Sullivan, 15 March 2016.

3. ACCESS TO INFORMATION

“You can’t ask for what you don’t know exists”¹⁶⁶

The country’s lack of an Access to Information (**ATI**) law emerged as a glaring gap in Namibian press freedom. In a speech following World Press Freedom Day in 2010, Media Ombudsman Clement Daniels declared that “access to information is a fundamental human right in any constitutional democracy and no country can truly call itself democratic, unless citizens have the right to access and request information that is held by public and certain private bodies”.¹⁶⁷

The desire for a robust ATI law is apparent even among state-owned media. “You can scream and shout until you’re blue, but if someone has decided you won’t get that information, you won’t”, said one NAMPAsubeditor. The Media Institute of Southern Africa (**MISA**), IPPR, NMT, and Insight Magazine are part of a domestic coalition advocating for an ATI law.

Namibia’s push for an ATI law comes at a time when many countries are calling for such laws, or for revision of inadequate ATI laws. Regional movements have been especially active. The African Charter on Human and Peoples’ Rights (**ACHPR**) guarantees access to information and the African Union Convention on Corruption calls on countries to “ensure that the Media is given access to information in cases of corruption and related offences.”¹⁶⁸

The Windhoek Declaration led to the creation of continent-wide African Platform on Access to Information (**APAI**). APAI adopted a declaration in 2011 in partnership with UNESCO, reiterating the importance of ATI and reiterating: “[t]he right of access to information shall be established by law in each African country. Such law shall be binding

¹⁶⁶ Interview with Tileni Mongudhi, Windhoek, Namibia, Interview by Katherine Sullivan, 15 March 2016.

¹⁶⁷ Media Ombudsman’s Office of Namibia, Clement Daniels, “Access to Information and the Right to Know – a Namibian Perspective” (May 2010), accessible <http://mediaombudsmannamibia.org/downloads/Access_to_information_WPF_DAY_Speech_Media%20Ombudsman.pdf>.

¹⁶⁸ *AU Convention on Corruption* (2003).

and enforceable and based on the principle of maximum disclosure. The law shall take precedence over other conflicting laws that limit access to information”.¹⁶⁹

The Declaration also noted the critical role of ATI in fighting corruption: “...media independent of powerful political and commercial interests are critical actors in unveiling and fighting corrupt practices, and their use of access to information laws and other mechanisms enhancing transparency should be encouraged.”¹⁷⁰ This document was signed by a legal official from the Ministry of Justice, a representative from the Ministry of Information and Communication, and more than twenty other news agencies and advocacy organizations in Namibia.¹⁷¹

Former President Pohamba, in a 2014 speech, declared, “Access to information is at the centre of all modern economies... we cannot talk about Vision 2030, without talking about access to information” and then further underlined the importance of access to information: “We believe that informed citizens are better equipped to take advantage of opportunities, access services, exercise their rights, negotiate effectively, and hold government and non-government actors accountable. This can be achieved through the availability of information that is relevant, timely, and presented in a manner that can be easily understood.”¹⁷²

An example of a robust ATI law was drafted by ACHPR¹⁷³. Improving access to information not only improves the quality of journalism, it can also make journalists’ jobs easier, increasing the capacity of individuals and media houses.

¹⁶⁹ *African Platform on Access to Information Declaration* (2011).

¹⁷⁰ *African Platform on Access to Information Declaration* (2011).

¹⁷¹ African Platform on Access to Information, “List of Declaration Signatories,” accessible <http://www.africanplatform.org/fileadmin/user_upload/pdf/APAI-Supporters-List-of-Signatories.pdf>.

¹⁷² Republic Of Namibia, “Statement by His Excellency Hifikepunya Pohamba Speech, President of the Republic of Namibia, on the Occasion of Inauguration of the Ohangwena-Helao Nafidi Regional Library”, (September 2014), accessible

<<http://www.gov.na/documents/10181/13234/STATEMENT+BY+HIS+EXCELLENCY+HIFIKEPUNYE+POHAMB A%2C+PRESIDENT++OF+THE+REPUBLIC+OF+NAMIBIA%2C++ON+THE+OCASSION+OF+THE++INAUGU RATION+OF+THE+OHANGWENA- HELAO+NAFIDI+REGIONAL+LIBRARY+%282014+09+18%29%29/b424d051-7b7e-4fae-8742-751d501e3407>>>

¹⁷³ African Commission on Human and People’s Rights (ACHPR), “Model Law on Access to Information for Africa” accessible <<http://www.achpr.org/instruments/access-information/>>.

Recommendation 13: The government should adopt an Access to Information law, and ensure adequate and strong drafting of this law as based on the ACHPR model.

Recommendation 14: The Media Institute of Southern Africa, Namibia Media Trust, and regional and international media development organizations should continue to provide and increase journalism training at both basic and advanced levels. Subject matter training in extractives and finance for more experienced journalists, and theoretical training on the role and importance of journalism in society to new journalists are both needed.

ENVIRONMENTAL ISSUES

A. NAMIBIA'S ENVIRONMENTAL LEGAL FRAMEWORK

Environmental management is incorporated in the Constitution, which mandates the adoption of policies aimed at the “maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilization of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future...”¹⁷⁴ This mandate, however, is not implementable or enforceable by itself and is only a guide to the government in making and applying laws.¹⁷⁵ Because of the traditional insufficiency of the constitutional provision, adequate environmental legislation needs to be adopted. In this regard, the insufficiency of, and difficulty and delays in passing and implementing environmental legislation in Namibia¹⁷⁶ is one of the initial challenges that the country needs to overcome.

The Environmental Management Act, 2007 (**EMA**) is one of the most significant pieces of environmental legislation in Namibia. Implemented in 2012, the EMA lays down the environmental impact assessment (**EIA**) framework and sets forth principles of environmental management to guide implementation of all laws relating to the protection of the environment. The EMA and its implementing rules specify certain activities, such as mining and aquaculture, which may not be undertaken without an environmental clearance certificate (**ECC**). An EIA must be conducted to serve as the basis for the issuance of the ECC. The EIA is conducted by an environmental assessment practitioner hired by the project proponent and is approved by the government.

Although implementing the EMA was already a step in the right direction, there is more that Namibia can do to improve its environmental protection framework. **Current laws lack important safeguards to protect the environment.** Particularly, the current legal regime does not impose clear

¹⁷⁴ *Constitution of the Republic of Namibia* (1990), Article 95 (l).

¹⁷⁵ *Constitution of the Republic of Namibia* (1990), Article 101.

¹⁷⁶ Natalie A. Renkhoff, “Environmental Impact Assessments in the Permitting Process to Obtain a Mineral License” in Natalie A. Renkhoff (ed) *Powering Namibia into the future towards sustainable energy production*, (Windhoek: Friedrich Ebert Stiftung, 2014), p. 156.

requirements for rehabilitation and financial guarantees.¹⁷⁷ Moreover, the laws do not ensure transparency¹⁷⁸ and public participation¹⁷⁹ in environmental matters despite the declaration that it is the government's strategy to "increase public access to environmental information."¹⁸⁰ Indeed, out of 70 countries assessed in the Environmental Democracy Index (EDI), Namibia was considered among the weakest in the 68th spot, confirming the lack of transparency, participation and justice in environmental decision-making in the country.¹⁸¹

To address these issues, a selective draft of suggested amendments to the EMA and its regulations are contained in Annexure 1, respectively. These suggestions are merely illustrative and, as with any legislative amendments, a holistic review of the law and accompanying regulations is required.

Recommendation 15: Both the government and project proponents should be required to publish environmental documents, such as the approved EIAs and ECCs, online.¹⁸²

¹⁷⁷ Current laws do not explicitly require the submission of a mine closure and rehabilitation plan. Moreover, while the Draft Procedures and Guidelines for EIA and EMP (April 2008) has some reference to a financial guarantee, there are no clear requirements for such financial guarantees.

¹⁷⁸ While the Environmental Commissioner is required to maintain a register of EIAs undertaken and ECCs issued, there is no positive duty under the EMA to make the documents available to the public. During our visit, we asked the Environmental Commissioner for a copy of the EIA for a proposed phosphate sand mining project. The Environmental Commissioner said that while his office makes EIAs available to the public, they require the submission of a request letter before giving access to such documents (Interview with Environmental Commissioner Teofilus Nghtila, Interview by Joanna Capones, Windhoek, 16 March 2016). It appears, however, that the process for obtaining documents is not that simple and that the Environmental Commissioner maintains discretion on whether to grant access to environmental documents. In an interview with a civil society organization (Interview by Joanna Capones, Erika Piquero, Lauren Waugh, Windhoek, 16 March 2016), we were told that it was only after threat of litigation that the Office of the Environmental Commissioner released a copy of an ECC that the organization requested.

¹⁷⁹ While project proponents are required to conduct public consultations and include details of the same in the EIA report, public hearings are not required under the EMA. The Environmental Commissioner has the discretion whether or not to hold a public hearing (Section 36(1)(C), *Environmental Management Act* (2007)). Moreover, for public consultations conducted by project proponents, only registered interested or affected parties are entitled to submit comments in writing for consideration of the Environmental Commissioner (Section 23(1), *Environmental Management Act* (2007)). Even then, the Environmental Commissioner has no duty to formally respond to public comments.

¹⁸⁰ Office of the President National Planning Commission, "Namibia's Fourth National Development Plan 2012/13 to 2016/17" above n 45, p 39.

¹⁸¹ Environmental Democracy Index, "Namibia" (2015), accessible <<http://www.environmentaldemocracyindex.org/country/NAM>>.

¹⁸² Jenik Radon, Comments delivered at the United Nations Economic and Social Council 2016 Integration Segment, New York, United States of America: 3 May 2016, accessible <<http://webtv.un.org/watch/21st-meeting-ecosoc-integration-segment-economic-and-social-council/4876493330001>>

Recommendation 16: The Environmental Commissioner should be required to publish its monitoring/inspection reports online to increase transparency and accountability.

Recommendation 17: The government should increase opportunities for and ensure public participation by amending the EMA and the EIA regulations to remove the registration condition for submitting comments in the public consultation process, require the project proponent or the Environmental Commissioner to prepare a response to public comments, and require the conduct of a public hearing for each ECC application.

The EMA also does not impose specific qualifications nor require certifications for environmental assessment practitioners.¹⁸³ As such, there are no assurances as to the capability and reliability of these practitioners. One scholar observed that local “environmental assessment practitioners do not have the capacity yet to undertake EIAs for huge mining projects.”¹⁸⁴ Meanwhile, foreign consultancies, which are used as alternatives to local practitioners, end up “rely[ing] more on desk studies than field research.”¹⁸⁵

Recommendation 18: The Environmental Commissioner should promulgate rules requiring the certification and registration of environmental assessment practitioners to ensure that individuals who conduct EIAs are trained, knowledgeable and can be held accountable for their reports.

It appears that existing laws also are not sufficient to deter violations and/or are simply not properly enforced. One study showed that over 90 percent of approved EIA reports in Namibia do not

¹⁸³ In an interview with the Environmental Commissioner (Interview by Joanna Capones, Windhoek, 16 March 2016), he said that his office previously did not impose restrictions for entry into this profession because it would not be fair to previously disadvantaged Namibians. He said his office is currently reconsidering the old policy.

¹⁸⁴ Natalie A. Renkhoff, “Environmental Impact Assessments in the Permitting Process to Obtain a Mineral License,” (2014), above n 176, p. 164.

¹⁸⁵ *Ibid*, p. 156.

identify and assess alternatives, which is required under the EMA.¹⁸⁶ Another report claims that there are too many mineral licenses being issued even where the EIA requirement is not fulfilled according to Namibian law.¹⁸⁷ An example of this is the claim by the Municipal Council of Windhoek that ECCs for mining activities situated within the city boundaries have been issued without consulting the city during the EIA process.¹⁸⁸ The authors of this Report were also informed about a waterfront development in Swakopmund that apparently went beyond the permitted scope of the original EIA, notwithstanding that construction activities are ongoing and have not been halted by the government.¹⁸⁹

A draft of the suggested amendment to the EMA, imposing an additional deterring penalty, is contained in Annexure 1.¹⁹⁰ As with previous suggested amendments, this is merely illustrative and requires a full review.

Recommendation 19: Impose additional penalties sufficient to deter non-compliance. Projects that go beyond the permitted scope of the final EIA should be completely halted, any buildings, infrastructure or improvements therein should be dismantled, and the project owner should be compelled to restore the area to its original state.¹⁹¹

The Office of the Environmental Commissioner has the general mandate to implement and oversee the EIA process, issue ECCs and monitor compliance. Four years after its establishment in 2012, staffing still remains a challenge. Its employees are often recruited by mining companies, which offer

¹⁸⁶ Hein van Gils, "How Often and Why are Alternatives Absent in Environmental Assessment Practice in Namibia?," (Conference paper delivered for 35th Annual Conference of the International Association for Impact Assessment 20-23 April 2015, Firenze Fiera Congress & Exhibition Center, Florence, Italy), accessible <<http://conferences.iaia.org/2015/Final-Papers/Van%20Gils,%20Hein%20-%20How%20Often%20and%20why%20are%20Alternatives%20Absent%20in%20Environmental%20Assessment%20Practice%20in%20Namibia.pdf>> .

¹⁸⁷ Natalie A. Renkhoff, "Evaluation of Nuclear Legislation: The issue of rehabilitation of uranium mine sites in Namibia," *EJOLT Report* No. 22 (March 2015), p. 47.

¹⁸⁸ Shinovene Immanuel, "Pollution Threat for Windhoek Water," *The Namibian* (8 July 2015), accessible <<http://www.namibian.com.na/index.php?id=139126&page=archive-read>>

¹⁸⁹ P F Koep, Chairperson Paddock Gardens Trust, Letter to Mr. Duvenhage, 7 March 2016.

¹⁹⁰ See Section 27(5) in Annexure 2 (a).

¹⁹¹ Structures that are constructed beyond the scope of the environmental certification are considered illegal structures. In Namibia, demolition of an illegal structure is a penalty that is already being enforced by a number of town councils. For example, Regulation 25 of the Municipal Building Regulations of Windhoek allows the Council to issue a demolition order against a person who erects a building without approved plans.

higher salaries for trained personnel.¹⁹² But there are prospects for the Office to collect more revenue: for example, the Environmental Commissioner only imposes a fixed charge of N\$300 for the issuance of an ECC,¹⁹³ although it has the authority to recover full costs for the assessments from project proponents.¹⁹⁴

Recommendation 20: Environmental officers trained by the government should be made to sign a contract with a restrictive conflict of interest covenant barring them, for a period of two years, from accepting employment with a private individual or entity that had substantial transactions with the Office of the Environmental Commissioner.

Recommendation 21: Project proponents should be required to pay fees for environmental assessments that are proportional to the amount of work and expertise involved. The proceeds should be used by the Office of the Environmental Commissioner to increase its institutional capacity.

Aside from the Environmental Commissioner, the Ombudsman also has the mandate “to investigate complaints concerning the over-utilisation of living natural resources, the irrational exploitation of non-renewable resources, the degradation of ecosystems and failure to protect the beauty and character of [the country].”¹⁹⁵ However, since its establishment in 1990, the Ombudsman has only investigated one environmental case.¹⁹⁶ In an interview, the Ombudsman said that his office receives very few environmental complaints, which he attributes to the public’s lack of knowledge of the Ombudsman’s environmental mandate. The Ombudsman also disclosed that his office does not have investigators who are specifically trained in environmental law.¹⁹⁷

¹⁹² Interview with Environmental Commissioner Teofilus Nghitila, Interview by Joanna Capones, Windhoek, 16 March 2016.

¹⁹³ *Environmental Impact Assessment Regulations*, Annexure 2.

¹⁹⁴ *Environmental Management Act (2007)*, Section 46.

¹⁹⁵ *Constitution of the Republic of Namibia (1990)*, Art. 91(c).

¹⁹⁶ The investigation was on the illegalities pertaining to the annual seal harvest in Namibia. It was initiated by complaints from civil society organisations, non-governmental organizations, individuals and other groups.

¹⁹⁷ Interview with Ombudsman of Namibia, John Walters, Interview by Joanna Capones, Erika Piquero, Lauren Waugh, Windhoek, 18 March 2016.

Recommendation 22: The capacity of key government agencies should be increased, particularly those with environmental mandates that require staff with technical knowledge and skills, by institutionalizing merit-based hiring and promotion, prioritizing training programs and career-development opportunities and maintaining competitive salaries.

B. NAMIBIA'S ENVIRONMENTAL CHALLENGES

In NDP4, the Namibian government considered freshwater scarcity, land degradation, deforestation, unsustainable use of coastal and marine resources and vulnerability to climate change as among the most pressing environmental challenges in Namibia.¹⁹⁸ Desertification and biodiversity preservation are also typically recognized as environmental challenges for Namibia.¹⁹⁹ Waste and pollution are also increasingly becoming a problem as a result of growing industrial production.²⁰⁰

At present, water scarcity is a particularly important problem in Namibia, which is considered the driest country south of Sahara.²⁰¹ There are predictions that Namibia's central cities will run out of water by September 2016.²⁰² The 2015/2016 rainy season (October 2015 to February 2016) did not ease the drought as the rainfall was below normal throughout the country.²⁰³ In his first State of the Nation Address, President Geingob announced the allocation of N\$300 million to provide interim drought relief measures, pending the conclusion of a final drought assessment.²⁰⁴ It was estimated that around 418,000 people have been affected by the current drought.²⁰⁵

¹⁹⁸ Office of the President National Planning Commission, "Namibia's Fourth National Development Plan 2012/13 to 2016/17", above n 45, p. 35.

¹⁹⁹ Central Intelligence Agency (CIA), The World Factbook, "Country Comparison to the World – Environment- Current Issues," accessible <<https://www.cia.gov/library/publications/the-world-factbook/fields/2032.html>> .

²⁰⁰ Oliver C. Ruppel and Katharina Ruppel-Schlichting (eds.), *Environmental Law and Policy in Namibia: Towards Making Africa the Tree of Life*, Fully Revised Second Edition (Hans Seidel Foundation, 2013).

²⁰¹ Stanford Law School, Mills International Human Rights and Environmental Law Clinics, and Legal Assistance Centre of Namibia, "Not Coming Up Dry: Regulating the Use of Namibia's Scarce Water Resources by Mining Operations" (Windhoek: John Meinert Printing (Pty) Ltd, 2009), p. 1.

²⁰² "Namibia's central cities to run out of water by September 2016!," *The Southern Times* (8 January 2016), accessible <<http://southernafrican.news/2016/01/08/namibias-central-cities-to-run-out-of-water-by-september-2016/>> .

²⁰³ "Rainfall still below normal – report," *New Era* (8 April 2016), accessible <<https://www.newera.com.na/2016/04/08/rainfall-normal-report/>> .

²⁰⁴ President Hage G. Geingob, "State of the Nation Address 2015," above n 140.

²⁰⁵ Theresia Tijhenuna, "Government to offer drought relief to 400 000 people," *The Namibian*, (27 April 2015), accessible <<http://www.namibian.com.na/index.php?id=136323&page=archive-read>> .

C. ENVIRONMENTAL IMPACT OF THE MINING INDUSTRY

One of the most important environmental impacts of mining and ore processing is the generation of waste that affects surrounding environments. Several studies have shown soil and water contamination in areas surrounding mines in Namibia.²⁰⁶ Last year, the Municipal Council of Windhoek appealed to the Ministry of Mines to stop issuing exploration licenses, and to the Ministry of Environment and Tourism (**MET**) to stop issuing ECCs to exploration firms operating over the Windhoek southern basin aquifer area because the resulting pollution could be “life threatening to the residents of Windhoek.”²⁰⁷ In 2001, MET reported that mine tailings and waste rock disposal dumps are “often poorly located in relationship to surface drainage and/or underground water resources” so that heavy rainfall leads to significant buffering and attenuation if the waste rock and surrounding rocks are calcareous or alkaline; if not, acid mine drainage results.²⁰⁸

²⁰⁶ [1] The dust blown out from the tailings dam in Rosh Pinah was seen to be a major problem endangering the soils and pasture grass in the Rosh Pinah Town. Vladimir Majer, et al., “Environmental-geochemical Surveying and Atmospheric Modeling of Dust Fall Out From Tailings Dam at the Rosh Pinah Area, Namibia” (unpublished, 2014); [2] A comprehensive environmental-geochemical survey conducted at the abandoned Berg Aukas mining district show severe heavy metal contamination of the surface soils. Main pollutants include Arsenic and Lead, which can cause severe health problems. Benjamin Mapani, et al., “Potential human health risks associated with historic ore processing at Berg Aukas, Grootfontein area, Namibia,” *Journal of African Earth Sciences* (2010); [3] Tree ring analysis confirmed soil and vegetation contamination in the vicinity of the Tsumeb smelter. Main contaminants are Arsenic, Copper, Lead, Cadmium and Zinc. Concentration of pollutants were highest at the height of production of the smelter. Martin Mihaljevic, et al., “Trace Elements and the Lead Isotopic Record in Marula (*Sclerocarya birrea*) Tree Rings and Soils Near the Tsumeb Smelter, Namibia,” *Water Air and Soil Pollution* (10 May 2015); [4] Copper and lead concentrations in farmland soils west of the tailings impoundment in the Kombat area have been found to exceed maximal allowed values in agricultural soils. Marta Mileusnic, et al., “Trace elements dispersion from a tailings dam and speciation study in surrounding agricultural soils: A Case study from Kombat Mine area, Otavi Mountainland, Namibia” in Benjamin Mapani and Bohdan Kribek (eds.) *Environmental and Health Impacts of Mining in Africa* (Reproduction of papers presented at the proceedings of the Annual Workshop IGCP/SIDA No. 594, Windhoek, Namibia, July 5-6th 2012; Published Prague: Czech Geologic Survey, 2012), 37-46, accessible <http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/SC/pdf/IGCP594-Proceedings__Windhoek_12-Part1.pdf>; [5] Using Canadian soil quality limits as guideline, the soil in Rosh Pinah town was said to have exceeded the limits, particularly in the case of lead and zinc, which corresponds to the composition of the extracted ore in the nearby mine. Bohdan Kribek, et al., “Contamination of soils with dust fallout from the tailings dam at the Rosh Pinah area, Namibia: Regional assessment, dust dispersion modeling and environmental consequences” *Journal of Geochemical Exploration* 144 (2014), 391-408.

²⁰⁷ Shinovene Immanuel, “Pollution Threat for Windhoek Water,” *The Namibian* (8 July 2015), above 188.

²⁰⁸ Ministry of Environment and Tourism of Namibia, “State of Environment Report on Waste Management and Pollution Control in Namibia” (August 2001), accessible <<http://www.met.gov.na/Documents/Waste%20management-executive%20summary.pdf>>, p. 21.

Managing environmental impacts is especially difficult for abandoned mines, which is a particular concern in Namibia. The government reports almost 250 abandoned mine sites in the country, while independent researchers estimate the number to be over 400.²⁰⁹

Abandoned mine sites in Namibia

In 2004, the Geological Survey of Namibia, on behalf of the Ministry of Mines and Energy, released the results of its assessment of the environmental hazard potential of six abandoned mine sites in Central Namibia.²¹⁰ The environmental hazards found in each mine are as follows:

1. *Klein Aub Mine (copper)*: wind-borne tailings dust, eroded tailings dump, collapsed underground mine, contamination of shaft water
2. *Oamites (copper)*: wind-borne tailings dust, caving of old underground mine, untreated sewage with high ammonia and nitrite concentrations discharges directly into the adjacent Oamites River
3. *Matchless (copper)*: pyrite-rich tailings and waste rock dumps, contamination of water and sediments of a four km-long section of the Matchless River by acid mine drainage, deep erosion in the downstream face of the main tailings dump, ineffective or breached earth dams
4. *Namib Lead (lead/zinc)*: wind-borne tailings dust and contaminated stream sediments in the surroundings of the mine
5. *Khan (copper)*: contamination of the gorge by tailings material
6. *Onguati (copper)*: open adits and shafts, scrap metal and a contamination of the adjacent creek by tailings material

Regulations on mine closure and rehabilitation must be developed to require a Mine Closure and Rehabilitation Plan and provide specific guidance on its contents. Among others, the regulations must:

- (i) specify the contents of a Mine Closure and Rehabilitation Plan;

²⁰⁹ Natalie A. Renkhoff, "Evaluation of Nuclear Legislation: The issue of rehabilitation of uranium mine sites in Namibia," (2015), above n 187, p. 6, 40.

²¹⁰ L. Hahn, F. Solebury and S. Mwiya, "Report: Assessment of Potential Environmental Impacts and Rehabilitation of Abandoned Mine Sites in Namibia," *Communications of the Geological Survey of Namibia*, 13 (2014), 85-91, accessible <http://www.mme.gov.na/files/publications/c5e_Hahn%20et%20al.pdf> .

- (ii) provide for the periodic review and updating of the Mine Closure and Rehabilitation Plan throughout the life cycle of the mine;
- (iii) require successive rehabilitation²¹¹ for uranium mines and other mines which use the open pit method;
- (iv) require mining companies to obtain insurance from a reputable insurance company to cover unplanned events, accidents and other risks that result in damage to the environment, provided that such insurance will not relieve the mining company of liability until rehabilitation is actually completed; and
- (v) require mining companies to set up a 'rehabilitation trust fund' to cover the cost of rehabilitation. At least 10 percent of the amount needed to implement the closure and rehabilitation plan should be put in the trust fund before the start of mining operations. Thereafter, the mining company should contribute a portion of their annual income to the trust fund, computed on the basis of the estimated costs of rehabilitation and the remaining life of the mine, less whatever amount is spent for current rehabilitation activities.

Recommendation 23: The Minerals Act should be amended to explicitly require the submission and approval of a detailed Mine Closure and Rehabilitation Plan as part of the mineral license application process and provide for its periodic review and updating. Financial guarantees, such as a rehabilitation trust fund and liability insurance, should also be required to cover the entire cost of rehabilitation and any other environmental damage that may be caused by mining operations at any given time.

The government also identified mining, particularly uranium and offshore diamond mining, as a serious threat to biodiversity conservation because most mines are situated in the most ecologically

²¹¹ Successive rehabilitation, which means that areas that have already been mined will be rehabilitated while mining operations still continue in other areas of the mine, is currently being done at the Langer Heinrich mine (Ministry of Mines and Energy of Namibia, "Annual Report Strategic Environmental Management Plan (SEMP) for the Central Namib Uranium Province 2013" (May 2015), accessible <http://www.mme.gov.na/files/publications/d57_2013%20SEMP%20Annual%20report%20final.pdf>). Hence, we find no reason why other mines using the open pit method cannot do the same.

sensitive areas.²¹² Mining activities cause habitat loss and destruction, which could eventually lead to the extinction of Namibia's vulnerable endemic species.²¹³

The huge amount of water used for mining operations is also a particular concern given the availability of clean water in Namibia.²¹⁴ All water used for mining activities ultimately comes from unexplored subterranean aquifers²¹⁵ and overexploitation could eventually lead to destruction of the groundwater resource,²¹⁶ thus further exacerbating the country's already alarming water shortage.

Recommendation 24: All applicants for mineral licenses must undergo a thorough background check as part of the application process. Applicants with previous environmental violations in other jurisdictions should not be allowed to operate mines in Namibia.

D. ENVIRONMENTAL IMPACT OF FISHING IN NAMIBIA

Fishing activities mainly impact the environment in two ways: by harvesting or removing a portion of the stock and by physically altering the marine habitat through the use of destructive fishing methods such as trawling.²¹⁷

In Namibia, the most significant environmental impact of the fisheries sector is the depletion of fish stocks, which is caused by overfishing and illegal, unreported and unregulated (IUU) fishing practices. While marine resource management has greatly improved since independence, fish stocks

²¹² Ministry of Environment and Tourism of Namibia, "Namibia's Draft Fourth National Report to the United Nations Convention on Biological Biodiversity (UNCBD)" (August 2010), accessible <<https://www.cbd.int/doc/world/na/na-nr-04-en.pdf>> , p. 1.

²¹³ *Ibid*, p. 12.

²¹⁴ Stanford Law School, et al, "Not Coming Up Dry," (2009), above n 204, p. 3.

²¹⁵ *Ibid*, p. 6.

²¹⁶ *Ibid*, p. 3.

²¹⁷ Namibian Coast Conservation & Management Project, "Threats on our coast," accessible <http://www.nacoma.org.na/Our_Coast/Threats.htm#Fishing>

have not yet recovered. In 2010, 44.4 percent of fish stocks are considered to have collapsed and 22.2 percent are overexploited.²¹⁸

The MET also reported marine pollution, although not widespread, caused by “effluents used in fish factories and hazardous substances used in repair and maintenance of fishing vessels and other ships.”²¹⁹

Recommendation 25: Prioritize the implementation of the Water Resources Management Act, 2013, which prohibits the discharge of effluents and other waste into a water resource without a discharge permit from the government²²⁰

²¹⁸ Sea Around Us, “Namibia: Mastrandrea Plot” (2015), accessible <<http://www.seaaroundus.org/data/#/eez/516/stock-status>>

²¹⁹ Ministry of Environment and Tourism of Namibia, “State of Environment Report on Waste Management and Pollution Control in Namibia” (August 2001), above n 208, p. 18.

²²⁰ The Namibian Parliament has enacted the *Water Resources Management Act (2013)*, which requires a discharge permit before a person may “cause or allow any wastewater, effluent or waste to be discharged or deposited, directly or indirectly, into a water resource, or to be introduced into a borehole or well (Section 70(1)(a)), on December 2, 2013. Pursuant to the Act, it shall come into operation on a date determined by the Minister (Section 134 (1)). The date has not yet been announced. It was reported that regulations are still being developed to implement it (Groundwater Resource Governance in Transboundary Aquifers (GGRETA Project) Stampriet Transboundary Aquifer System Case Study, “Summary of the Fourth Regional Technical Workshop and International Water Law Training,” (Collaboration by the Governments of Botswana, Namibia and South Africa, with UNESCO International Hydrological Programme and the International Groundwater Resources and Assessment Centre), (5-8 May 2015, Gaborone, Botswana), accessible <http://groundwaterportal.org/sites/default/files/Summary_StamprietTechnicalMeeting_May2015_Final.pdf>).

SOCIAL ISSUES

A. CONTEXT

Namibia is frequently lauded as exemplifying suitable practices in terms of social license to operate in its extractives sector, especially compared to its Sub-Saharan African counterparts — and “the development indicators for Namibia, be it political, social or economic, are emerging positively.”²²¹ As mining activities often occur in deserted areas of Namibia, and fishing activities take place offshore, common challenges seen around social license are not necessarily perceived to be experienced in Namibia.

Despite this perception, Namibia’s mining and fisheries sectors have identifiable social impacts. In fact, many stakeholders interviewed disagree with this perception in its entirety, instead characterizing Namibia as historically prioritizing extractive industries and their activities above, for example, communal land rights and the health of workers.²²² This intersection of business activities and human rights issues in Namibia demonstrates a need for action: the country’s business-and-human-rights track record leaves much to be desired and demonstrates a need for serious action on behalf of the Namibian government to ensure that “human rights and business activities can coexist.”²²³ Failure to address the business-and-human-rights nexus will lead to further costs for the Namibian people, Namibian businesses, and the Namibian government.

As one of the world’s least densely populated countries²²⁴ (estimated at 2.6 persons per square kilometer in 2011),²²⁵ Namibia’s population is sparse and spread out — so population

²²¹ Jenik Radon and Nandini Ravichandran, “The ‘business of extractives: my resources, my rules,” *The Namibian*, (7 August 2015), accessible <<http://www.namibian.com.na/index.php?id=139106&page=archive-read>>.

²²² Interview with a civil society organization by Joanna Capones, Erika Piquero, Lauren Waugh, Windhoek, March 16, 2016.

²²³ Sam Szoke-Burke, “Time to Act on Business and Human Rights,” *The Namibian* (18 November 2014), accessible <<http://www.namibian.com.na/index.php?id=130673&page=archive-read>>.

²²⁴ “Pictures: Ten Least Crowded Places in the World,” *National Geographic*, (31 October 2011), accessible <<http://news.nationalgeographic.com/news/travelnews/2011/10/pictures/111031-seven-billion-7-world-earth-population-least-populated/>>

visibility often presents a challenge in preventing human rights violations connected to extractive activities.²²⁶ Systemic lack of enforcement, a lack of institutional practice in addressing social impacts connected to extractive activities and a systemic lack of rights knowledge and education all further exacerbate the failure to address social impacts.

Larger cultural traits of conflict avoidance, lack of rights awareness and subsequent lack of rights defense, all deserve attention. Many Namibians attribute these social patterns to historical societal systems that fostered deference to tribal chiefs.²²⁷ Avoidance of conflict thus seems to have become a cultural trait, evidenced by many interactions with and among community members that fail to engage or speak up, especially in defense of their rights. This is also partially due to the aforementioned lack of awareness of rights. Moreover, the authors of this Report were told that there is not a culture of recognizing individual rights (other than voting rights every five years).²²⁸ However, this seems to be changing, even if only slightly so: some Namibians are beginning to engage more critically and deeply in upholding rights.²²⁹ Regardless, further rights education is vital in order to ensure that the population is informed and empowered to take a stand and engage in public debate around their rights.²³⁰

Recommendation 26: The government should work with Namibian civil society organizations (as well as with the UN High Commissioner of Human Rights, if necessary) to develop a human rights education and training program suitable to the Namibian context.²³¹

²²⁵ Government of Namibia, “Census Projected Population,” accessible <<http://www.gov.na/population>>.

²²⁶ Interview with a civil society organization by Joanna Capones, Erika Piquero, Lauren Waugh, Windhoek, March 16, 2016.

²²⁷ Interview with Bertchen Kohrs, Interview by Joanna Capones, March 16, 2016

²²⁸ Interview with a civil society organization by Joanna Capones, Erika Piquero, Lauren Waugh, March 16, 2016.

²²⁹ Interview with Bertchen Kohrs, Interview by Joanna Capones, Windhoek, March 16, 2016.

²³⁰ *Ibid.*

²³¹ United Nations Office of the High Commissioner for Human Rights (OHCHR), “Human Rights and Education Training,” accessible <<http://www.ohchr.org/EN/Issues/Education/Training/Pages/HREducationTrainingIndex.aspx>>

B. SOCIAL ISSUES RELATING TO THE MINING SECTOR

1. URANIUM MINING AND HEALTH IMPACTS

Uranium mining and its operations often pose serious social and environmental risks, especially due to negative health impacts associated with the product and its production methods. In Namibia, serious and detrimental health effects have already impacted uranium mine workers. In 2013, Earthlife Namibia and the Labour Resource and Research Institute authored an extensive study on the effects of low-level radiation upon the mine workers of Rio Tinto's Rössing Uranium,²³² using interviews with current and former uranium workers to illuminate many of these negative impacts.²³³ This and other studies have shown that the exposure to fine uranium particles, unstable by-products of uranium and radon in the uranium mining process is connected to lung cancer, birth defects, contraction of leukemia, DNA mutations, stomach cancer, chromosomal deformities and more.²³⁴



Poisonous substance stored at the Langer Heinrich Uranium Mine

²³² Environmental Justice, Liabilities and Trade (EJOLT) & Earthlife, B. Kohrs and P. Kafuka, "Study on low-level radiation of Rio Tinto's Rössing Uranium mine workers," (2014) accessible <<http://www.criirad.org/mines-uranium/namibie/riotinto-rossing-workers-EARTHLIFE-LARRI-EJOLT.pdf>>

²³³ *Ibid.*

²³⁴ Labour Research and Resource Institute (LRRI), Hilma Shindondola-Mote, "Uranium Mining & The Health of Workers – Some Epidemiological Evidence," in *Powering Namibia into the Future Towards Sustainable Energy Production*, 2014, p. 175.

Rössing is currently engaged in another study regarding the health of its workers²³⁵ and states that employees are well cared-for medically during their employment.²³⁶ However, there remain serious concerns regarding workers' health and the medical care provided them, as instances of subpar and biased medical care have been recorded.²³⁷ Mining safety manuals and safety trainings fail to explain to workers "the link between exposure to radiation and possible occupational repercussions,"²³⁸ and access to medical reports held by Rössing's medical team has repeatedly been denied by requesting employees.²³⁹ What is more, open discussion around these issues may have resulted in community members feeling intimidated: an anonymous community member from Windhoek expressed fear in discussing these issues due to corporate and government backlash.²⁴⁰

However, these kinds of discussions are vital due to the potential medical, health and safety costs arising from these activities. These issues deserve to be addressed in order to avoid their continuation, and the private corporations involved in business connected to such human rights impacts should be required to cover these costs. Businesses must be engaging in proper analysis and calculation of the human rights issues and costs that are connected to their activities, and include these social costs in their overall operating costs and budgets. Failure to do so leaves the state vulnerable to ensuring these costs are covered if, for example, companies fail or declare bankruptcy.

Recommendation 27: Businesses in Namibia should be engaging in proper and thorough cost analysis of human rights issues connected to or exacerbated by their corporate activities. The Namibian government must ensure proper and relevant legislation is thus in place and enforced.

²³⁵ Perhaps in response to the above report, as it generated serious backlash from Rössing, the government and others.

²³⁶ Authors interview with anonymous source in Windhoek (March 15, 2016).

²³⁷ Authors interview with anonymous source in Windhoek (March 15, 2016).

²³⁸ Labour Research and Resource Institute (LRRI), Hilma Shindondola-Mote, "Uranium Mining & The Health of Workers – Some Epidemiological Evidence," in *Powering Namibia into the Future Towards Sustainable Energy Production*, 2014, p.178.

²³⁹ Earthlife Namibia, Bertchen Kohrs, "Radiation Impacts of Uranium," in *Powering Namibia into the Future Towards Sustainable Energy Production*, 2014, p.182.

²⁴⁰ Interview with anonymous community member from Windhoek, Interview by Mobeen Bhatti, Erika Piquero, Swakopmund, 17 March 2016.

2. LABOR RIGHTS

Namibia's mining industry has a history of heavily relying on contract workers. Before independence, under South African rule, a contract labor system was imposed upon black Namibians and compensation was awarded based on "ranked classes, rather than the type of work."²⁴¹ During Rössing's first years of operation, it relied upon migrant laborers, which the International Commission of Jurists referred to "[as] similar to slavery" and declared as unlawful.²⁴² A recent petition compiled by Rio Tinto's Rössing Uranium contract workers expresses similar and continual grievances. Their 2015 petition stated the following:

"Contract workers are being dismissed without fair hearings. Their access cards are simply blocked without any reason. There are no written contracts of employment; no disciplinary policies; and the employer changes the conditions without notifying anyone and it becomes a dispute."²⁴³

This situation for contract workers still presents a valid and serious concern; however, the social problems posed by contract labor have largely improved and changed, especially since the peak of contract work during the late 1970s. Historically, mining encouraged contract labor and families were systematically separated. However, after Namibia's independence, contract work was often discouraged and mining towns such as Tsumeb, Arandis and Oranjemund became more established as contract labor declined.²⁴⁴

Other labor grievances include mining companies' "systematic victimization" of mine workers, especially employee representatives.²⁴⁵ In addition, working conditions are often unsafe for mine workers, and mining companies demonstrate weak efforts to implement

²⁴¹ Earthlife Namibia, Bertchen Kohrs, "History of Rio Tinto's Rössing Uranium Mine" in *Powering Namibia into the Future Towards Sustainable Energy Production*, 2014, p.139.

²⁴² *Ibid.*

²⁴³ Adam Hartman, "Rössing Contract Workers Feel Exploited and Abused," *The Namibian* (9 October 2015), accessible <<http://www.namibian.com.na/index.php?page=archive-read&id=142848>> .

²⁴⁴ Interview with LaRRI, Interview by Joanna Capones, Erika Piquero, Windhoek, 14 March 2015.

²⁴⁵ Milbeba Chipepo, "Namibia: Employee Representatives are Targeted and Mistreated by Companies, Claims Union Leader," *Namibia Economist* (26 June 2015), accessible <<http://business-humanrights.org/en/namibia-employee-representatives-are-targeted-and-mistreated-by-companies-claims-union-leader>>.

worthy risk management policies that protect their workers.²⁴⁶ Another important point to consider with regard to the labor rights of mine workers is the social responsibility to those workers were the sector to crash and investors to withdraw – a serious threat given low commodities prices.²⁴⁷

3. SOCIAL AND GENDER IMPACTS

In addition to health issues, the social fabric of communities is often disrupted by mining activities. Mining encourages contract work, as mentioned previously, and systematically separates families,²⁴⁸ especially as many contract workers were historically required to leave behind their families for the period of their work.²⁴⁹ The formal mining industry is also a male-dominated sector, with little opportunity for women's entry into the workforce. However, women form many dependent side economies to this, selling food and other supplies to workers.²⁵⁰ Additionally, more women are involved as mine workers in the informal mining industry's family-based and -oriented process.²⁵¹ These women are often overburdened, though, with such additional responsibilities contributing to unequal gendered work distribution.²⁵²

Gendered impacts experienced here deserve attention because, primarily Namibians themselves are identifying these issues as pertinent.²⁵³ Moreover, failing to address issues connected to mining activities in Namibia poses the potential for increased social conflict in the future as these issues contribute to perpetuating inequality — which in turn poses more costs for the state. Therefore, in order to avoid increased future costs, preventive approaches are clearly preferable in addressing these impacts.

²⁴⁶ IndustriAll Global Union, "Rio Tinto: The Way It Really Works," (15 April 2015), accessible <http://www.industriall-union.org/sites/default/files/uploads/documents/Rio_Tinto_Campaign/pre-agm_handout_hires21.pdf>

²⁴⁷ "A Mining Sector in Crisis," *The Southern Times* (14 March 2016), accessible <<http://southernafrican.news/2016/03/14/a-mining-sector-in-crisis/>>.

²⁴⁸ Interview with LaRRI, Interview by Joanna Capones, Erika Piquero, Windhoek, 14 March, 2015.

²⁴⁹ Earthlife Namibia, Bertchen Kohrs, "Radiation Impacts of Uranium," above n 239, p.139.

²⁵⁰ *Ibid.*

²⁵¹ *Ibid.*

²⁵² *Ibid.*

²⁵³ Interview with LaRRI, Interview by Joanna Capones, Erika Piquero, Windhoek, 14 March, 2015

4. LAND RIGHTS

There are more than 80 community and tribal lands in Namibia, and virtually all of them contain Exclusive Prospecting Licenses (**EPLs**).²⁵⁴ Community members residing on and caring for these lands are often unaware that EPLs have been granted and prospective mining companies have no obligation to inform communal residents before beginning explorative activities.²⁵⁵ Thus, communal residents may only become aware of the EPL's existence when they physically see explorative activities taking place.²⁵⁶ The Mines Act of 1992 requires prospective mining companies to negotiate with commercial landowners but not with communal residents;²⁵⁷ there is “a deliberate attempt not to deal with those residents, they're disadvantaged.”²⁵⁸ Furthermore, community consultation practices are not sufficiently implemented nor enforced into the process of obtaining EPLs or ECCs.²⁵⁹

A significant legislative gap seems to exist in ensuring that public consultation occurs with regards to mining activities, contributing to larger failures to respect and uphold land and community rights.²⁶⁰ Moreover, these issues lack support within the appropriate government ministries to ensure their enforcement; no culture exists of implementing and enforcing respect for human rights issues connected to mining activities, and resource and capacity challenges further augment and exacerbate this point.²⁶¹

Recommendation 28: Ensure that public consultation occurs and communal residents' or landowners' rights are respected and upheld in practice, across all relevant government ministries, especially with the presence of extractive activities.

²⁵⁴ Interview with civil society organization, Interview by Joanna Capones, Erika Piquero, Lauren Waugh, Windhoek, March 16, 2016.

²⁵⁵ *Ibid.*

²⁵⁶ *Ibid.*

²⁵⁷ However, this could potentially be challenged constitutionally with Section 16 of the Namibian constitution. Interview with civil society organization, Interview by Joanna Capones, Erika Piquero, Lauren Waugh, Windhoek, March 16, 2016.

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.*

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*

Recommendation 29: The government should publicly acknowledge and better implement the UN Guiding Principles on Business and Human Rights and sign the International Labour Organisation’s Convention on Indigenous and Tribal Peoples.

Mining Fraud in Anabeb¹

An unknown Chinese mining company was granted an EPL in the area of Anabeb in northern Namibia. The clearance certificate showed that the company had declared to the Environmental Commissioner that they would use one vehicle to access the area and a shovel to conduct minor explorative activities. Additionally, the company had expressed its plans to work with local community members to purchase water from them.

By chance, an employee from the Legal Assistance Center (LAC) was traveling through the Anabeb region and spoke with residents there regarding these explorative mining activities. Community residents showed that the mining company had in fact lied to the Environmental Commissioner regarding its exploration activities. The company had bulldozed a road through this area, destroying protected and ancient Welwitschia plants. They had also drilled water holes without obtaining proper permissions that caused contamination of a nearby natural spring that provided drinking water for rhinoceroses and other animals.

The aforementioned LAC employee requested a copy of the granted certificate from the Environmental Commissioner’s office. However, they were refused this request – and only upon stating that they would take the matter to court was the request granted. As the contact information the company provided to obtain the certificate proved to be falsified, no further information was secured regarding the incident.

C. SOCIAL ISSUES RELATING TO THE FISHERIES SECTOR

Namibia has one of the richest fishing grounds in the world and the industry is quickly growing, as evidenced by a 42 percent increase in export revenues in the past year.²⁶² However, the economic benefits presented by Namibia's fishing industry are experienced by a small fraction of the Namibian people: quotas are only given to certain companies and individuals, and obtaining these quotas involves many obstacles.²⁶³ Despite this, the fishing industry would have the potential to address serious social concerns in Namibia if the appropriate mechanisms were in place:

In addition to providing food, aquaculture development can contribute to poverty alleviation, employment, community development, reduction in overexploitation of fisheries resources, as well as food security.²⁶⁴

1. FOOD SECURITY AND POVERTY

Namibia's aridity and propensity for droughts often affects Namibian livelihoods and exacerbates issues of inequality and poverty throughout the country.²⁶⁵ In Namibia, child malnourishment ranges from 30 percent to 50 percent throughout the country — and while fish products elsewhere constitute inexpensive protein options, “fish comprises only about 14 % gram [sic] of total animal protein intake except for in the northern region in the Cuvelai and Caprivi floodplains.”²⁶⁶

²⁶² Adam Hartman, “Record Export Revenue for Fisheries,” *The Namibian* (1 March 2016), accessible <<http://www.namibian.com.na/index.php?page=read&id=37754>>

²⁶³ Interview with Ombudsman of Namibia, John Walters, Interview by Joanna Capones, Erika Piquero, Lauren Waugh, Windhoek, 18 March 2016.

²⁶⁴ United Nations Food and Agriculture Organization (UNFAO), “Fisheries and the Right to Food: Implementing the Right to Food in National Fisheries Legislation,” (2009), accessible <<http://www.fao.org/docrep/016/ap553e/ap553e.pdf>>, p.8.

²⁶⁵ United Nations Food and Agriculture Organization (UNFAO), “Namibia Fisheries Country Summary,” (2007), accessible <<http://www.fao.org/fi/oldsite/FCP/en/nam/profile.htm>>.

²⁶⁶ *Ibid.*

Part of this is undoubtedly due to accessibility: “the distance between the ocean, the harbors and the major cities and towns is so great that it is not always easy to access fish products.”²⁶⁷ Additionally, fish prices are too high for the average Namibian to purchase — so benefits to food security that could be felt are lost to international exports.²⁶⁸ Quota processes are not conducive to ensuring that benefits are received by ordinary citizens.²⁶⁹ Together these factors undoubtedly contribute to the lack of food security felt in Namibia.

2. Marine Phosphate Mining and Potential Impacts upon Employment in the Fisheries Sector

Namibia’s fishing industry contributes significantly to its economy, with current employment in the sector estimated at approximately 13,700 people.²⁷⁰ In addition, its fishing grounds are some of the richest and most diverse in the world. Marine phosphate mining would pose a seriously detrimental risk to both of these aspects. While there is currently a moratorium in place on offshore phosphate mining,²⁷¹ vocal proponents for these activities are still hoping to push forward,²⁷² resulting in a direct conflict between the fisheries and mining sectors.²⁷³ The number of employment opportunities that would be created by marine phosphate mining activities is very low and the estimated revenue from offshore phosphate mining is unclear.²⁷⁴ Meanwhile, the income from the fisheries industry is hugely beneficial, and it creates significant employment opportunities — so many Namibians are at a loss to understand why the state would risk its fisheries success for such uncertain and insecure activities.²⁷⁵

²⁶⁷ *Ibid.*

²⁶⁸ *Ibid.*

²⁶⁹ Interview with Ombudsman of Namibia, John Walters, Interview by Joanna Capones, Erika Piquero, Lauren Waugh, Windhoek, 18 March 2016.

²⁷⁰ United Nations Food and Agriculture Organization (UNFAO), “Namibia Fisheries Country Summary,” (2007), accessible <<http://www.fao.org/fi/oldsite/FCP/en/nam/profile.htm>>.

²⁷¹ Adam Hartman, “Phosphate Mining a ‘Dark Cloud’ Over Fisheries,” *The Namibian* (2 March 2016), accessible <<http://www.namibian.com.na/index.php?page=read&id=37778>>

²⁷² See Namibian Marine Phosphate (Pty) Ltd., accessible <<http://www.namphos.com/>>.

²⁷³ Interview with civil society organization, Interview by Joanna Capones, Erika Piquero, Lauren Waugh, Windhoek, March 16, 2016.

²⁷⁴ Interview with Ben Begbie-Clench, Interview by Erika Piquero, Windhoek, 16 March, 2016.

²⁷⁵ *Ibid.*

D. CONCLUSION

The social impacts connected to the mining and fisheries sectors described here are certainly detrimental — especially to those directly experiencing these impacts — but compared to many of its counterparts Namibia is perceived as “doing well” with regards to its management of the two natural resource sectors.

Despite this characterization, the myriad factors discussed here must be addressed and the proper regulatory framework must be introduced in order to protect and uphold these rights. Without this necessary framework, Namibia’s position is precarious, and if the sector landscapes change (as often occurs with natural resources), the current legal framework would largely fail to ensure rights protection. Moreover, the characterization of Namibia as “doing well” might be faulty simply due to insufficient data collection on human rights issues and social impacts tied to extractive activities.

The responsibility to ensure the proper laws are in place of course lies with the Namibian government, but the business community in Namibia has certain responsibilities as well. While both the mining and fisheries sectors have demonstrated some positive acts of corporate responsibility with regard to providing education opportunities,²⁷⁶ there is still much that can be done. For example, business actors in Namibia can take the lead in ensuring that proper Social Impact Assessments (**SIA**) are conducted thoroughly — and separately from EIAs — and in a participatory manner. As these SIAs are increasingly recognized as essential by Namibian civil society actors²⁷⁷ and international authorities²⁷⁸ alike, the Namibian government should ensure that proper legislation is enacted to make SIAs mandatory for all extractive projects.

²⁷⁶ Rössing and several fishing companies have been known to offer a limited number of scholarships supporting children’s and young adult’s educational pursuits.

²⁷⁷ Interview with the civil society organization, Interview by Joanna Capones, Erika Piquero, Lauren Waugh, Windhoek, March 16, 2016.

²⁷⁸ *UN Guiding Principles of Business and Human Rights* (Adopted 16 June 2011).

Simultaneously, the government and Office of the Ombudsman can work more closely with the business community to create a business and human rights plan²⁷⁹ that works to ensure rights protections. More effort must be exerted to champion these issues and create a culture of enforcement because “this is not sustainable in the long-term, what is happening.”²⁸⁰ More specifically, failing to address these issues and ensure an improved culture of addressing these problems will certainly contribute in the future to serious financial costs for the state to rectify such negative social impact.



Workers at Seaworks Fish Processing Plant

²⁷⁹ There is currently no business and human rights plan, although the Ombudsman has expressed initial interest in pursuing this. (Interview with Ombudsman of Namibia, John Walters, Interview by Joanna Capones, Erika Piquero, Lauren Waugh, Windhoek, 18 March 2016).

²⁸⁰ Interview with civil society organization, Interview by Joanna Capones, Erika Piquero, Lauren Waugh, Windhoek, March 16, 2016.

Recommendation 30: Develop a comprehensive business and human rights plan, ensuring consultation with all necessary stakeholders (community members, civil society organizations, corporate actors, etc.).

Recommendation 31: Implement processes so that Social Impact Assessments are conducted separately from Environmental Impact Assessments; codify that the SIAs and EIAs are independent and involve public consultation; and ensure that all SIAs are publicly available and easily accessible within 30 days of their finalization.

Recommendation 32: Codify and introduce enforceable penalties for non-compliance with social standards on behalf of corporate activities.

Recommendation 33: Require companies to include thorough analyses of social impacts and their costs, and to include those costs in their overall operating budgets.

Recommendation 34: Consult with Namibian civil society actors and appropriate international organizations (if necessary) to improve and further develop robust human rights data collection methodologies.

THE MINING SECTOR

A. OVERVIEW OF THE MINING INDUSTRY

The first uranium mine in Namibia, Rössing Uranium (owned by Rio Tinto), commenced its operation in 1976, almost two decades before Namibia gained its independence in 1990.²⁸¹ Since then, the mining sector has become one of the key contributors to the economy of Namibia. In 2015, the total revenue received from the sector contributed to 11.9 percent of Namibia's GDP.²⁸² The Namibian economy continues to grow faster than the 4.3 percent long term trend due to the current construction boom, household consumption growth and growth in tradable services, partially due to unusually high foreign direct investment.²⁸³ The government, well aware of mining's significant contribution to the economy, has successfully created a favorable investment climate to further encourage investment in the sector.²⁸⁴

As one of the main drivers of the economy, the mining sector could play a substantial role in supporting the Namibian Vision 2030 set forth in the NDP4. In the document, the government declared three goals for development in Namibia: high and sustainable growth, employment creation and a reduction in income inequality.²⁸⁵ One of the key visions of

²⁸¹ South Africa granted the license to Rio Tinto despite the enactment of the 1974 UN Decree for the Protection of the Natural Resources Namibia which effectively recognizes the illegality of the South African presence in Namibia, including the invalidity of its acts on behalf of Namibia in the granting of permit of natural resources exploration and exploitation (The Rössing file). The ruling party after Namibia's independence, the South WestSouthwest Africa People's Organization (SWAPO), perceived Rio Tinto as a symbol of foreign power, yet it still maintained support for the company, declaring it to be fundamental for the economy of the newly created state.

²⁸² Namibia Statistics Agency, "Preliminary Annual National Accounts 2015," above n 7, p. 23

²⁸³ The World Bank, "Countries Overview on Namibia", accessible

<<http://www.worldbank.org/en/country/namibia/overview>>. Namibia is experiencing faster economic growth as a result of low interest rates, fiscal stimulus, and unusually high foreign direct investment in the mining sector.

²⁸⁴ Fraser Institute, "Annual Survey of Mining Companies 2015", accessible

<<https://www.fraserinstitute.org/studies/annual-survey-of-mining-companies-2015>> Namibia currently ranks 25 on the investment attractiveness index released by the Fraser Institute's Survey of Mining Companies 2013/2014. The rankings assess a combined country's mineral potential and the government policy in the mining sector, including trade barrier, taxation, and regulatory uncertainty. Namibia has recently become Africa's most attractive place to invest; Geological Survey of Namibia (GSN), "Country Supplement: Namibia: Abundant Exploration Opportunities", (October 10, 1997), *Mining Journal*, Volume 329 No. 8450, accessible <<http://www.gsn.gov.na/pdf/miningjournal.pdf>>.

²⁸⁵ Office of the President of Namibia, National Planning Commission, "Namibia's Fourth National Development Plan 2012/13 to 2016/17," above n 45.

mining sector development in Namibia is to ensure the “maximum sustainable contribution to the socio-economic development of the country”.²⁸⁶ The positive growth in investment in the mining sector in Namibia is a promising sign, however, Namibia needs to overcome some challenges to fully tap into its full economic potential.

B. MAXIMIZING THE BENEFITS OF THE MINING SECTOR IN NAMIBIA

1. EPANGELO MINING COMPANY (PTY) LTD

The Namibian government maintains that the revenue from mining sector — which is mainly derived from royalties and taxes — is disproportionately low and that as such not all Namibians will be able to enjoy the benefits of their country’s natural resources.²⁸⁷ Based on this view, the government proposed beneficiation strategy²⁸⁸ and established Epangelo Mining Company (Pty) Ltd (**Epangelo**) in 2008 under the Namibian Companies Act, 2004 with the Namibian government as the sole shareholder.²⁸⁹ It became operational in mid-2010, with initial financing of N\$ 1.5 million (US\$ 217,500) from the government.²⁹⁰ In 2011 the Cabinet declared that Epangelo would be granted all new licenses issued for exploration and mining of all strategic minerals — which are diamonds, uranium, copper, gold, zinc and coal — and that this regulation would not be applied retroactively.²⁹¹ Although the

²⁸⁶ Ministry of Environment and Tourism of Namibia, “Minerals Policy of Namibia,” accessible <<http://www.mti.gov.na/downloads/Namibia%20Mineral%20Policy.pdf>>.

²⁸⁷ For a more detailed analysis on the contribution of the mining sector to Namibian economy, the *Economics* section at p.18.

²⁸⁸ Namibia seeks to gain more benefits from the mining value chain, especially from the diamond industry by introducing the Mineral Beneficiation Strategy for Namibia. Effectively this policy will impose levy as incentive for mineral value addition in Namibia. This initiative is part of Namibia’s industrialization and economic diversification plan. For more detailed analysis please see the *Economics* section on p. 20.

²⁸⁹ R. Grant, R. Araeb, A. Jacobi, KPMG Global Mining Institute, “Namibia Mining Country Guide,” (2014), accessible <<https://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/mining-country-guides/Documents/namibia-mining-guide.pdf>>.

²⁹⁰ The World Bank, Overview of State Ownership in the Global Mineral Industry, (May 2011), Extractive Industry for Development Series #20, accessible <<http://siteresources.worldbank.org/INTOGMC/Resources/GlobalMiningIndustry-Overview.pdf>>.

²⁹¹ Chamwe Kaira, “Epangelo Cannot Have Mining Rights- Koep”, *The Namibian* (25 March 2014), accessible <<http://www.namibian.com.na/index.php?id=121360&page=archive-read>>.

government intended Epangelo to be a significant if not leading player in providing funding for an extremely capital-intensive mining industry, many stakeholders expressed concern that it does not have the necessary funds to carry out all the activities to fulfill its vision, especially to participate in large transactions.²⁹² In 2012 - 2013, Epangelo would have required approximately N\$ 300 million fulfill its mandate, yet the government only allocated N\$ 5 million, and there is no evidence to suggest that the funding will increase dramatically.²⁹³

As expressed in the NDP4, the government's investment strategy will be guided by government-led economic development, balanced with the need to maintain macroeconomic stability. Epangelo was intended to provide greater participation of the government and the Namibian people in the mining sector. However, many stakeholders, especially from the private sector, are skeptical about Epangelo's capacity to carry out its mandate to play a significant role in the mining sector in Namibia due to its limited financial capacity.²⁹⁴ Unless the government provides full support for Epangelo to carry out its mandate, this policy may lead to the stagnation of the mining sector in Namibia.²⁹⁵

Besides access to capital, another important issues relevant for Epangelo is the obvious institutional conflict of interest.²⁹⁶ Some stakeholders problematize the fact that the Ministry of Energy and Mines, which supervises Epangelo, is effectively granting licenses to itself.²⁹⁷ This dual role, as regulator and owner-producer, is not uncommon, however it requires some precautions to reconcile the potential competing interests and roles.²⁹⁸

This proposed change has not been applied in Namibia. There is a concern over potential conflict of interest that may arise in the granting of licenses. Some stakeholders argue that it is problematic that the decision maker can grant itself licenses.

²⁹² *Ibid.*

²⁹³ H., Linakela, "Is the Government Killing Epangelo?", *The Villager* (2 June 2014), accessible <<http://www.thevillager.com.na/articles/6483/Is-Government-killing---Epangelo-/>>

²⁹⁴ Authors interview with stakeholders in Windhoek and Swakopmund

²⁹⁵ Chamwe Kaira, "Epangelo Cannot Have Mining Rights- Koep", *The Namibian* (25 March 2014), above n 291.

²⁹⁶ *Ibid.*

²⁹⁷ *Ibid.*

²⁹⁸ Jenik Radon and Julius Thaler, "Resolving Conflict of Interests in State- Owned Enterprises" (ISSJ Manuscript No. 702, 2009).

Many countries have managed to achieve economic success with large State Owned Enterprises (SOE) sector. In Singapore, for example, the government owns enterprises in various sectors including power, telecommunications, and transportations.²⁹⁹ However, SOEs that are not efficiently managed will only squander taxpayers' money.³⁰⁰ The performance of an SOE can be improved through organizational reform, an increase in competition, and political administrative reforms.³⁰¹ Many countries have managed to revitalize their SOEs and increase their contribution to the economy. In 2009, Chile successfully reformed Corporación Nacional del Cobre de Chile (Codelco), one of the largest SOEs in Chile and the world's largest copper producer. The reform eliminated the Ministers from the board, increased the number of independent directors elected through competitive and open process and established that Codelco is subject to the same requirements as private companies.³⁰² Codelco's five-year plan, which was proposed by the chief executive after the reform, is expected to raise the copper output up to 30 percent by 2018.³⁰³

Recommendation 35: Namibia should revisit the structure of Epangelo including its goals, organization, financial capacity, and management (independence from the government) to ensure its efficiency

²⁹⁹ United Nations Development Strategies (UN DESA) : Ha- Joon Chang, " State –Owned Enterprise Reform', (2007).

³⁰⁰ *Ibid.* A good SOE can help the government in attaining the profit objectives while achieving the non-profit objectives that can include guaranteeing access to basic social services, or investment in sustainable development

³⁰¹ *Ibid.* There are several principles that are likely to lead to successful SOEs, which often also apply to successful private firms. These principles include: 1. Clearly defined non-profit objectives; 2. Established management strategy that is profit oriented; 3. Adopt the latest possible technologies; 4. Promote experts; 5. Invest in human resources; 6 . Improve the incentive system. These principles need to be complemented with reforms at the level of the government to make sure the SOEs can fully perform, without being bogged down by politics.

³⁰² Organisation for Economic Cooperation and Development (OECD), " Corporate Governance in Chile, " accessible <<https://www.oecd.org/corporate/ca/corporategovernanceprinciples/47073155.pdf>>.

³⁰³ " Chile's Copper Industry : Reviving Codelco," *The Economist* (21 October 2010), accessible <<http://www.economist.com/node/17311933>>.

2. EMPLOYMENT AND THE SOCIAL LICENSE TO OPERATE

Unemployment, along with poverty and income inequality, remains persistent in Namibia.³⁰⁴ The BoN attributes the high unemployment rate to sectors that do not create significant job opportunities such as mining.³⁰⁵ In 2013, the mining industry “only” provided 7,582 permanent jobs out of which 353 were for expatriates.³⁰⁶ In 2011 Rössing Uranium, one of the largest uranium mines in the country, employed 1,673 people, while Langer Heinrich, another uranium mine, reported employing 330 employees and 580 contractors in the financial year 2012.³⁰⁷ The entire uranium industry is estimated to employ between 3,000-5,000 people.³⁰⁸ Despite low numbers of direct employment, the mining sector in Namibia contributes to the growth of procurement companies, including enterprises that emerge to deliver goods, services and infrastructure. In 2014, Rössing Uranium spent N\$ 1.086 billion on procurement, which accounts for 68 percent of the total operating costs. Most of this expenditure was allocated to Namibian registered suppliers.³⁰⁹ 80 percent of Paladin’s procurement was from local Namibian companies in 2012.³¹⁰ In certain areas, mining companies are dependent on one particular company, such as NamWater for water and NamPower for electricity. In other cases, the company can source the services from several companies through an open bidding process.

Mining can also directly affect the agriculture and tourism sectors, which create significant employment opportunities in Namibia. The agricultural sector, which employed 31.4 percent of Namibians in 2015, depends on water extracted from aquifers.³¹¹ Therefore any risks of

³⁰⁴ KPMG Global Mining Institute, “Namibia Mining Country Guide,” (2014), above n 295.

³⁰⁵ Itziar Aguirre, Global Risk Insights, “Four Challenges for Namibia’s PM Geingob, (26 December 2014), accessible <<http://globalriskinsights.com/2014/12/four-challenges-for-namibias-pm-geingob/>>

³⁰⁶ Chamwe Kaira, “Epangelo Cannot Have Mining Rights- Koep”, *The Namibia* (25 March 2014), above n 297.

³⁰⁷ Mateusz Pietrzela, “Mining and Sustainability ? Systems and Stakeholder Analyses of Uranium Mining in Namibia,” accessible <<http://www.diva-portal.org/smash/get/diva2:637864/FULLTEXT01.pdf>>.

³⁰⁸ Chamber of Mines Namibia, *Annual Review, (The Chamber of Mines, 2014)*.

³⁰⁹ Rössing Uranium, “Working for Namibia,” accessible <<http://www.rossing.com/riotinto.htm>>

³¹⁰ Mateusz Pietrzela, “Mining and Sustainability? Systems and Stakeholder Analyses of Uranium Mining in Namibia,” above n 307.

³¹¹ African Economic Outlook, “Namibia 2015,” above n 6. Agricultural activity will be affected directly by the quality of groundwater and levels, which could be negatively affected by pollution from the mining operations

pollution or leakage to the water sources from the mining operations may create a negative externality for the agricultural sector in Namibia.³¹²

Tourism, the third most important economic sector in the country, provided 15.5 percent of the total GDP and 19 percent of the total employment in Namibia in 2015.³¹³ It is one of the government's priority sectors, as stated in NDP4. The potential loss of biodiversity and environmental degradation due to mining projects, especially those operating inside the Namib Naukluft National Park, will directly affect the tourism industry.³¹⁴ For example, the Husab project in the Erongo region will have an impact on the landscape surrounding the iconic Welwetschia plains, and is predicted to impact the internationally renowned "Moon Landscape".³¹⁵

Ensuring direct contribution to the local community is imperative to maintaining the social license to operate.³¹⁶ Local communities usually have set expectations about the type of contribution mining projects can bring to their region, which may include direct employment.³¹⁷ For example, the loss of local employment when the mines close has been known to create negative sentiments towards the operator and the sector in general.³¹⁸ Therefore, in the case of Namibia, a lack of direct contribution to the local community, coupled with a lack of information sharing between the company and local population, may make it harder for the industry in general to maintain the social license to operate, especially

³¹² United Nations Food and Agriculture Organization (UNFAO),: H. Krugmann and M. Alberts, "Water Use and Demand : Namibia", (February 2012), accessible <http://www.fao.org/nr/water/docs/okavango/CBR7_WaterUseNAM.pdf>.

³¹³ Office of the President of Namibia, National Planning Commission, "Namibia's Fourth National Development Plan 2012/13 to 2016/17," above n 45, p. 92; World Travel and Tourism Council, "Economic Impact 2015: Namibia," accessible <<https://www.wttc.org/-/media/files/reports/economic%20impact%20research/countries%202015/namibia2015.pdf>>.

³¹⁴ Ndeshi Shiviya and Michelle Fournier, "Uranium mining versus tourism, biodiversity," *The Namibian* (12 August 2010) accessible <<http://www.namibian.com.na/index.php?id=69440&page=archive-read>>.

³¹⁵ "Uranium Giants Awaken," *The Namibian Sun* (25 February 2015), accessible <<http://www.namibiansun.com/local-news/uranium-giant-awakens.76926>>.

³¹⁶ Ernst and Young, "Business Risks Facing Mining and Metal 2015/2016 : Moving from the back seat to the driver's seat", accessible <[http://www.ey.com/Publication/vwLUAssets/EY-business-risks-in-mining-and-metals-2015-2016/\\$FILE/EY-business-risks-in-mining-and-metals-2015-2016.pdf](http://www.ey.com/Publication/vwLUAssets/EY-business-risks-in-mining-and-metals-2015-2016/$FILE/EY-business-risks-in-mining-and-metals-2015-2016.pdf)>

³¹⁷ Ernst and Young, "Business Risks Facing Mining and Metal 2015/2016," above n 3162.

³¹⁸ *Ibid.*

when there are potential negative impacts to the agriculture and tourism sector, two sectors that a significant number of Namibians depend on.³¹⁹

3. THE NATIONAL EQUITABLE ECONOMIC EMPOWERMENT FRAMEWORK (NEEEF)

The government recently introduced the NEEEF.³²⁰ One of the key pillars in NEEEF is empowerment, which aims at addressing the needs of “previously disadvantaged persons”.³²¹ The law regulates ownership, management, control, employment equity, and entrepreneurship development, among other things, that are applicable to public procurement, access rights to natural resources (including mining and fishing), as well as business licenses across the entire Namibian economy.³²² This policy framework, if legislated, will effectively require all newly registered entities to have as one of their partners, shareholders or members a “previously disadvantaged person” who must own at least 25 percent of the equity of the registered entity.³²³ While in principle this policy of empowerment is commendable, many stakeholders expressed concerns over its implementation. The private sector claimed that this policy would severely limit their operations.³²⁴ Given the value of private sector investments in Namibia, meeting the 25 percent share of ownership by previously disadvantaged persons would pose a serious financial and management challenge and may result in investors withdrawing, or at least limiting, their investment from Namibia.³²⁵ Local stakeholders were equally critical, saying that the policy, unless executed properly, would not help the previously disadvantaged

³¹⁹ Growth in the uranium industry put more pressures in the already-constrained power and water sector in Namibia, which directly affect local population and other sector especially agriculture (please see the *Mining* section for a more in-depth analysis).

³²⁰ Regulated under the *National Equitable Economic Empowerment Bill*, 2015. The public is invited to submit their queries, comments and inputs to the bill draft before April 29, 2016. The Chamber of Mines of Namibia is trying to lobby against this bill, especially on the provisions requiring 25% ownership. This policy is similar to the Black Economic Empowerment law enacted in South Africa.

³²¹ Under the current NEEEF draft, “*Previously disadvantaged persons*” is defined as; 1. Racially disadvantaged persons; 2. Women and ;3. Persons with disability as defined in National Disability Council Act.

³²² *National Equitable Economic Empowerment Bill* (2015).

³²³ *National Equitable Economic Empowerment Bill* (2015).

³²⁴ Barbel Kirchner, “Will NEEEF reduce poverty?”, *The Namibian* (19 February 2016), accessible <<http://www.namibian.com.na/index.php?page=archive-read&id=147560>>.

³²⁵ “Businesses need to come up with own strategies to implement NEEEF Bill,” *Namibia Economist* (24 March 2016), accessible <<https://economist.com.na/16322/headlines/businesses-need-to-come-up-with-own-strategies-to-implement-neeef-bill/>>.

groups because the general population in Namibia does not have access to capital, especially to enter a capital-intensive sector like mining.³²⁶

The implementation of NEEF in the mining sector will remain contentious not only because of the issue of lack of capital, but also due to potential unintended consequences. Some critics suggest that this policy may only benefit wealthy Namibians and make the poor even poorer.³²⁷ Without precautions and proper strategy, this policy framework could widen the wealth gap in Namibia, which is the opposite of what the government is trying to achieve.³²⁸ It is important to maintain the balance between pursuing the goals of NEEF and maintaining economic growth in Namibia.

Recommendation 36: The government should reconsider the NEEEF requirement for the mining sector and assess prerequisites (such as restrictions on share transferability, and its effects) and potential implications to ensure successful implementation of NEEEF.³²⁹

C. RESOURCES AND COMMODITIES

Although Namibia is rich in resources, most of its commodities have relatively low economic value (with a few exceptions, such as diamonds).³³⁰ Even uranium, one of Namibia's main commodities, is a low-grade ore, containing between .01 percent to .05 percent of uranium in the deposits. Comparatively, deposits in Australia and Canada have,

³²⁶ Authors interview with anonymous source in Windhoek (March 15, 2016).

³²⁷ Barbel Kirchner, "Will NEEEF reduce poverty?", *The Namibian* (19 February 2016), above n 324.

³²⁸ *Ibid.*

³²⁹ Please refer to the *Economics* section for more detailed analysis

³³⁰ Felix Njini, "Namibian in Talks to Sell Diamonds Separately from De Beers," *Bloomberg* (4 July 2014) accessible <<http://www.bloomberg.com/news/articles/2014-07-03/namibia-says-in-talks-to-sell-diamonds-separately-from-de-beers>> Namibia produces the highest quality diamond in the world. It remains one of the most important contributors in Namibian economy. During our fieldtrip, it was suggested that this sector remains very secretive. Further investigation on potential strategies that can be employed to maximize the benefits in this sector, and prevent leakages would be useful.

on average, a tenfold higher uranium content.³³¹ For diamond production in Namibia, which remains one of the biggest contributors to the economy, up to 60 percent is generated from offshore mining. An anticipated breakthrough in offshore diamond technology could enable De Beers, the biggest diamond license-holder in Namibia, to tap into an estimated 80 million carats of marine diamonds in the shallow waters of the Atlantic seabed.³³² In 2014-2015, the diamond industry paid N\$ 1.97 billion in taxes to the Ministry of Finance, making it one of the most valuable commodities in Namibia and the most significant contributor to the economy.³³³ The main markets for Namibian diamonds are the US, Europe, India and China.^{334 335}

Another important commodity for Namibia is uranium. Currently, two of Namibia's large mines are capable of providing 10 percent of world uranium mining output.³³⁶ The development of the uranium sector in Namibia is supported by the government's sustainable economic growth objective, which identifies uranium as a key commodity.³³⁷ Despite the drop in the price of uranium, Namibia is expecting a quadrupling of growth in the near term due to the expansion and development of uranium in the Erongo region, especially from the Husab mine.³³⁸ Uranium will remain an important commodity in Namibia; currently, the investment to improve processing facilities and expansion of the mines accounts for one of the largest capital expenditures in Namibia.³³⁹ Operational challenges, including water and power shortages and the absence of minimum environmental management standards,³⁴⁰

³³¹ World Nuclear Association, "Uranium in Namibia", accessible < <http://www.world-nuclear.org/information-library/country-profiles/countries-g-n/namibia.aspx> >

³³² KPMG Global Mining Institute, "Namibia Mining Country Guide," (2014), above n 289.

³³³ Chamber of Mines Namibia, *Annual Review, (The Chamber of Mines, 2014)*.

³³⁴ The diamond price rose steadily after the drop in demand following the global financial crisis, before falling sharply due to lack of demand in Europe corresponding to the EU crisis.

³³⁵ De Beers stated that the growth in the US market pushed the demand upward by 4 percent-4.5 percent in 2014.

³³⁶ World Nuclear Association, "Uranium in Namibia", above n 331.

³³⁷ Reggie Sikhakhane, "Mining A Key Component in Namibia's Economy," *Miningweekly.com* (18 May 2012), accessible <<http://www.miningweekly.com/article/mining-a-key-component-in-namibias-economy-2012-05-18>>.

³³⁸ *Ibid.* The rapid growth in uranium production will help surpass the diamond sector as the largest foreign currency earner in the mining industry between 2015-2020 (accessible <<http://feeco.com/namibias-uranium-industry-boasts-biggest-growth-potential/>>).

³³⁹ *Ibid.* Rio Tinto has invested about \$285 million in the expansion of Rössing Uranium Reserve Development project. Similarly, China Guangdong Nuclear Power Corporation subsidiary, Taurus Minerals Husab uranium mine project expansion invested \$1.6 billion. This is the highest value project in Namibia's uranium mining industry, accounting for 32 percent of total capital expenditure invested in the country.

³⁴⁰ Namibian Uranium Association, "The Namibian Uranium Mining Model," accessible <<http://www-pub.iaea.org/iaeameetings/cn216pn/Tuesday/Session5/224-Swiegers.pdf>>. The government of Namibia seeks to create "a sustainable uranium mining culture in Namibia" and bring all existing and planned uranium suppliers to "certain"

remain some of the biggest challenges facing the uranium industry.³⁴¹ Namibian uranium is mostly sold to Central Europe, North America and Southeast Asia.



Namibia Capstone Team Members at the Langer Heinrich Uranium Mine

The drop in commodity prices of one substance also affects other commodities, including gold and zinc. Several mines have had to scale back production in 2015 to respond to weak commodity price.³⁴² In 2014, Glencore cut 124 jobs, or 20 percent of its staff, at the Rosh Pinah mine in an attempt to control costs.³⁴³ Weatherly Mining Namibia suspended its central operations in 2015 and cut 222 jobs due to the low copper price.³⁴⁴ However, the Namibian Chamber of Mines remains positive regarding the overall outlook of the sector in

level of Sustainable Development capability. Even though Namibia has been making headway by adopting the Sustaining Global Best Practices in Uranium Mining and Processing: Principles for Managing Radiation, Health, Safety, Waster and the Environment as an official document in 2008, the absence of minimum environmental management standards may pose serious challenges in achieving the goal of sustainable mining practices in Namibia.³⁴¹ Felix Njini, "Rio Tinto, Paladin Namibia Uranium Mines Face Water Shortage", *Bloomberg* (9 November 2013), accessible < <http://www.bloomberg.com/news/articles/2013-11-18/rio-tinto-paladin-uranium-mines-in-namibia-face-water-shortage>>.

³⁴² Mining investment to offsets low commodity prices", *The New Era* (15 February 2016), accessible <<https://www.newera.com.na/2016/02/15/mining-investments-offset-commodity-prices/>>.

³⁴³ Silvia Antonioli, "Glencore to cut 124 jobs at Namibia Zinc and lead mine," *Reuters* (3 June 2014), accessible <<http://www.reuters.com/article/glencore-namibia-idUSL6N0OK1HA20140603>>.

³⁴⁴ Mining investment to offsets low commodity prices", *The New Era* (15 February 2016), above n 349.

2016 and its positive contribution to the economy, mostly due to realization of new mines, including the Husab mine.³⁴⁵

D. STAKEHOLDER MAPPING AND ANALYSIS³⁴⁶

1. THE NAMIBIAN GOVERNMENT

The government is responsible for formulating, implementing and enforcing laws concerning mining in Namibia.³⁴⁷ The Minerals (Prospecting and Mining) Act, 1992 (**Minerals Act**) is the law governing the awarding of mining licenses in any area of Namibia, protected or otherwise.³⁴⁸ This law gives the power to grant licenses to the Ministry of Mines and Energy (**MME**), including the power to appoint the Mining Commissioner.³⁴⁹ The Mining Commissioner heads a committee comprised of the Mining Committee and Minerals Committee (Minerals Prospecting and Mining Rights Committee, or **MPMRC**), which reviews applications for mining licenses. Applicants submit documents, including the EIA and Environmental Management Plan (**EMP**). The Minister makes the final decision based on the recommendations of the committee. MPMRC, or the “Minerals Board of Namibia” as it is known, is comprised of technical staff from the Ministry of Mines, with representation from both Ministry of Environment and Tourism and the Ministry of Finance. According to the Minerals Act, the board must consist of eight individuals with the chairperson (either the Minister or his designated proxy). The Minister has sole discretion in deciding the composition of the MPMRC. The Chamber of Mines can nominate two

³⁴⁵ *Ibid.*

³⁴⁶ Mateusz Pietrzela, “Mining and Sustainability? Systems and Stakeholder Analyses of Uranium Mining in Namibia,” above n 313. The interlinkage between different actors will enable us to understand the power relations and processes that connects them, therefore helping to identify the pressure points or potential leakages in the extractive sector, particularly mining.

³⁴⁷ Legal Assistance Centre, Stefan Carpenté, “Mining vs. the Environment Does Namibia Need Another Uranium Mine,” accessible < <http://www.lac.org.na/projects/lead/Pdf/uranium.pdf> > .

³⁴⁸ *Ibid.*

³⁴⁹ Stanford Law School, Mills International Human Rights and Environmental Law Clinics, and Legal Assistance Centre of Namibia, “Striking a better balance: An investigation of mining practices in Namibia’s protected areas” (Windhoek: John Meinert Printing (Pty) Ltd, 2009)

members; however, the Minister can veto these nominations. The Ministry of Mines and Energy does not use external resources when reviewing the applications.³⁵⁰

After reviewing the application, the MME meets with the MET to discuss reservations each side may have.³⁵¹ Although the government bodies involved in this process supposedly have equal decision-making power, the MET has relatively little influence in the decision-making process, even for mining in a protected area. In theory, the MET has veto power, however, it is only exercised in extreme circumstances.³⁵² There is a lack of legal authority for the MET in the licensing process.³⁵³ Permission from the Directorate of Parks and Wildlife is legally required in order to mine in any game park or nature reserve — however, in practice this has merely been a formality and the Directorate has little influence over the outcome of the permit.³⁵⁴ The Environmental Commissioner under the MET has a general mandate to implement and oversee the EIA process, which is a prerequisite for the issuance of ECC, however, it is severely constrained by various factors, including its limited capacity to execute said mandate.³⁵⁵

The licensing process highlights potential problems with Namibia's regulation of mining, including overlapping jurisdictions between the Ministries. The MME is effectively in charge as both licensing authority and environmental regulator in the mining sector.³⁵⁶ These dual roles demonstrate lack of checks and balances that can lead to disastrous consequences.³⁵⁷ To avoid this conflict of interest, the function of licensing, monitoring and enforcement should be structurally separated.

³⁵⁰ Mateusz Pietrzela, "Mining and Sustainability? Systems and Stakeholder Analyses of Uranium Mining in Namibia," above n 307.

³⁵¹ *Ibid.*

³⁵² *Ibid.*

³⁵³ Stanford Law School, et al, "Striking a better balance," (2009), above n 3496.

³⁵⁴ Mateusz Pietrzela, "Mining and Sustainability? Systems and Stakeholder Analyses of Uranium Mining in Namibia," above n 3073.

³⁵⁵ For more detail analysis, please see environmental section on p.

³⁵⁶ Stanford Law School, et al, "Striking a better balance," (2009), above n 356.

³⁵⁷ Columbia SIPA Capstone Team, "Oil: Uganda's Opportunity for Prosperity," (Columbia SIPA, 2012). Please see p. 19 on the United States and the Deepwater Horizon Disaster. The Mineral Management Service (MMS) in the US was in charge of both regulating the safety of oil drilling and maximizing the revenues. The obvious conflict of interest results in numerous instances of collusion between government officials and oil company executive. This, among other factors, is considered to have prevented the authorities from foreseeing and avoiding the explosion of BP's Deepwater Horizon rig in 2010, resulting in billion dollar of economic losses in one of the most ecologically sensitive region in the US.

Recommendation 37: Establish a clear division of decision-making powers across ministries and agencies

2. MINING COMPANIES

The major mining houses operating in Namibia, including Rio Tinto, Paladin, B2Gold and De Beers, enjoy great access to capital.³⁵⁸ These companies are seen to have better environmental and social practices than smaller companies by virtue of being international companies that have more exposure to reputational risks. As such, they are seen as more likely to adhere to international standards, including EITI.³⁵⁹ The Namibian Stock Exchange (**NSX**) agreed in 2008 to only list uranium exploration and mining companies that are good standing members of the Chamber of Mines of Namibia. Most mining companies that are members of the Chamber of Mines of Namibia are bound by the Chamber's Code and Conduct to ensuring the "highest standards of environmental and radiation safety management".³⁶⁰ There are also some small-scale mining operations, mostly operating in the Erongo region.³⁶¹

3. OTHER STAKEHOLDERS

Most commodities in Namibia are sold in the international markets, making them susceptible to international price fluctuations. It is important for mining companies to demonstrate that their operations are resilient and can be flexible enough to adapt to the market changes, and have obtained and can maintain a social license to operate.³⁶² In Namibia, stakeholders that are affected by mining operations include local residents³⁶³ and other businesses, including

³⁵⁸ Authors interview with various stakeholders in Windhoek.

³⁵⁹ Authors interview with a representative of an international organization based in Namibia (March 15, 2016).

³⁶⁰ Namibian Uranium Association, "The Namibian Uranium Mining Model," above n 340.

³⁶¹ Authors interview with a representative of an international organization in Windhoek (March 15, 2016).

³⁶² Ernst and Young, "Business Risks Facing Mining and Metal 2015/2016," above n 322.

³⁶³ Mateusz Pietrzela, "Mining and Sustainability? Systems and Stakeholder Analyses of Uranium Mining in Namibia," above n 3073. This paper discusses stakeholders that are directly affected and affected the mining industry, particularly

local farmers³⁶⁴ and the tourism industry.³⁶⁵ Keeping these stakeholders abreast of developments right from the prefeasibility phase is essential to ensure that all stakeholders are aware of the impacts of the operation. As communities and advocates have become more litigious, early consultation is considered crucial to avoid expensive and damaging legal battles. Constant engagement is also important to maintain awareness of the communities' attitudes that often run ahead of the legal and regulatory framework.³⁶⁶

The relationship between NGOs and the mining industry is mixed. Some NGOs act as watchdogs and try to influence public discourse on mining practices in Namibia. For example, the Labor Research and Resource Institute (**LARRI**) has been involved in producing studies related to the health impact of the uranium industry on mine workers and Earthlife Namibia has been releasing publications focused on radiation and environmental hazards.³⁶⁷ These entities should be differentiated from “NGOs” established or financed by the mining companies to support their operations or corporate social responsibility (**CSR**), such as the Rössing Foundation and the Namdeb Foundation.

Recommendation 38: The government should encourage information sharing among government, the mining companies and the community during mine operations to maintain a social license to operate

uranium mine, in Namibia. The Erongo region, which is where most of the uranium projects are located, is in close proximity to Walvis Bay, Swakopmund, the small town of Arandis, and Usakos. These towns are either positively or negatively affected by the operations. They housed some of the procurement companies, but they can also be affected by the pollution, or waste from the mining operations. Arandis for example is most exposed to dust emissions and radiation from mining operations, there are also risks associated with waste.

³⁶⁴ The Erongo region, which is rich in Uranium, is also home to agricultural activity, mainly concentrated in the Swakop river. Local farmers influence on the sector has been negligible, mainly deriving from the fact that they are the affected party. The local farmer and the mining industry are competing in the use of groundwater, thus directly affected by the quality of the groundwater and levels, so potential pollutions from the mining activities will affect their activity.

³⁶⁵ Tourism is the third most important economic sector in the country, it provided roughly 3.7 percent of the GDP and 18,000 jobs for local residents(cite). The potential loss of biodiversity and environmental degradation due to mining projects will directly affect the tourism industry. Husab project for example in the Erongo region will have impact in changing the sense of Welwetschia plains, moreover it is predicted to affect the internationally renowned “Moon Landscape”. Some claims that mining will bring opportunities for tourism, Rössing Uranium for example offer a mine tour attended by more than 3000 visitors each year.

³⁶⁶ Ernst and Young, “Business Risks Facing Mining and Metal 2015/2016,” above n 316.

³⁶⁷ Please see sections on *Environment* and *Social Issues*.

E. LICENSING IN THE MINING SECTOR

1. TYPES OF LICENSES

The Minerals Act, constitutes the regulatory framework for licensing laws for the extractives sector in Namibia. A “mineral license” is an umbrella classification of four types of licenses: reconnaissance, prospecting, mining or mineral deposit retention licenses.³⁶⁸ Such licenses may only be granted to a citizen of Namibia “who has reached the age of 18 years and who in the opinion of the Minister is a fit and proper person to hold such license,” or a company registered in Namibia.³⁶⁹

Table 2. Overview of licenses available and general terms

LICENSE TYPE	EXCLUSIVITY	VALIDITY PERIOD	RENEWAL PERIOD	TRANSFERABILITY
Reconnaissance		6 months	Up to 6 months	No
Prospecting	Non exclusive	1 year		No
	Exclusive	3 years	Up to 2 times, in 2 year blocks, or as “desirable in the interests of the development of the mineral resources of Namibia”	Yes, with consent of relevant Minister
Deposit retention		5 years	Up to 2 years	Yes, with consent of relevant Minister
Mining	Where exclusive prospective license held	25 years	Renewable in 15 year blocks of time	Yes, with consent of relevant Minister
	Where non-exclusive prospecting license held	3 years	Renewable in 2 year blocks of time	Yes, with consent of relevant Minister

³⁶⁸ *Minerals (Prospecting and Mining) Act* (1992), s1 (definition).

³⁶⁹ *Minerals (Prospecting and Mining) Act* (1992), s1 (definition), and s 46.

Reconnaissance licenses enable the licensee to conduct reconnaissance operations for minerals. They are granted for a maximum period of 6 months, and in exceptional circumstances, can be extended for a further period of 6 months. They are not transferrable.³⁷⁰

Prospecting licenses enable the licensee to undertake territorially based excavations, usually for the purpose of feasibility studies. There are two sub-categories of prospecting licenses — “non-exclusive”, which are valid for a maximum period of one year and are not transferrable, or “exclusive” licenses which are valid for a period of three years and may be renewed for up to four years or as considered “desirable in the interests of the development of the mineral resources of Namibia.” Non-exclusive prospecting licenses allow prospecting to be undertaken on a non-exclusive basis on the designated ground as long as such ground is not subject to other mineral rights. Exclusive prospecting licenses are limited to an area of no more than 1000 km², and can be transferred only with the consent of the relevant Minister.³⁷¹

Deposit retention licenses authorize companies who were successful in their prospecting operations to be granted a right to mineral deposits discovered and which are deemed “economically unviable” in the short term. Thus, this license is not available unless the applicant is already a holder of an exclusive prospecting license or has a mining claim in relation to the area of land and minerals subject of the application. Such licenses are valid for a period of up to five years, but can be renewed for a further period of up to two years and are subject to the fulfillment of certain work and expenditure obligations.³⁷²

Mining licenses enable the licensee to conduct mining operations and confer a right to sell or otherwise dispose of minerals extracted. If an exclusive prospecting license is held, a mining license can be granted for an initial period of twenty-five years, renewable thereafter in fifteen-year blocks of time. If a non-exclusive prospecting license is held, a claim to mine the

³⁷⁰ *Minerals (Prospecting and Mining) Act* (1992), s58-66.

³⁷¹ *Minerals (Prospecting and Mining) Act* (1992), s 16-24 (non-exclusive prospecting licenses), and s 67-76 (exclusive prospecting licenses).

³⁷² *Minerals (Prospecting and Mining) Act* (1992), s79-89.

land correlating with the prospecting license should be registered with the Minister. A mining license will then be granted for an initial period of three years, renewable thereafter in two-year blocks of time. In all cases, a mining license is not transferrable without the consent of the relevant minister.³⁷³

2. ISSUES WITH THE PRESENT LICENSING LAWS

Our interviews unveiled a strong perception of an increasing practice of “unfettered license flipping” in Namibia. Concerns were expressed that licenses, in particular mining licenses, could be “flipped” or transferred easily, without requiring the formal approval of the relevant Ministry, and moreover, that transferees were not subject to the same requirements and obligations as the original license applicant. Corollary to this concern was that governmental oversight over the process of transferring licenses, or rights under such licenses, is negligible or non-existent.

The relevant provisions pertaining to the transfer of licenses, or rights thereunder, are found in the Minerals Act. The Minerals Act implements a bifurcated transfer system, where the transfer of certain types of licenses is strictly prohibited and transfers of other types of licenses are permitted with the written approval of the relevant minister. As such, we note that on the one hand, there is a strict prohibition on transferring non-exclusive prospecting licenses as well as reconnaissance licenses.³⁷⁴ On the other hand, section 3(1) of the Minerals Act expressly prohibits the transfer of or ceding, granting or assignment of any part or whole of certain types of licenses (exclusive prospecting, mineral deposit retention or mining licenses) to any person, unless the minister grants his written approval. Section 3(2) holds the non-complying individual liable to a “fine not exceeding R100,000” (South African Rands (**SAR**)). As the N\$ is pegged to the SAR this is equivalent to the local currency; approximately US\$ 6,900) and/or up to five years imprisonment.³⁷⁵

³⁷³ *Minerals (Prospecting and Mining) Act* (1992), s 90-101.

³⁷⁴ *Minerals (Prospecting and Mining) Act* (1992), s 23 and 64.

³⁷⁵ *Minerals (Prospecting and Mining) Act* (1992), s 3.

A perception of increasing “unfettered license flipping” is of significant concern because each exclusive prospective, mineral deposit retention or mining license that is “flipped” without approval of the relevant Ministry equates to a potential loss of at least N\$ 250,000 (approximately US\$ 17,300) in application fees per “flipped” license”.³⁷⁶

With respect to the permitted transfer of exclusive prospecting, mineral deposit retention or mining licenses (subject to ministerial approval), the transferee must be “a company” or a “Namibian citizen who has reached the age of 18 years and who in the opinion of the Minister is a fit and proper person to hold such license.”³⁷⁷ Upon receipt of the transfer application form and an application fee, the Minister has discretion to grant or refuse such an application.³⁷⁸ However, the Minerals Act provides that the minister “shall” grant an inter-company transfer of a license “from a company which is the holder of such mineral license to a company which is controlling, controlled by or under common control with such holder if the Minister is on reasonable grounds satisfied that such holder is not contravening or failing to comply with the terms and conditions of such license or any other mineral license held by it or any provision of this Act.”³⁷⁹

At present, any application for a transfer of a mineral license must comply with the same formality requirements as that of an initial application for the license. Thus, generally, in an application, the transferee must demonstrate to the minister that he satisfies the requirements of Section 46 of the Minerals Act, has the technical and financial resources to take over the rights and responsibilities under such license and where applicable, provide an estimation of the effect of the proposed operations on the environment, and proposed steps to minimize or prevent such effect.³⁸⁰

However, the transfer regime is notable for the broad discretion conferred onto the minister in determining whether to grant the application for transfer. The Act does not require any

³⁷⁶ *Minerals (Prospecting and Mining) Act* (1992), “Determination of Application Licence and Registration Fees,” Schedule 2, accessible < http://www.mme.gov.na/files/downloads/cf9_fee-schedule.pdf >

³⁷⁷ *Minerals (Prospecting and Mining) Act* (1992), s 46.

³⁷⁸ *Minerals (Prospecting and Mining) Act* (1992), s 47(2)(a).

³⁷⁹ *Minerals (Prospecting and Mining) Act* (1992), s 47(2)(b).

³⁸⁰ See e.g., *Minerals (Prospecting and Mining) Act* (1992), s 60, 68, 79, and 91.

information, aside from the application form and fee, to be furnished to the Minister; rather, the minister “may” require the applicant to do so.³⁸¹ The one mandatory consideration that the Act requires the Minister to consider with respect to an application for the transfer of a license is the “need to conserve and protect the natural resources in, on or under the land to which the application relates and in, on or under adjoining or neighbouring land.”³⁸²

For example, with respect to mining licenses, the minister is empowered to grant a mining license subject to the satisfaction of terms and conditions outlined at Sections 92(2) and 92(4) of the Minerals Act. However, the Minerals Act, at present, does not require the transferee to demonstrate satisfaction of the same terms and conditions as the original applicant. In light of the fact that the Act expressly provides that all rights, liabilities and obligations of the original holder shall accordingly vest in the new holder of the license,³⁸³ it appears incongruous that the transferee of a license need not satisfy the Minister of the same conditions as the original license applicant.

Recommendation 39: Undertake a comprehensive review of the Minerals (Prospecting and Mining) Act, 1992, including with respect to section 48 to ensure that the transferee must demonstrate satisfaction of the same conditions as the original license holder in order to be granted a license transfer, as in Annexure 1 (a)

Section 50 of the Minerals Act lists terms and conditions applicable to the holder of any mineral license, encompassing for example, obligations to “give preference to Namibian citizens” in employment, training and contractual engagement, to monitor the environmental impact of operations and to implement corresponding environmental management plans. At first glance, one might consider that Section 50 applies equally to the transferee, in the same way as it formerly applied to the original license holder. However, this is unclear for two reasons. Firstly, the section 1 definition of a mineral license holder refers to its “renewal” and not implicitly therefore to a transferee. Secondly, Section 46(3)’s reference to “rights,

³⁸¹ *Minerals (Prospecting and Mining) Act* (1992), s 48.

³⁸² *Minerals (Prospecting and Mining) Act* (1992), s 48(3).

³⁸³ *Minerals (Prospecting and Mining) Act* (1992), s 46(3), cross-referring to ss 39(6), 39(7) and 39(8).

liabilities and obligations” vesting in the transferee upon transfer appears to be a reference to “rights, liabilities and obligations” extraneous to the legislative framework (ie. contractual in nature).³⁸⁴

Additionally, in light of the equal importance of holding the original license holder liable for liabilities that arose or were pending prior to or at the time of the transfer, the cumulative effect of section 39(6), (7) and (8) could be further reinforced by the addition of a further sub-clause to section 39:³⁸⁵

Recommendation 40: Undertake a comprehensive review of the Minerals (Prospecting and Mining) Act, 1992, including with respect to Sections 39 and 47, to ensure that the transferee is subject to the same obligations as the original license holder, and that in the absence of any express agreement to the contrary, the original license holder remains liable for any claims that arose prior to the time of transfer, as per Annexure 1 (b)

3. UNSUSTAINABLE HEALTH AND SAFETY PRACTICES IN THE MINING INDUSTRY

There are increasingly frequent reports of incidents of breaches of labor, health and safety conditions, and a perception of growing discontentment among the labor force as a consequence. For example, in July 2015, it was reported that a report commissioned by the Australian Prime Minister pinpointed a “lack of safety” at the Langer Heinrich mine, including a lack of awareness among its employees of a Radiation Management Plan, a general lack of staff capacity to implement radiation protective measures, untimely submission of radiation exposure reports to the Namibian government and a general “lack

³⁸⁴ *Minerals (Prospecting and Mining) Act* (1992), s 1, 46(3), cross-referring to ss 39(6), 39(7) and 39(8).

³⁸⁵ See e.g., Rio Tinto, “Sustainable Development Report 2014,” (2014), available < <http://www.riotinto.com/sd2014/>>; De Beers, Corporate Social Responsibility reports, available < <https://www.debeersgroup.com/en/reports.html>>

of safety culture” concerning radiation management.³⁸⁶ In 2013, reports emerged of female miners miscarrying, allegedly as a consequence of radiation exposure. Although a subsequent government committee investigation dismissed such allegations on the basis that there was “no scientific evidence,” the same report nonetheless noted that a range of other breaches in health and safety regulations strongly suggested that “safety matters are not given the necessary priority.”³⁸⁷ Against this backdrop, there have been a high number of reported worker protests, alleging “unsafe working conditions.”³⁸⁸ The wider implications of unsustainable health and safety practices are documented in Section Social Issues of this Report.

Under the auspices of the *Mine Health and Safety Regulations* (10th Draft), the MME is empowered to undertake on-site inspections of mines. Complementary legislation is provided by the Namibian Labour Act, 1992, which mine operators are obligated to comply with during the life of a mine, primarily to provide and ensure “safe working conditions”. Namibia is therefore not devoid or otherwise lacking in a labor law framework.

At present, the Minerals Act imposes the same conditions on application for renewal of a license, as those imposed at the original application stage.³⁸⁹ However, neither the granting of the license nor its renewal is subject to any consideration of compliance with labor laws. Such laws, including that of occupational health and safety with a special focus on the extractive industry, could be reinforced through requiring a clear employment and occupational health and safety policy to be set out in the license application, and to be further monitored at the renewal stage. The underlying premise of doing so is that “[c]orporations operating in a state with strong labor protections are less likely to face strikes

³⁸⁶ Will Fitzgibbon, “Companies accused of taking advantage of regulatory weakness,” *International Consortium of Investigative Journalists* (ICIJ), (10 July 2015), accessible < <http://www.icij.org/project/fatal-extraction/companies-accused-taking-advantage-regulatory-weakness>>; Shinovene Immanuel and Ndanki Kahunka, “Aussies in toxic trail,” *The Namibian* (10 July 2015), accessible < <http://www.namibian.com.na/index.php?page=archive-read&id=139214>>

³⁸⁷ See e.g., Will Fitzgibbon, “Companies accused of taking advantage of regulatory weakness,” *International Consortium of Investigative Journalists* (ICIJ), (10 July 2015), accessible < <http://www.icij.org/project/fatal-extraction/companies-accused-taking-advantage-regulatory-weakness>>.

³⁸⁸ See e.g., Adam Hartman, “Mine workers not happy with employer, pay,” *The Namibian* (7 February 2013), accessible <<http://www.namibian.com.na/index.php?id=111343&page=archive-read>>; Faith Sankwasa, “Langer Heinrich mine denies claims of ill treatment,” *The Namibian Sun* (27 June 2013), accessible <<http://www.namibiansun.com/labour/langer-heinrich-mine-denies-claims-ill-treatment.54429>>

³⁸⁹ See e.g., *Minerals (Prospecting and Mining) Act* (1992), s 47, 72, 84, and 96.

or public protests that may disrupt operations.”³⁹⁰ Further, a system that designates the adoption, implementation and continued monitored development of an employment and occupational health and safety program over the life of an investment as a regulatory priority serves to “send a signal to investors, particularly socially responsible investors and investors concerned about their global reputations, that the state has a stable, rights-protective regulatory environment in which to conduct business.”³⁹¹

In light of the fact that persons will be engaged to carry out work other than at the mining stage of operations, for consistency, further amendments should be made to the application criteria for the granting and renewal of reconnaissance licenses (Section 60), exclusive prospecting licenses (Section 68), and non-exclusive prospecting licenses (Section 18).

Recommendation 41: Undertake a comprehensive review of the Minerals (Prospecting and Mining) Act, 1992, including with a view to reinforcing domestic labor law standards via for example, sections 50 and 91 of the *Minerals (Prospecting and Mining) Act* (1992), as per Annexure 1 (c)

F. THE INTERACTION BETWEEN LICENSING AND INVESTMENT

The Foreign Investment Act, 1990 (**FIA**) implements the regulatory framework within which foreign direct investment in Namibia is governed, and in doing so, also establishes the Namibia Investment Centre (**NIC**), which serves as an intermediary liaison body between the prospective investor and the government. Aside from being involved in marketing efforts, NIC is also the primary body involved in screening investments, although the ultimate decision-maker is the Minister of Industrialization, Trade and SME Development (**MITSD**).

³⁹⁰ J. Anthony Van Duzer, Penelope Simons and Graham Mayeda, *Integrating Sustainable Development into International investment Agreements: A Guide for Developing Country Negotiators*, (Commonwealth Secretariat, 2013), p. 330-331.

³⁹¹ *Ibid*, p. 330-331.

Significantly, the FIA mirrors the provisions in the Constitution pertaining to protection of investment and property from expropriation, and fair compensation in the event thereof.³⁹² A foreign investment is eligible for entry into Namibia and to a Certificate of Status Investment if it has an “investment value of not less than the amount which the Minister may determine from time to time by notice in the Gazette.”³⁹³ The factors that the minister ought to have “special regard” to in deciding whether to grant the Certificate of Status Investment are enumerated in the FIA as well as informal guidelines, and include: the extent to which the proposed investment is “likely to contribute towards Namibia’s development objectives,” including by “increasing employment opportunities,” “providing training,” “earning or saving foreign exchange,” “generating development,” “redressing social, economic or educational imbalances in the Namibian society,” “make provision for equal opportunities for women,” and “measures proposed to deal with any adverse environmental consequences.”³⁹⁴

Although in granting a Certificate of Investment Status, the minister “shall have special regard” to the environmental impact of any proposed investment, the assessment process for both the investment screening stage and the license granting stage can be streamlined by incorporating an element of intergovernmental department cooperation. This would allow the state to undertake a more holistic evaluation of the potential risks (and benefits) that a proposed foreign investment may bring, and thus make a more informed decision as to the same.

In this regard, we recommend that a complete review of the FIA be undertaken. For illustrative purposes, the following as italicized and underlined is a suggested amendment to Sections 6(3) of the FIA, which endeavours to import the language of Section 50 of the Minerals Act.

³⁹² *Constitution of the Republic of Namibia* (1990), Art. 16; *Foreign Investment Act* (1990), Art. 11.

³⁹³ *Foreign Investment Act* (1990), s 5.

³⁹⁴ See e.g., *Foreign Investment Act* (1990), s 6(3) and further, Ministry of Industrialization, Trade and SME Development of Namibia, “Guidelines Regarding Applications for Certificate of Status Investment”, accessible <<http://www.mti.gov.na/downloads/Status%20of%20Investment%20Certificate%20-%20Guidelines.pdf>>

In addition, given the reference to “special regard” at section 6 is somewhat unclear (i.e. to what extent must the Minister be satisfied that the conditions prescribed by section 6 must be complied with), it may be further pertinent to reconsider the use of this particular phrase.

Recommendation 42: Where a proposed investor holds or is likely to hold a license under the Minerals (Prospecting and Mining) Act, 1992, ensure that the Minister of Industrialization, Trade and SME Development in approving the proposed investment takes into account, and in consultation with the Minister of Mines, conditions especially pertaining to environmental impact that the prospective investor will need to satisfy in order to be granted a license, as per Annexure 1 (d).

Section 13 of the FIA confers onto an investor holding a Certificate of Status Investment a right to refer two types of disputes to international arbitration proceedings: i) where the dispute is “any issue relating to the amount of, or any other matter in connection with, any compensation payable in a case of an expropriation as provided in section 11”; and ii) the validity or continued validity of the Certificate.³⁹⁵ The present dispute resolution framework is problematic for two main reasons.

Firstly, the broad wording of section 13 — “any other matter in connection with any compensation payable in a case of expropriation as provided in section 11” — could be potentially relied upon by an aggrieved investor (who holds both a Certificate of Status Investment and a relevant mining license) to refer to Section 13’s arbitration mechanism, a dispute pertaining to the cancellation or non-renewal of a mining license granted under the Minerals Act. Indeed, in international investment arbitration jurisprudence, the cancellation or non-renewal of a mining license has been found, in certain circumstances, to amount to an act of expropriation.³⁹⁶ The risk of this occurring is high not only because of the imprecise wording of Section 13, but moreover, because the Minerals Act does not preclude a dispute regarding the cancellation or non-renewal of a mining license from being referred

³⁹⁵ *Foreign Investment Act* (1990), s 13(1).

³⁹⁶ See e.g., *Tecnicas Medioambientales Tecmed S.A. (“Tecmed”) v Mexico*, ICSID Case No. ARB (AF)/00/2, Award, 42 I.L.M 133 (2004).

to arbitration. In this respect, we note that Section 131 of the Minerals Act 1992 simply states that “[a]ny person who feels aggrieved with any action or decision taken or made by the Commissioner in terms of any provision of this Act, may within 30 days as from the date on which such action or decision was made known to such person, lodge an appeal against any such action or decision, and thereupon the Minister may confirm, set aside or amend any such action or decision” (emphasis added).³⁹⁷

Secondly, the manner in which any arbitration proceedings might be conducted is unclear. In this vein, we note that as Section 11 refers back to Article 16(2) of the Constitution, it is unclear whether the question of whether an expropriation has occurred is a question determined by reference to Namibian laws or to international law principles and customs on the matter of expropriation. Moreover, in light of Namibia’s lack of ratification of the ICSID Convention,³⁹⁸ it would appear that any arbitration would be conducted on an *ad hoc*, rather than institutionally monitored basis.

In this regard, we recommend that the disputes that Section 13 of the FIA purports to refer to arbitration, especially that concerning the issuance or continued validity of a Certificate of Status Investment, be instead referred to an administrative review process. This would be in line with the practice of other countries as well.³⁹⁹

Recommendation 43: Reconsider the inconsistent dispute resolution mechanism.

To date, Namibia has entered into bilateral investment treaties (**BIT**) with fourteen countries, of which eight treaties (with Austria, Finland, France, Germany, Italy, the

³⁹⁷ *Minerals (Prospecting and Mining) Act* (1992), s 131.

³⁹⁸ International Center for the Settlement of Investment Disputes (ICSID), “List of Signatory and Contracting States,” accessible <<https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/Database-of-Member-States.bak.aspx?tab=KtoO&rdo=BOTH>>

³⁹⁹ Noting e.g., the Committee on Foreign Investment in the US (CFIUS), Foreign Investment Review Agency (FIRA) in Canada, and in the Australian context, see e.g. , Stephen Kirchner, ‘Capital Xenophobia II: Foreign Direct Investment in Australia, Sovereign Wealth Funds and the Rise of State Capitalism,’ (The Centre for Independent Studies, Policy Monograph 88, 2008).

Netherlands, Spain and Switzerland) have been ratified and are in force.⁴⁰⁰ Namibia has entered into treaties with both Russia and China, but neither treaty has yet entered into force. Its treaty with Russia, dated 2009, is the most recent treaty it has entered into. As a member of the SACU, Namibia is subject to a treaty pertaining to cooperation in trade and investment that exists between SACU and the United States. Interestingly, whereas the preamble of most BITs entered into by Namibia refer to an aspiration towards “economic growth and sustainable development,” the SACU-U.S. cooperation agreement additionally refers to a joint “desire to promote transparency and to eliminate bribery and corruption in international trade and investment.”

Intensifying since the advent of the UN’s Sustainable Development Goals, there is growing impetus to incorporate principles of sustainable development in future investment agreements entered into with other countries.⁴⁰¹ This is something that Namibia should consider. Given that many companies globally are already guided by the principles articulated in voluntary codes of conduct, such as the *UN Global Compact*, *OECD Guidelines for Multinational Enterprises*, *UN Guiding Principles of Business and Human Rights*, *International Chamber of Commerce Guidelines for International Investment*, little credence ought to be given to an argument that complying with such standards would prove extraordinarily burdensome for investors.⁴⁰² Namibia is a signatory of the International Labour Organisation (ILO)’s Convention, and has ratified the key ILO Conventions.⁴⁰³ In light of this, exploring the ways in which principles of sustainable development, especially as it relates to ensuring high standards of occupational health and safety in the extractive industry can be integrated into future investment treaties and agreements, would support an ideal of sustainable development for Namibia. Moreover, it would allow it to more fully comply or satisfy its

⁴⁰⁰ United Nations Conference on Trade and Development (UNCTAD), “International Investment Agreements Navigator – Namibia,” accessible <<http://investmentpolicyhub.unctad.org/IIA/CountryBits/145#iiaInnerMenu>>

⁴⁰¹ See e.g., J. Anthony Van Duzer, et al (2013), above n 390, p. 330-332; International Institute for Sustainable Development (IISD), Howard Mann, Konrad von Moltke, Luke Eric Peterson and Aaron Cosbey, *IISD Model International Agreement on Investment for Sustainable Development: A Negotiator’s Handbook*, (2005), accessible <https://www.iisd.org/pdf/2005/investment_model_int_handbook.pdf>

⁴⁰² J. Anthony Van Duzer, et al (2013), above n 390, p. 335.

⁴⁰³ International Labour Organisation (ILO), “List of Signatory Countries”, accessible <<http://www.ilo.org/public/english/standards/relm/country.htm>>; International Labour Organisation (ILO), “Ratification of Fundamental Convention and Protocols by Country”, accessible <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:10011:0::NO::P10011_DISPLAY_BY,P10011_CONVENTION_TYPE_CODE:1,F>.

international law obligations under the ILO and also hold foreign investors accountable to the international law principle of complying with the laws of the host state.

Recommendation 44: Integrate principles of sustainable development in future investment contracts and agreements, as per the model provision in Annexure 1 (e).

G. CORRUPTION AND BENEFICIAL OWNERSHIP

Although Namibia has not fallen prey to the “resource curse”⁴⁰⁴ yet, there is no reason for complacency. Unchecked corruption in the public and private sector, and other leakages can potentially cost the government extensive revenue loss thereby diverting funds from social programs and hurting the poor disproportionately and also cause an erosion of social capital and acceptance for mining companies in Namibia. As demonstrated below, the legal and regulatory framework of mining in Namibia creates opacity and an uneven playing field.

Namibian think tanks such as the IPPR have pointed out how the “diversion” of mining revenues to a politically connected elite has prevented Namibia’s economically disadvantaged communities from benefiting from revenues connected with the mining industry, such as sales tax, stamp duties or other value added taxes.⁴⁰⁵ *Al Jazeera* has also reported on cronyism in the form of contracts, licenses and connections being granted to political elites and connected individuals instead of being allocated through transparent and competitive practices.⁴⁰⁶

⁴⁰⁴ The resource curse or the paradox of plenty refers to the phenomenon where countries that are well endowed with non renewable resources such as minerals tend to perform poorly in terms of development than countries that are not so well endowed. See Institute of Development Studies, Andrew Rosser, “The Political Economy of the Resource Curse: A Literature Survey” (April 2006).

⁴⁰⁵ Institute for Public Policy Research (IPPR), “Namibia’s New Frontiers Transparency and Accountability in Extractive Industry Exploration,” (Anti-Corruption Research Programme, June 2013), accessible <http://www.ippr.org.na/sites/default/files/Extractive%20Industry_Mining_LOW.pdf

⁴⁰⁶ John Grobler, “Namibia slipping into endemic corruption,” *Al Jazeera* (2 September 2014), accessible <<http://www.aljazeera.com/news/africa/2014/09/namibia-slipping-into-endemic-corruption-201492131519733850.html>>.

As described in Section II Governance and Media, the general perception in the mining industry appears to be that the industry is not entirely free of leakages. The practice of transferring mining licenses without clear and precise regulations and adequate regulatory oversight seems to be a common one, as discussed above. Detrimental to the Namibian government in this process is that large international mining companies pay hundreds of thousands of dollars to intermediaries for the purchase of exclusive prospecting licenses. This represents a huge cost in terms of lost revenue to the government of Namibia. Leakages of this nature in the private sector are considered corruption under the United Nations Convention Against Corruption (**UNCAC**).⁴⁰⁷ Namibia ratified the UNCAC on August 3, 2004, and is consequently a party to the same. The UNCAC prescribes that States should take measures to prevent the misuse of procedures by the private sector, including procedures regarding subsidies and licenses.⁴⁰⁸ The UNCAC also mandates measures to audit and create transparency within private enterprises.⁴⁰⁹

Another practice that the law does not guard against in Namibia is identification of beneficial ownership. Beneficial ownership has been defined by the Extractive Industries Transparency Initiative, which is a global standard to promote open and accountable management of natural resources, as any “natural person[s] who directly or indirectly ultimately own or control the corporate entity.”⁴¹⁰ Interestingly, interviews by the IPPR have also demonstrated that Namibia is not keen on becoming a member of the EITI in the near future.⁴¹¹ A memorandum by Radon Law Offices notes that mining laws and contracts often “fail to require the identification of beneficial owner(s) and even worse, fail to protect liability of the government to any beneficial owner or fail to require the beneficial owner to comply with legal and contractual obligations, which would plug leakages of possible revenue loss.”⁴¹²

⁴⁰⁷ *United Nations* General Assembly Resolution A/58/422 (31 October 2003), above n 109.

⁴⁰⁸ *Ibid*, Article 12 (d).

⁴⁰⁹ *Ibid*, Article 12(c), (f).

⁴¹⁰ Extractives Industry Transparency Index (EITI), “EITI Glossary,” accessible <https://eiti.org/glossary#Beneficial_ownership>..

⁴¹¹ Institute for Public Policy Research (IPPR), “Namibia’s New Frontiers Transparency and Accountability in Extractive Industry Exploration,” above n 405, p. 11.

⁴¹² Jenik Radon, Mahima Achuthan and Nandini Ravichandran, “Natural Resource Revenue Loss: How to Plug Leakages and Prevent the Resource Curse,” accessible <http://www.academia.edu/14560098/NATURAL_RESOURCE_REVENUE_LOSS-HOW>, p 8.

In Namibia, reporting requirements pertaining to beneficial ownership are present in the Minerals Act under Section 41 as well as under standard terms and conditions of mining licenses. Section 41 mandates that the Commissioner of Mines must be informed in writing of the beneficial owner of more than 5 percent of the shares of a company within 30 days of any change. However, this reporting requirement *is only after the fact* and leaves the regulator with little control over the transfer of any assets, or the license itself. Transferring control of a company that owns a license is also transferring effective control of the license itself. This leaves scope for shell companies to acquire licenses purely for the purpose of re-selling them for profit — which is essentially a loss to the Namibian budget. Also, there is now room for undisclosed beneficial owners who may have political connections to influence outcomes of mining contracts.

A broad and strict conflict of interest law would restrict all government officials and their relatives, politicians or members of political parties from obtaining shares in mining companies. While this restriction would certainly close the existing gaps in terms of the ability to exercise undue influence on government contracts for personal gain, it might be very difficult to implement. There are practical difficulties in monitoring each and every government official and his/her relatives and their shareholding in mining companies in the Namibian context. Prohibiting poorly paid government officials from holding shares in profit-making ventures in a resource-rich country like Namibia might also appear to be an overly punitive measure.

A middle ground to resolving the conflict of interests issue is adding the requirement of a mandatory declaration of any conflict of interest with the MME *prior* to transferring or obtaining shares in mining companies. In addition, the Minerals Act should include a provision that restricts those persons from holding shares in mining companies to be involved in any decision-making process regarding mining contracts and such.

In terms of beneficial ownership, there is a clear lack of policy or legislation. Inserting a provision in the Minerals Act which broadens the scope of the term “beneficial ownership” while also making reporting requirements continuous and more stringent can help monitor mining companies more effectively. Radon Law Offices also suggest that false, incomplete

or omitted beneficial ownership information should result in an immediate, non-discretionary and automatic termination of all mining licenses, rights and contracts.⁴¹³ Strict implementation of such a legal provision would act as a deterrent and also send out a clear signal that the government is indeed serious about punitive action against entities that violate the law.

Recommendation 45: Make bidding processes for mining licenses and contracts more transparent and competitive by ensuring that all bidding procedures are open to public scrutiny.⁴¹⁴

Recommendation 46: Amend the Minerals Act to clearly define who a beneficial owner is, and add reporting requirements that impose an obligation on companies to report changes of more than 5 percent in beneficial ownership prior to the execution of such transaction.

Recommendation 47: Amend the Minerals Act to insert deterrent measures that result in an immediate and non-discretionary suspension of all mining rights and licenses if a company or license holder is found to have false or incomplete information regarding its beneficial owners.

H. WATER SCARCITY

Namibia is described as one of the sunniest countries in the world, with more than three-hundred days of sunshine annually.⁴¹⁵ The driest country in sub-Saharan Africa, it has two

⁴¹³ *Ibid.*

⁴¹⁴ Institute for Public Policy Research (IPPR), “Namibia’s New Frontiers Transparency and Accountability in Extractive Industry Exploration,” above n 405.

deserts — the Kalahari and the Namib. In general, the climate is hot and dry and the country receives on average only 270 millimeters of rainfall annually,⁴¹⁶ of which “83 percent evaporates as soon as it hits the ground.”⁴¹⁷

Since December 2015, Namibia has been facing a looming water crisis because of a lack of rainfall. The Windhoek Municipality declared a water crisis in December 2015. The Namibia Water Corporation, or NamWater, the country’s state owned water utility, declared that “there is a need of N\$ 8 billion to fulfill its mandate of providing potable water to all Namibians.”⁴¹⁸ Interviews with both local residents as well as mining industry experts reveal that concern about an impending water crisis is high.⁴¹⁹ From our interviews and news reports cited previously, it is evident that the general perception in Windhoek is that the existing water supply infrastructure is insufficient to ensure constant supplies to the whole country and that the government is doing little to supplement the water supply.

The mining industry is one of the biggest consumers of water in Namibia. Rössing Uranium’s total water consumption is 2.3 million cubic meters (m^3) per annum.⁴²⁰ Langer Heinrich consumes 2.25 m^3 annually.⁴²¹

The Erongo Desalination Plant (**EDP**) was set up by Areva Resources, Namibia in August 2010 to support the Trekkopje Uranium Project, which is located within the Erongo Desert. Lacking access to groundwater and surface water resources, desalination was the only viable

⁴¹⁵ Climate and Weather of Namibia, accessible <<http://www.info-namibia.com/info/weather>>.

⁴¹⁶ United Nations Development Programme (UNDP) - Namibia, “Adapting to Water Shortages in Arid Namibia”, accessible <<http://www.na.undp.org/content/namibia/en/home/ourwork/environmentandenergy/successstories/adaptingtoaridnam.html>>.

⁴¹⁷ *Ibid.*

⁴¹⁸ “Namibia: Water Shortage Assumes Crisis Proportions,” *New Era* (4 December 2015), accessible

<<http://allafrica.com/stories/201512040957.html>>/

⁴¹⁹ Interview with Mr. Robert Grant and Mr. Petrus Elago, Windhoek. Interview by Ms. Ketaki Purohit and Ms. Riza Aryani, 14 March 2016 and interview with anonymous source in Windhoek. Interview by Ms. Ketaki Purohit, Ms. Erika Piquero and Ms. Riza Aryani, 15 March 2016.

⁴²⁰ Interview with anonymous source in Windhoek. Interview by Ms. Ketaki Purohit, Ms. Erika Piquero and Ms. Riza Aryani, 15 March 2016.

⁴²¹ Adam Hartman, “Langer Heinrich Needs More Water”, *The Namibian* (4 April 2011), accessible <<http://www.namibian.com.na/index.php?id=78520&page=archive-read>>.

means of supporting the water-intensive Areva Resources Uranium Mine.⁴²² The EDP is located 30 kilometers north of Swakopmund and produces 20 m³ of potable water per annum.⁴²³ This is also the first seawater desalination plant in Namibia.

Although Areva Resources has suspended mining activity, the EDP is a source of water for other mines in the Namib Desert, including Rio Tinto's Rössing Uranium. *The Namibian* has also reported that falling commodity prices, including a low uranium price of N\$ 297, and a prohibitively high cost of water of N\$ 90 per unit of desalinated water had prompted Rössing Uranium to consider building its own desalination plant with a capacity of 3 m³ liters. Rössing Uranium's costs had substantially increased (by N\$ 110 million per annum) after switching to purchase of desalinated water and the company has consequently performed a feasibility study to construct its own desalination plant.⁴²⁴ The costs associated with constructing a desalination plant are predicted to be approximately N\$ 200 million.⁴²⁵ However, Environmental Commissioner Teofilus Nghitila declined Rössing Uranium's application, after alleged objections by the Ministry of Agriculture in July 2015.⁴²⁶ Rössing Uranium subsequently appealed and a decision is pending. News reports suggest that the decision to reject Rössing Uranium's application was taken because the Government of Namibia is planning to buy out the EDP and, consequently, is eliminating competition and control for water sales in the region.⁴²⁷

The government's inability to address the lack of adequate infrastructure for water supply to the mining industries in Namibia is a cause for concern in arid Namibia. One industry expert also suggested that the government is not aiding plans for desalination plants and similar

⁴²² *The Namibian* also reported that production came to a halt for two days at both Langer Heinrich and Rössing Uranium mines because of damaged infrastructure to the Omdel aquifer, which supplies water to the Swakopmund region. Langer Heinrich reported revenue losses of N\$ 8 million as a result.

⁴²³ Areva, Press Release, "Namibia: Areva Inaugurates First Seawater Desalination Plant in Southern Africa," (Published 16 April 2010), accessible <<http://www.areva.com/EN/news-8350/namibia-areva-inaugurates-first-seawater-desalination-plant-in-southern-africa.html>>.

⁴²⁴ Interview with anonymous source in Windhoek. Interview by Ms. Ketaki Purohit, Ms. Erika Piquero and Ms. Riza Aryani, 15 March 2016.

⁴²⁵ *Ibid.*

⁴²⁶ Namibia: Government Halts Rössing Water Plant", *The Namibian* (Undated), <accessible <http://allafrica.com/stories/201510020558.html>>

⁴²⁷ *Ibid.*

infrastructure projects because of infighting within the government and certain interest groups not having received any consideration.⁴²⁸

One suggestion that arose out of discussions with the private sector is that the government should take steps to liberalize the water sector within Namibia. Granting licenses to construct desalination plants is one way of increasing competition in the water sector and efficiency in the mining industry, because of resultant lower production costs. With a large coastal area, very low rainfall and the presence of water-intensive industries such as mining, desalination plants are a good solution to the mining companies' water problems. This suggestion is also endorsed by Swakopmund Council CEO Eckart Demasius, who stated "We need to speed up the desalination developments here to make sure we have enough water. More mines are being developed that will need more water. The communities are growing and need more water. And the water supply systems are not up to standard."⁴²⁹

Recommendation 48: The government should harness the support of the mining industry and take steps to ensure that applications for construction of desalination plants are considered as part of a national economic growth plan.

⁴²⁸ Interview with Anonymous, Windhoek. Interview by Ms. Ketaki Purohit and Ms. Riza Aryani, 13 March, 2016.

⁴²⁹ Adam Hartman, "Erongo Region Faces Serious Water Shortage", *The Namibian* (23 July 2009) accessible <<http://www.namibian.com.na/index.php?id=55829&page=archive-read>>

Social Impacts of Namibia's Water Shortages

Namibia's water crisis affects the general population as well as business activities throughout the country.⁴³⁰ Social movements have taken up the issue, demanding that groundwater sources not be used for mining activities — and many other actors agree, such as the Ombudsman.⁴³¹ There exists a clash between water usage purposes, namely between agricultural activities and mining activities. However, there are also vulnerable communities affected near the Kuiseb Delta.⁴³² The 'Topnaar peoples' livelihood is directly connected to the Kuiseb Delta and the occasional flooding it provides for growing Camelthorn trees that serve as fodder for their livestock.⁴³³ Extracting water from the Kuiseb directly affects the Topnaar livelihoods, and without proper regulatory frameworks in place this threatening problem could become dire for the Topnaar people as water usage and shortages both increase.⁴³⁴

Similar issues can be seen with the Na Jaqna and Nyae Nyae conservancies, where many San people reside. For many years, mining explorations activities have taken place in both conservancies — for gold in Na Jaqna and diamonds in Nyae Nyae — and if commodity prices increase or significant amounts of either resource are discovered, the legal framework currently in place would not protect the rights of the Indigenous peoples living there: their livelihoods would suffer drastically, and they might even be displaced from their lands.⁴³⁵ It is vital that policies and safeguards are in place to prevent this, but this is not currently the case.⁴³⁶ One only need look to similar cases in Mozambique or Botswana to see what may happen if proper policies are not in place.⁴³⁷

⁴³⁰ "Namibia: Water Could Cripple Industry," *Namibia Economist* (4 December 2015), accessible <<http://allafrica.com/stories/201512041030.html>> .

⁴³¹ Interview with Ombudsman of Namibia, John Walters, Interview by Joanna Capones, Erika Piquero, Lauren Waugh, 18 March 2016.

⁴³² *Ibid.*

⁴³³ Interview with the Legal Assistance Centre, Interview by Joanna Capones, Erika Piquero, Lauren Waugh, March 16, 2016.

⁴³⁴ *Ibid.*

⁴³⁵ Interview with Ben Begbie-Clench, Interview by Erika Piquero, 16 March, 2016.

⁴³⁶ *Ibid.*

⁴³⁷ Nisha Varia, "Mozambique's Mining Boom Damns the Poorest", *Human Rights Watch* accessible <<https://www.hrw.org/news/2014/10/14/mozambiques-mining-boom-damns-poorest>>

I. LACK OF A SKILLED WORKFORCE

The Namibia Labour Force Survey reported in 2014 that the total population of Namibia is 2.2 million, of which 1.4 million or 63.8 percent are aged 15 years or older.⁴³⁸ Within this segment, approximately 991,000 people are classified as “economically active” or able to contribute to the economy. Within this sub-segment, 712,752 persons are employed and 278,245 are unemployed (approximately 12.3 percent of the population).

Interestingly, the survey also reported that, “the employed population without formal education constitutes 11.3 percent of the total employed population, and only 1 percent of the total employed have certificates and diplomas in various fields. At the higher levels, about 6 percent of the employed persons have completed a course at a university or polytechnic, and only 1.1 percent of the employed population have post-graduate diplomas and degrees such as Masters and PhDs.”⁴³⁹

This data provides the background to the shortage of skilled workforce in the mining industry in Namibia. The 2006 Final Report of the Namibia Occupational Skills Assessment Survey (**NOSAS**) states, “There is abundant supply of human resources not being efficiently utilized. The high unemployment and underemployment reinforces (*sic*) the above fact.”⁴⁴⁰ The 2015-2016 Global Competitiveness Report also rated Namibia 109th out of 140 countries in terms of higher education and training,⁴⁴¹ and stated that an inadequately educated workforce was one of the most problematic factors for doing business in the country.⁴⁴² The lack of an educated, skilled workforce is an issue that needs to be addressed.

The issue is complex and layered. Namibia faces a dearth of educated, specialized and skilled workers, along with high attrition rates within the mining industry. The 2006 NOSAS found

⁴³⁸ Namibia Statistics Agency, “The Namibia Labour Force Survey 2014 Report” (Published March 2015), above n 70.

⁴³⁹ *Ibid.*

⁴⁴⁰ Final Report of the Namibia Occupational Skills Assessment Survey (2006), p. 1.

⁴⁴¹ World Economic Forum, “2015 Global Competitiveness Report,” accessible <<http://reports.weforum.org/global-competitiveness-report-2015-2016/economies/#economy=NAM>>, and similarly, <<http://www3.weforum.org/docs/gcr/2015-2016/NAM.pdf>>.

⁴⁴² *Ibid.*

that a lack of required skills / qualifications was the most common reason for vacancies being left unfilled in the mining and quarrying sectors.⁴⁴³ In addition, the 2006 NOSAS also stated that 50 percent of vacancies that were hard to fill were of the “Professionals” category followed by 25 percent each under the categories of “Technical and associate professionals” and “crafts and trade workers”.⁴⁴⁴

The problem is compounded by the fact that foreigners find it particularly difficult to obtain work visas. Mining companies are consequently left searching for talent. The findings of the NOSAS were also confirmed by our interviews, which also highlighted the difficulty in obtaining work visas for foreign workers to fill the gap.⁴⁴⁵

On a related note, Petrus Elago, attorney at law, brought up delays in the licensing procedure caused again, by a lack of expertise within the government. Mr. Elago said, “The human resource capacity in Namibia is limited, which makes it difficult to vet processes causing delays and hold-ups when one applies for a license. For instance, there might be a scarcity of trained geologists within the Ministry of Mines.”⁴⁴⁶

All of the above demonstrates a pressing need for Namibia to take measures to combat the human resources shortage that is affecting both the mining industry and the government.

Recommendation 49: Namibia should direct greater resources towards skill development and education as a long-term investment. Greater analyses of demand for labor are required to design and implement education programs that equip people with specific skills.

In the short to medium term, lessons can be drawn from the Singapore economic growth model, which relied in large part from the 1970s to 2010 on foreign labor as well as a highly

⁴⁴³ Final Report of the Namibia Occupational Skills Assessment Survey (2006), above n 440, p.21.

⁴⁴⁴ *Ibid*, p.22.

⁴⁴⁵ Interview with anonymous source on March 15, 2016, Windhoek.

⁴⁴⁶ Interview with Mr. Petrus Elago (Attorney) on March 13, 2016, Windhoek.

efficient civil service. By 1971, Singapore was already importing more than 40,000 workers from Malaysia alone and also from non-traditional sources (that were previously banned) such as Sri Lanka, Bangladesh and Thailand.⁴⁴⁷ Importing labor can be useful where the domestic labor force either lacks certain skills, or where programs to train workers would take too long. Namibia could emulate the Singaporean example and liberalize its policy of regulating entry of foreign workers in the country in the short term. This would help the mining industry enhance productivity and labor efficiency by filling in vacancies with skilled workers and reducing attrition rates (especially among foreign workers).

Recommendation 50: In the short to medium term, Namibia should liberalize its policy towards importing foreign labor and streamline processes to ensure that mining companies are able to hire foreigners where necessary to fill gaps.

⁴⁴⁷ Hawyee Auyong, “Singapore’s Productivity Challenge, Part I” (Lee Kuan Yew School of Public Policy), (2014), accessible <<http://policy-design.org/wp-content/uploads/2014/09/Productivity-challenges-in-Singapore-Part-1.pdf>>, p. 5. “Singapore also emphasized on productivity and established the National Productivity Board to promote productivity consciousness amongst the workforce as well as employers.”

THE FISHERIES SECTOR

A. MARINE FISHERIES SECTOR

1. MARINE FISHERIES: INDUSTRY OVERVIEW

The Namibian fishing industry is divided into the following sub-sectors: marine capture fisheries, inland fisheries and marine and freshwater aquaculture. The marine capture fisheries sector, exclusively industrial in nature, targets hake in deep water, and monkfish, sole, snoek and kingklip inshore. The mid-water trawlers target horse mackerel and purse-seiners target pilchard (or, sardines), juvenile horse mackerel and anchovy. Other industrial-level fisheries include: tuna fishing, rock lobster fishing, deep-sea red crab fishing and line-fishing.⁴⁴⁸ There are 20 commercially exploited fish species in Namibia; eight of these species are regulated through TACs.⁴⁴⁹

Namibia's two major ports are Luderitz and Walvis Bay, with a majority of landings and processing plants located in the latter. Namibia's marine capture industry includes catching, processing and marketing of fish and fish products. According to 2007 Food and Agricultural Organization (FAO) data, approximately 85 percent of the fish landed (that is, caught and brought onshore) is processed within Namibia and then exported.⁴⁵⁰ The Namibian government incentivized onshore processing through the 1992 Namibianisation policy, which introduced rebates on quota fees according to factors such as the degree of Namibian ownership, employment of Namibians and whether the fish was landed or processed in Namibia.⁴⁵¹

⁴⁴⁸ United Nations Food and Agriculture Organization (UNFAO), "Fishery Country Profile: Republic of Namibia," (March 2007), accessible <<http://www.fao.org/fi/oldsite/FCP/en/nam/profile.htm>>.

⁴⁴⁹ *Ibid.*

⁴⁵⁰ *Ibid.*

⁴⁵¹ Sumaila, Ussif Rashid., Stein Ivar Steinshamn, and Morten D. Skogen, *Namibia's Fisheries: Ecological, Economic and Social Aspects* (Eburon, Delft, 2004), p. 207.

2. ECONOMIC ROLE OF FISHERIES IN THE NATIONAL ECONOMY

Namibia's industrial fishing sector is the nation's third largest contributor to its GDP. On average, the fishing industry contributes between 3 and 3.5 percent to GDP;⁴⁵² the sector's 2012 contribution was 4.1 percent.⁴⁵³ According to the Ministry of Fisheries and Marine Resources (**MFMR**) 2012-2013 Annual Report, an increase in the fish and fish processing on board and growth in the mid-water fisheries output caused this increase in the fishing sector's contribution to GDP.⁴⁵⁴ Namibia's annual marine landings of approximately 550,000 tons are valued at around N \$7 billion (2015) (or, about US\$ 465 million). Namibia's fisheries sector ranks third in terms of size in Africa and thirtieth globally.⁴⁵⁵

In 2014, fish exports were Namibia's fourth highest export (behind precious stones; ships, boats and floating structures; and ores), accounting for around 11 percent of total exports.⁴⁵⁶ Namibia exports over 90 percent of its fisheries production to international markets, mainly to Spain, South Africa, the Democratic Republic of Congo and Mozambique.⁴⁵⁷ Fish exports are largely hake and horse mackerel. The majority of Namibian hake is exported to Spain, where it enters the Spanish market or is further distributed to other European markets, including Portugal, France, Italy, Holland and Germany. The country's hake is also exported to Australia, Malaysia and the United States of America. Horse mackerel is mainly distributed to African markets; 70 percent goes to the Democratic Republic of Congo and the remainder to South Africa, Mozambique and other SADC countries.⁴⁵⁸ According to FAO estimates, only 10 percent of Namibian fish is consumed in the domestic market (for reasons discussed in the *Economics* section).

⁴⁵² Food and Agriculture Organizations, "Namibia at a glance", <<http://www.fao.org/namibia/fao-in-namibia/namibia-at-a-glance/en/>>

⁴⁵³ African Economic Outlook, "Namibia"

<http://www.africaneconomicoutlook.org/fileadmin/uploads/aeo/2014/PDF/CN_Long_EN/Namibie_ENG.pdf>

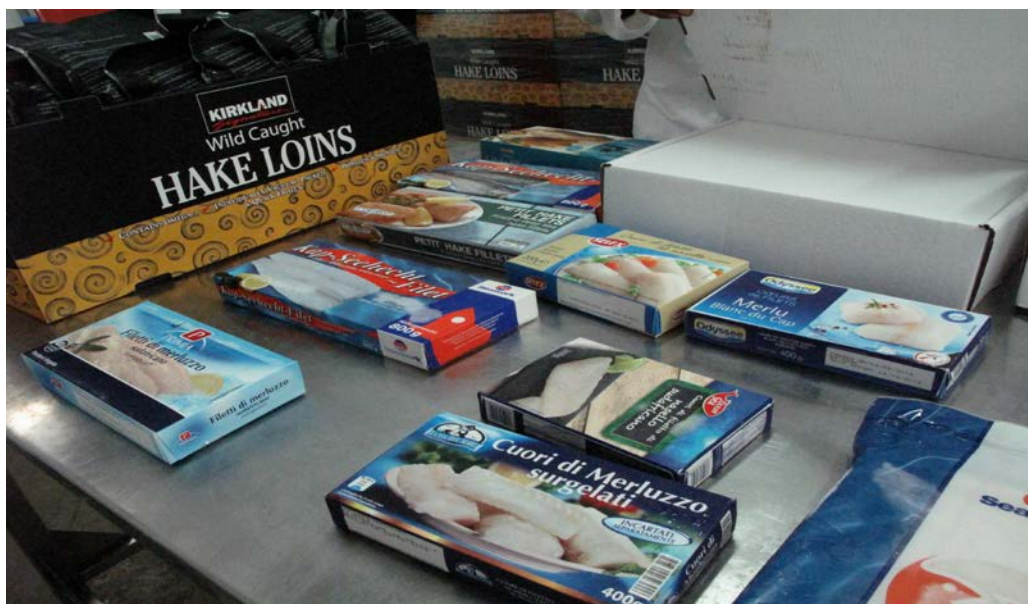
⁴⁵⁴ Ministry of Fisheries and Marine Resources of Namibia, "Annual Report: 2012-2013."

⁴⁵⁵ Adam Hartman, "New Fishing Quota System to Be Introduced," *The Namibian* (10 November 2015), accessible <<http://www.namibian.com.na/index.php?page=archive-read&id=144030>>.

⁴⁵⁶ Namibian Statistics Agency, "Annual Trade Statistics Bulletin," (Published 2014), accessible <http://cms.my.na/assets/documents/Annual_Trade_Statistics_Bulletin_2014.pdf>.

⁴⁵⁷ UNFAO, "Fishery Country Profile: Republic of Namibia," (March 2007), above n 448.

⁴⁵⁸ *Ibid.*



Processed fish for export

3. MARINE FISHERIES: FISHERIES MANAGEMENT OVERVIEW

As part of the Benguela Current System, Namibia's marine waters are home to highly productive fishing grounds. Namibia's 200 nautical mile Exclusive Economic Zone (EEZ) was established following the country's independence in 1990. Before independence, Namibian waters were administered by South Africa and, due to an open access policy, its resources exploited without regard to the sustainability of marine populations. The newly independent Namibian government inherited a fish stock that had been seriously depleted by foreign fishing fleet and a poorly developed domestic fishing industry, which provided little employment to Namibians.⁴⁵⁹ As a result, the state set two goals in fisheries management: (a)

⁴⁵⁹ Carola Kirchner and Anthony Leiman, "Resource Rents and Resource Management Policies in Namibia's Post-Independence Hake Fishery," *Marine Studies Journal* (2014) accessible <<http://link.springer.com/article/10.1186%2F2212-9790-13-7>>.

to establish industrial, marine fishing as a domestic activity; and (b) to allow marine resources to recover to maximum sustainable yield levels.

As one of the few countries in the world to have successfully captured successful economic rent from the imposition of quota fees,⁴⁶⁰ Namibia's fisheries management has been lauded as a success story.⁴⁶¹ Management plans (**OMPs**) have been in place for more than ten years and are accepted by major stakeholders, and the state appears to be supportive of scientific management.⁴⁶² Namibia's post-independence government had clearly framed objectives from the start:

the government's main objective for the fisheries sector is to utilize the country's fisheries resources on a sustainable basis and to develop industries based on them in a way that ensures their lasting contribution to the country's economy and overall development objectives...the government is committed to rebuilding depleted fishery stocks to their level of full potential...All stocks will otherwise be exploited on a sustainable basis and at moderate levels, in general below maximum sustainable yields.⁴⁶³

However, in spite of its fisheries management policies and commitment to scientific management, Namibia's fish stocks have remained constant or declined relative to 1990 levels.⁴⁶⁴ Although based on individual quotas, Namibia's post-independence fisheries

⁴⁶⁰ Rashid, Steinshamn, and Skogen(2004), above n 459, p. 205.

⁴⁶¹ Kirchner and Leiman (2014), above n 459.

⁴⁶² *Ibid.*

⁴⁶³ Ministry of Fisheries and Marine Resource of Namibia, "*Towards Responsible Development of the Fisheries Sector*, (Published August 2004), accessible <<http://www.mfmr.gov.na/documents/120354/165201/Marine+Resources+Policy+2004.pdf/4862b255-17c1-4d86-97fc-5dc339e21ac3>>.

⁴⁶⁴ Kirchner and Leiman (2014), above n 459.

⁴⁶⁵ According to the MFMR 2010-2011 Annual Report, some improvement in hake stocks is "noticeable" (in terms of total biomass, fishable biomass, CPUE (catch-per-unit effort) and sizes), but the hake stock is "still in an undesirable state and needs to be rebuilt to sustainable levels." According to all available MFMR data from 1964 to 2010, the Namibian hake stock is below the state of 1990 (pre-independence levels) and the overall stock indicator is "way below" the maximum sustainable yield level (MSYL). MFMR's 2010-2011 Annual Report reports that 2010 horse mackerel biomass was estimated as 1,207,000 tons, with an increase in CPUE from 18.1 tons/hour in 2009 to 30.1 tons/per hour in 2010. A major limitation to improvements in Namibia's hake and other fish stocks is the poor state of its sardine, or pilchard, stock. As a major food source for hake, a healthy, sustainable sardine stock is key to benefiting marine ecosystem health and improving overall socioeconomic gains in Namibia's fisheries sector. (*Data for this*

management procedures have conflicted, as expected, with the state's commitment to economic efficiency and job creation. The Namibianisation policy,⁴⁶⁶ which attempts to expand domestic control of the fisheries sector, has resulted in both increased fishing effort and decreased hake stocks below economically optimal levels. Despite current over-capacity and declining fish stocks, the government continues to reward new investments.⁴⁶⁷

4. TRANSPARENCY

Representatives from the Namibian government and academia stated in interviews that the data that underlie TAC decisions are not publicly accessible because MFMR does not want the public to “steal” or “misuse” fisheries data or to “do [one’s] own analysis and come up with a different TAC from the government’s [established] TAC.”⁴⁶⁸ However, in order to establish transparent and objective criteria for the distribution of national quotas, sharing the data that undergirds those TAC decisions is necessary for Namibia’s citizens to be informed, active participants in the management of the country’s natural resources.

Control over most fisheries-related data lies with MFMR. Gaining access to unpublished data or raw datasets involves writing a request to MFMR’s permanent secretary and waiting a “few weeks or a few months” to receive access, in the event that it is granted.⁴⁶⁹ Additionally, the National Marine Information and Research Centre (**NatMIRC**) should populate its marine data services, making its data repositories and data request submission pages available online. The MFMR should also increase the public availability of its most up-to-date documents, as the most recent MFMR annual report currently available online is from 2009 and, in hard copy, from 2012-2013. Making this information available online aligns with the

footnote from: Ministry of Fisheries & Marine Resources of Namibia, “Annual Report: 2010/2011,” accessible <[⁴⁶⁶ “The 1992 Namibianization policy gave citizens economic incentives to participate in the fisheries industry as owners or as employees in order to: increase Namibian control and ownership and increase economic benefits to Namibians. In 1993, all pre-existing fishing rights were terminated and, in the allocation of new rights, Namibian control in applicant firms was the primary criterion. These rights were allocated rather than auctioned, but they were not costless.” All rights incurred a levy, quota fees, corporate tax fees, by-catch fees and a Marine Research Fund fee, although Namibians paid much less than foreigners for the levy and quotas fees. Kirchner and Leiman \(2014\), above n 459.](http://209.88.21.36/opencms/opencms/grnnet/MFMR/downloads/>..)</i></p></div><div data-bbox=)

⁴⁶⁷ Kirchner and Leiman (2014), above n 459.

⁴⁶⁸ Sourced from anonymous interviews.

⁴⁶⁹ Sourced from anonymous interviews.

ACC's strategic objective to prevent corruption in government offices, ministries, agencies and state-owned enterprises by increasing institutional transparency through expanding the availability of public data produced by public authorities.⁴⁷⁰

Recommendation 51: The Ministry of Fisheries and Marine Resources (MFMR) should publish, and make publicly accessible, total allowable catch data – and the data that undergirds TAC decisions – on an annual basis.

Recommendation 52: The MFMR and NatMIRC should publish, and make publicly accessible, marine data on an annual basis.

5. CORPORATE SOCIAL RESPONSIBILITY

The MFMR currently requires fishing companies to outline and commit to CSR efforts in local communities as one criterion in the fishing quota allocation process. However, in the opinion of a government representative, these efforts are merely “lip service.”⁴⁷¹ When companies apply for fishing quotas, they must explain how they will engage with local communities to meet empowerment criteria, but these efforts are often superficial (e.g., distributing Coca-Cola or football jerseys to community members).⁴⁷² Sometimes companies enumerate benefits in their proposals to community leaders whom they have never approached or consulted.⁴⁷³ Fishing companies should be encouraged to engage in their local communities and take on any voluntary CSR efforts they so choose. However, if companies' participation in CSR efforts is tied to the allocation of fishing rights, licenses or quotas, the

⁴⁷⁰ Namibia. Anti-Corruption Commission. *National Anti-Corruption Strategy and Action Plan: 2016-2019*, above n 129, Strategic Objective 2, Specific Objective 2.2, p. 17.

⁴⁷¹ Sourced from anonymous interview.

⁴⁷² Sourced from anonymous interviews.

⁴⁷³ Center for Public Integrity, Emma Schwartz, Marcos Garcia Rey, and John Grobler, "The New Colonizers," (4 October 2011), accessible <<https://www.publicintegrity.org/2011/10/04/6769/spain-s-hake-appetite-threatens-namibia-s-most-valuable-fish>>.

MFMR should consider more robust and objective CSR requirements. The MFMR, instead of asking companies to make their own CSR proposals, which may or may not address community needs, could require payment of a CSR fee. This CSR fee could be similar to the Marine Resources Fund (**MRF**) levy, which fishing companies currently pay with respect to collection and distribution. The MRF levy is a small fee charged upon all landings, which finances the research activities of the MFMR. While the MFMR controls the MRF expenditures, quota and by-catch fees are not under the control of MFMR; these fees go directly to the public coffers and are controlled by the Ministry of Finance.⁴⁷⁴ A CSR fee could be collected simultaneously with the MRF levy and serve as a funding source for local NGOs, CSOs or groups engaged in community capacity building and environmental initiatives.

Recommendation 53: The MFMR should strengthen its corporate social responsibility (CSR) requirements in its fishing quota allocation process.

Recommendation 54: MFMR should allocate more funding for trainings for the Fisheries Inspectorate Office, specifically to improve understanding of the legal framework of the United Nations Convention on the Law of the Sea (UNCLOS) as it pertains to Namibian waters.⁴⁷⁵

⁴⁷⁴ UNFAO, "Fishery Country Profile: Republic of Namibia," (March 2007), above n 456.

⁴⁷⁵ According to a representative from the Fisheries Inspectorate Office, trainings for Monitoring, Control, and Surveillance (**MCS**) staff members on UNCLOS, particularly with respect to jurisdictional matters, are key to successful implementation of Namibia's marine fishing regulations.

B. LEGAL FRAMEWORK

1. PUBLIC ENTITIES

The central entity of the fisheries sector is the MFMR. The minister is in charge of determining “the general policy with regard to the conservation and utilization of marine resources,” and has discretion to grant fishing rights, quotas and licenses; appoint fisheries inspectors; determine fees and levies; and even suspend, cancel or reduce the exercise of fishing rights, quotas and licenses. Other relevant entities are the Fisheries inspectors,⁴⁷⁶ the Fisheries Observer Agency⁴⁷⁷ and the Marine Resources Advisory Council.⁴⁷⁸

2. RIGHTS AND QUOTAS

To harvest marine resources for commercial purposes in Namibia or in Namibian waters, the MFMR first has to grant a fishing right. This right may correspond to either (i) an exploratory right to harvest⁴⁷⁹, (ii) a right to harvest marine resources (a “**Fishing Right**”) or (iii) a fisheries agreement.⁴⁸⁰ Commercial exploitation of marine resources is done mainly through Fishing Rights.

⁴⁷⁶ *Marine Resources Act (1990)*, Section 5. Fisheries inspectors are appointed by the minister among any staff members or official of any ministry or government department, or any regional, local or statutory authority. Their role is to conduct inspections over any vessel or premise on which marine resources or fishing gear is being kept or transported, in order to detect potential illegalities.

⁴⁷⁷ *Marine Resources Act (1990)*, Sections 8, 9 and 11. It is a private entity which is in charge of appointing, and training fisheries observers. Fisheries observers are in charge of observing the harvesting, handling and processing of marine resources; collecting samples and information related to fishing activities; and reporting to the agency any observations they may have. Although this agency is independent, its work depends on the MFMR, as it is subject to an agreement with said ministry, which sets out its functioning. In addition, officers of the MFMR are members of the agency’s management board.

⁴⁷⁸ *Marine Resources Act (1990)*, Sections 38 (2), 44, 45 and 46. It advises the MFMR in relation to fisheries matters, such as total allowable catches; fees and levies; and funds.

⁴⁷⁹ *Marine Resources Act (1990)*, Section 34. These rights may be granted by the minister to only one person at one time, regarding (a) resources for which no rights have been granted, in order to explore the commercial viability and biological sustainability of such resources; or (b) resources for which rights have been granted to others but not to such persons, in order to research the commercial viability of a harvesting method not ordinarily used in Namibian waters.

⁴⁸⁰ *Marine Resources Act (1990)*, Section 35. Agreements executed between the president and a member country of the Southern African Development Community (SADC), which allows that country to harvest marine resources. This agreement allows for the application of a quota or a fishing license, as if the right was held by the applicant. Currently, Mozambique and Angola have executed agreements with the Namibia.

The exercise of a Fishing Right, however, is not automatic. To harvest marine resources, the right-holder must have been subsequently granted a quota by the MFMR, which determines the exact amount of resources that such right-holder may harvest.⁴⁸¹ The purpose of the quota system is “to ensure fairness and equitable distribution taking into account the extent of onshore investments together with employment in the sector.”⁴⁸² Significantly, the exercise of a Fishing Right is limited by the quota that was granted afterwards.

Quotas are allocated annually by the minister based on the TAC for a specific resource, which is “the quantity which may be harvested in respect of any marine resource in a given period.”⁴⁸³ TACs are determined by the MFMR considering the information provided by the Marine Resources Advisory Council, and are published in the Gazette.

3. OBTAINING A RIGHT TO HARVEST MARINE RESOURCES, AND A QUOTA

Interested parties may apply for a Fishing Right only when the MFMR has opened a period of application for such rights, through an announcement in the Gazette. In this announcement, the MFMR may determine the conditions under which the Fishing Right will have to be exercised.⁴⁸⁴ The purpose of this system is to “limit the number of entry and control fishing for resource management purposes.”⁴⁸⁵

The application for a Fishing Right must provide a detailed feasibility study (including a market analysis of processing and marketing, and a financial analysis of projected profitability); a management analysis that describes the ownership, control and management of the operations; and a technical analysis of the vessel and processing factories to be used.⁴⁸⁶

⁴⁸¹ *Marine Resources Act (1990)*, Section 39.

⁴⁸² *Policy Statement (Guidelines) for the Granting of Rights to Harvest Marine Resources and the Allocation of Fishing Quotas (2009)*, Section 7.

⁴⁸³ *Marine Resources Act (1990)*, Section 33 (6) and 38.

⁴⁸⁴ *Marine Resources Act (1990)*, Section 33.

⁴⁸⁵ *Policy Statement (Guidelines) for the Granting of Rights to Harvest Marine Resources and the Allocation of Fishing Quotas (2009)*, Section 3.

⁴⁸⁶ *Policy Statement (Guidelines) for the Granting of Rights to Harvest Marine Resources and the Allocation of Fishing Quotas (2009)*, Section 3.

When the applicant is a company, there is no requirement to disclose its beneficial ownership.⁴⁸⁷ As demonstrated in the case of the mining industry in the section on *Mining* of this Report, this creates the risk of having undisclosed beneficial owners who may have a conflict of interest given their relationship with members of the MFMR, or of having foreign companies operating through shell companies. However, as explained below, the immediate beneficial ownership (i.e., the shareholders of the company applying for a fishing right) may be considered by the MFMR when granting Fishing Rights and quotas. Therefore, disclosing immediate beneficial ownership may be deemed a requirement to apply, since disclosure will improve the possibility of obtaining a Fishing Right or quota in the event that the majority of the beneficial ownership vests in Namibian citizens.

Once applications have been filed, the minister will decide to whom to grant Fishing Right(s) based on numerous criteria. These criteria are: (a) whether the applicant is a Namibian citizen; (b) if the applicant is a company, whether the beneficial control vests with Namibian citizens (as mentioned in the previous paragraph); (c) the beneficial ownership of the vessels to be used; (d) the ability of the applicant to exercise the right in a satisfactory manner; (e) the advancement of persons in Namibia who have been socially, economically or educationally disadvantaged before the independence of Namibia; (f) regional development within Namibia; (g) cooperation with other countries; (h) conservation and economic development of marine resources; (i) whether the applicant successfully performed under an exploratory right; (j) socioeconomic concerns; and (k) the contribution of marine resources to food security.⁴⁸⁸

Although this list of criteria appears to contain reasonable requirements, the minister has discretion to decide which of these criteria will be afforded greater weight when granting rights. In other words, the minister has no obligation to consider all of these requirements simultaneously or to balance the different criteria in a particular way. Further, not even the Namibian ownership of the venture is considered a mandatory requirement, as rights may be

⁴⁸⁸ *Marine Resources Act (1990)*, Section 33.

granted to wholly owned foreign ventures when they show contribution to the economic and overall development of Namibia.⁴⁸⁹ In fact, currently several foreign companies are operating in Namibia through Namibian subsidiaries or in joint ventures with Namibian companies. For example, in the hake industry, companies such as Blue Sea, Cadilu, Corvima, Merlus, Overberg, NovaNam, Rainbow, Talanam and Beira, are fully or partially owned by Spanish companies, such as Caladero, Iberconsa, Pescanova, Pescapuerta, Pereira and Marfrío.⁴⁹⁰

The negative implications of having wide discretion rather than obligatory requirements is mitigated by the fact that there are some mandatory specific criteria that must be considered when determining the period of time during which the Fishing Rights must be exercised. The minister may grant rights for periods of time that range between seven, ten, fifteen or twenty years, depending on factors such as the number of permanent Namibian employees on land, the percentage of Namibian beneficial ownership and whether the venture will provide an economic, development or innovation contribution to Namibia.⁴⁹¹

As previously mentioned, the application for a Fishing Right does not require disclosure of the beneficial ownership of the company. However, when granting Fishing Rights or determining the term of such a right, the minister may consider the beneficial control of the company and the percentage of Namibian beneficial ownership. This eliminates to some extent the negative risks associated with the lack of information regarding beneficial ownership, as the minister may consider this criterion to allocate a Fishing Right. However, this mitigation is limited by the fact that the minister has the discretion to weigh or balance the different criteria when making a decision.

⁴⁸⁹ *Policy Statement (Guidelines) for the Granting of Rights to Harvest Marine Resources and the Allocation of Fishing Quotas (2009)*, Section 4.

⁴⁹⁰ Robin Sherbourne, *Guide to the Namibian Economy 2013/14*, 3rd edition (Institute for Public Policy Research, 2013), p. 145-7.

⁴⁹¹ *Policy Statement (Guidelines) for the Granting of Rights to Harvest Marine Resources and the Allocation of Fishing Quotas (2009)*, Section 5.

Recommendation 55: The scope of the Minister’s discretionary powers should be prescribed and limited by amending the legislation to include a list of mandatory requirements to be considered, and how they are considered, in the process of allocating fishing rights and quotas. Include provisions in Article 33 of the Marine Resources Act (1990), or in future policies of the MFMR, as specified in Annexure 3.

The results of the allocation procedure are by the MFMR to the individual applicants, and the Ministry of Information and Broadcasting announces the results in the media.⁴⁹² This announcement only contains the name of the company and does not include an explanation of the criteria that were considered by the MFMR when assigning such rights. The lack of a legal requirement to provide a written explanation or rationale may open a gap for corruption to occur, as individuals that do not comply fully with the requirements set forth in the Marine Resources Act, 2000 (**MRA**) may try to exploit this lacuna to obtain a Fishing Right.⁴⁹³

Recommendation 56: Include in the MFMR’s policy a provision to report conflicts of interest between an applicant and officials of the MFMR, as specified in Annexure 4.

Another problem is the failure to make publicly available an updated list of right and quota holders. In fact, the most updated official list available to the public contains information regarding the harvesting rights as of 2011/12.⁴⁹⁴

⁴⁹² *Policy Statement (Guidelines) for the Granting of Rights to Harvest Marine Resources and the Allocation of Fishing Quotas* (2009), Section 3.

⁴⁹³ Media has pointed out that this lacuna has permitted the irregular allocation of Fishing Rights and quotas. See Ndanki Kahiurika, “Esau relative chairs Fishcor”, *The Namibian* (17 September 2014), accessible <<http://www.namibian.com.na/index.php?id=128019&page=archive-read>>; and “Namibia: Something Fishy About Quotas”, *The Namibian* (12 September 2014), accessible <<http://allafrica.com/stories/201409120876.html>>.

⁴⁹⁴ Ministry of Fisheries & Marine Resources of Namibia, “Holders of the Rights of Exploitation for Commercial Fishing, 2013 Directory”, 2013.

Recommendation 57: The MFMR should maintain and publish updated lists of right, quota and license holders.

There are also publication and discretion issues in the quota allocation procedure. This process is not published in the Gazette, but informed by a private written notice to the holders of rights.⁴⁹⁵ The minister is not required to consider all the criteria set forth in the MRA when granting a quota. Further, the minister may not allocate quotas to individual holders.⁴⁹⁶ This ambiguity might have been the reason why, in the past the MFMR indulged in the irregular practice of awarding quotas outside of the scope of the MRA. Recently, a decision by the MFMR to allocate a quota to a company that did not have a Fishing Right was declared void by the High Court of Namibia, for being an act in violation of the provision of the MRA that required the MFMR to allocate fishing quotas only to individuals that hold a Fishing Right or that are part of a fisheries agreement.⁴⁹⁷ However, since the High Court of Namibia's judicial ruling, the MRA was amended, eliminating from the definition of "quota" the expression "by a holder of a right or a group of holders of a right".⁴⁹⁸ This amendment grants even more discretion to the MFMR, as in the future it may lead to the allocation of quotas to entities that do not already hold rights.

Recommendation 58: The authorizing document that grants rights or quotas should also be public. This would allow stakeholders and the general public to be able to assess whether the allocation of a right or a quota was made fairly by the MFMR.

⁴⁹⁵ *Marine Resources Act (1990)*, Section 39 (2).

⁴⁹⁶ *Marine Resources Act (1990)*, Section 39 (4).

⁴⁹⁷ In the case *Namsoy Fishing Enterprises (Pty) Limited v Minister of Fisheries and Marine Resources (A 241-2014 [2015] NAHCMD 3* (High Court of Namibia, 20 January 2015), the High Court of Namibia found that the MFMR had unlawfully and irregularly allocated quotas when it granted quotas considering the proportionate allocation of quotas and the need of the applicants, as well when it granted quotas to entities that did not have fishing rights.

⁴⁹⁸ *Marine Resources Amendment Act (2015)*, Section 1 (c).

4. TRANSFER OF RIGHTS AND QUOTAS

According to the MRA, no Fishing Right or exploratory right may be transferred without the approval, and subject to the conditions determined by, the minister.⁴⁹⁹ The transfer of a Fishing Right necessarily involves the transfer of the corresponding quota that has been granted in connection to the right. The minister's approval is also necessary for transferring a quota and such approval may only be granted when the acquirer of the quota is also a right-holder for the same marine resource.⁵⁰⁰ These provisions, however, do not require the transferee to comply with the same criteria that were considered by the minister when granting the Fishing Right or quota to the original holder. Further, the minister is granted discretion (again) to decide the conditions of the transfer.

Recommendation 59: Include provisions in Article 42 of the Marine Resources Act (1990), or in future policies of the MFMR, as specified in Annexure 5.

According to the Permanent Secretary of the MFMR, some right-holders have sold their quotas to third parties without proper authorization of the MFMR.⁵⁰¹ In such cases, the fishing rights can be revoked by the permanent secretary.⁵⁰²

It is also important to note that this provision does not prevent companies from entering into operational agreements with other companies that have vessels and processing facilities to utilize the allocated quota.⁵⁰³ As a consequence, the person or entity exploiting a Fishing Right and quota is not necessarily the holder of such right and quota. In fact, this is the model used by Seawork Fish Processors, a Namibian-owned company that provides vessels

⁴⁹⁹ *Marine Resources Act (1990)*, Section 42 (1).

⁵⁰⁰ *Marine Resources Act (1990)*, Section 42 (2).

⁵⁰¹ Denver Kisting, "Fishing rights sellers to face music", *The Namibian* (10 July 2015), accessible <<http://www.namibian.com.na/index.php?id=139211&page=archive-read>>.

⁵⁰² *Ibid.*

⁵⁰³ "Over 140 fishing right holders registered", *The Namibian* (2 May 2013), accessible <<http://www.namibian.com.na/index.php?id=107720&page=archive-read>>.

for catching and has fish processing factories, despite not having its own Fishing Rights and quotas.⁵⁰⁴

5. ENFORCEMENT

The MFMR may order the suspension, cancellation or reduction of rights, quotas and licenses when there has been (a) untrue or incomplete information in an application; (b) contravention or breach of a condition imposed to the exercise of its right, quota or license; (c) contravention or breach of the MRA; or (d) conviction of an offense under the MRA.⁵⁰⁵

The Minister makes a final decision in these matters. As noted previously, the Minister has been granted discretion to decide whether to apply these sanctions or not, as the MRA also permits him to not take any action on the matter.⁵⁰⁶ Such wide discretionary powers are susceptible to misuse by condoning certain actions (for instance, the unauthorized transfer of such rights or quotas) that should be a cause for revocation or suspension of fishing rights and quotas.

The MRA also includes a catalogue of offenses, punishable with fines that cannot exceed N\$ 2 million.⁵⁰⁷

⁵⁰⁴ Robin Sherbourne, *Guide to the Namibian Economy 2013/14* (2013), above n 498.

⁵⁰⁵ *Marine Resources Act (1990)*, Section 41 (1) and (4).

⁵⁰⁶ *Marine Resources Act (1990)*, Section 41 (3)(e).

⁵⁰⁷ *Marine Resources Act (1990)*, Part IX. These fines may only be imposed by a court. Additionally, the person convicted for an offense may be sentenced to pay a fine equal to three times the monetary value of the advantages he or she received due to his or her offense; the assets related to the commission of the offense may be forfeited.

CONCLUSION

Since its independence in 1990, Namibia has emerged as one of the most successful countries in Africa. With relative peace and security, a well functioning bureaucracy, a mostly free press environment and high GDP per capita, Namibia is well positioned to continue on its development path.

Namibia's upgrade to an "upper middle income" economy is a reflection of the development success it has achieved, largely because of revenues from the natural resource sector and stable democratic governance. The mining sector, accounting for the largest share of GDP, represents both the potential for continued success and challenges for the Namibian government. In particular is the risk of sliding into the "resource curse."

The same holds true for the fast growing fisheries sector. As this industry gains significance in the Namibian economy, better regulation and increased transparency, especially with regards to allocation of permits, is of utmost importance.

Striking the balance between healthy utilization of resources and detrimental exploitation of them is no easy task. It requires an administration that is committed to transparency and accountability at all levels. The role of the Anti-Corruption Commission in ensuring that Namibia's natural resources contribute to sustainable development growth cannot be overemphasized. Regulation must go beyond window dressing and address the true complexity of these issues.

Finding this balance is all the more important at a time when the urgent need for public services such as water and energy infrastructure create a threat to stability and growth. At the time of writing, Windhoek faces the most severe water crisis in its history. Fixing such problems requires deft and transparent management of revenues from industries like mining and fishing, and leaves no room for corruption or mismanagement error.

The success Namibia has achieved in international rankings potentially stands to lull the country into a sense of complacency. Such an approach is dangerous if Namibia is to address the pressing service issues mentioned above and continue on a positive growth path. Containing the corruption seen in Namibia today—such as the questionable rewarding of tenders and permits—can prevent the country’s slide into the more ingrained, high-level and damaging forms of corruption seen in some neighboring countries.

The recommendations in this report are by no means exhaustive, and only begin to scratch the surface of what can be done in the key facets of Namibian governance. As Namibia forges ahead with the utilization of its many valuable natural resources, its trajectory will be determined by its willingness to confront, address and prevent corruption and mismanagement at all levels. Namibia today represents a country truly on the brink.

ANNEXURE 1

(a) PROPOSED AMENDMENTS TO THE EMA

17. (2) The functions of the Environmental Commissioner are to –

xxx

- (i) conduct inspections for monitoring compliance with this Act and make reports from such inspections available online for public viewing;
- (j) promulgate rules regarding the certification and registration of environmental assessment practitioners; and

27. (5) In addition to the penalties above, any structure installed or constructed in contravention to the scope and conditions of the environmental clearance certificate shall be summarily demolished and the person responsible for such construction shall, at his own expense, restore the area to its state prior to the construction.

36. (1) Within a reasonable time after the closing date referred to in section 35(7)(c), the Environmental Commissioner must review the application, set the date for the public hearing, and may take any action the Environmental Commissioner considers appropriate for the review of the application, including –

- (a) consulting any person... in relation to the application; or
- (b) carrying out, or appointing a person..., the assessment or any submission; ~~or~~
- ~~(c) holding a public hearing.~~

(2) At least 14 days before the date fixed for the holding of a public hearing in accordance with subsection (1)~~(c)~~,

38. (3) A copy of the record must be made available for public inspection at the office of the Environmental Commissioner during office hours. Copies of final assessment reports and environmental compliance certificates must also be made available online by the office of the Environmental Commissioner and the respective project proponent.

(b) **PROPOSED AMENDMENTS TO THE EIA REGULATIONS**

7. (1) After submitting the application to the competent authority, the proponent must –
- (e) give all ~~registered~~ interested and affected parties an opportunity to comment on the scoping report in accordance with regulation 23.

23. (1) ~~A registered~~ Any interested or affected party is entitled to comment in writing....
- (2) Before the applicant submits a report compiled in terms of these regulations to the Environmental Commissioner, the applicant must give ~~registered~~ all interested and affected parties access to, and an opportunity to comment in writing on the report.

xxx

- (4) Any written comments received by the applicant from ~~a registered~~ an interested or affected party must accompany the report when the report is submitted to the Environmental Commissioner.

- (5) ~~A registered~~ Any interested or affected party may comment on the final report....

24. (1) The applicant responsible for an application ...
- (2) The Environmental Commissioner shall address the comments by interested and affected parties in its decision.

ANNEXURE 2

(a)

Section 48. Powers of Minister in respect of applications for, or for renewal or transfer of, mineral licences or for approval for grant, cession or assignment of interests in mineral licences, or to be joined as joint holders of such mineral licences or interests

...

(3) In considering any application referred to in section 47 and the terms and conditions subject to which such application may be granted, the Minister shall take into account, and give priority to, the need to conserve and protect the natural resources in, on or under the land to which the application relates and in, on or under adjoining or neighbouring land.

Further, in considering any application referred to in section 47(1)(c),⁵⁰⁸ the Minister shall not grant such application unless the applicant has demonstrated satisfaction of, mutatis mutandis:

i) in respect of a mining license, Section 92(2), 92(3) and 92(4);

ii) in respect of an exclusive prospecting license, Section 69;

iii) in respect of a mineral deposit retention license, Section 80.

⁵⁰⁸ Section 47(1)(c) refers to applications “for the transfer of a mineral licence, or the grant, cession or assignment of any interest in any mineral licence, or to be joined as a joint holder of a mineral licence or such interest.”

(b)

Section 47. Applications for, or for renewal or transfer of, mineral licences, or for approval to grant, cession or assignment of interests in mineral licences, or to be joined as joint holders of such mineral licences or interests.

...

(3) The provisions of section 39(6), (7) and (8), and section 50 shall apply mutatis mutandis in relation to the transfer of a mineral license or the granting, cession or assignment of any interest in a mineral license or the joinder of a person as a joint holder of such mineral license or interest.

...

Section 39. Transfer of mining claims, and grant, cession or assignment of interests in mining claims, and joinder of persons as joint holders of such mining claims or interests

...

(6) The transfer of a mining claim or the grant, cession or assignment of any interest in a mining claim or the joinder of a person as joint holder of such mining claim shall not affect any legal proceedings instituted against the holder of such claim, and such legal proceedings shall be continued as if such transfer, grant, cession, assignment or joinder had not taken place.

[Suggested new clause] The transfer of a mining claim or the grant, cession or assignment of any interest in a mining claim or the joinder of a person as joint holder of such mining claim shall not affect the liability of the transferor as to claims arising from actions or omissions of the transferor prior to the time of the transfer, in respect of which the transferor shall remain liable, which liability shall be jointly and severally assumed with the transferor by the transferee.

(c)

Section 50. General terms and conditions of mineral licenses

In addition to any term and condition contained in a mineral agreement and any term and condition contained in any mineral licence, it shall be a term and condition of any mineral licence that the holder of such mineral licence shall –

....

Ensure compliance with all applicable laws on the safety, welfare and health of persons, engaged with respect to the proposed operations, including but not limited to implementing, monitoring and enforcing policies and practices designed for this purpose.

Section 91. Applications for mining licenses.

An application by any person for a mining licence –

....

(f) shall contain particulars of –

....

(iv) any policy and practice implemented, or proposed to be implemented, demonstrating and ensuring compliance with all applicable laws on the safety, welfare, and health of persons, engaged with respect to the proposed operations.

(d)

Section 6. Application for a Certificate of Status Investment

....

(3) In considering an application for a Certificate of Status Investment, the Minister shall have special regard to:

...(e) the impact which the activities of the enterprise in which the proposed investment is to be made is likely to have on the environment and, where necessary, the measures proposed to deal with any adverse environmental consequences.

(i) where the enterprise in which the proposed investment holds, or anticipates holding a license pursuant to the Minerals (Prospecting and Mining) Act (1992), the Minister, in consultation with the Commissioner appointed under section 4 of the Minerals (Prospecting and Mining) Act (1992), shall have special regard to any environmental impact assessment and environmental management plan to be submitted by the applicant in relation to any prospecting operations or mining operations of the enterprise in which the proposed investment is to be made.

(e)

Investors of a Party , including all direct and indirect beneficial owners thereof, and their investments are subject to and shall respect and comply with the laws and regulations of the other Party, including but not limited to its laws, regulations, standards and practices for the protection of human rights, labour rights, the rights of indigenous peoples and the environment, and:

- a) They shall not be complicit or assist in the violation of such rights by others in the other Party, including by public authorities or during civil strife;*
- b) They shall strive, through their management policies and practices, to contribute to the development objects of the other Party, and of sub-national levels of government that govern the area where the investment is located.⁵⁰⁹*

...In relation to all of their activities in the other Party, investors of a Party and their investments shall comply with all measures of the other Party intended to and consistent with ensuring compliance with its domestic labour and environmental laws, and its international labour and environmental law obligations.⁵¹⁰

⁵⁰⁹ Based partly, with modification, from a sample treaty provision drafted by J. Anthony Van Duzer, et al (2013), above n 390, p. 294.

⁵¹⁰ Based partly, with modification, from a sample treaty provision drafted by J. Anthony Van Duzer, et al (2013), above n 398, p. 337.

ANNEXURE 3

Right to harvest marine resources

33.

...

(5) The Minister shall prefer applications that fulfill either of the criterion described in (a) or (b) of subsection (4) over those application that do not comply with either of these criteria.

(6) The Minister shall reject applications that do not satisfy the criteria set forth in (d) and (e) of subsection (4).

ANNEXURE 4

3. GRANTING OF RIGHTS TO HARVEST MARINE RESOURCES

Preparation and Delivering of Applications

Applicants are expected to provide a detailed feasibility study, including market analysis indicating processing and marketing of fish and fishery products; financial analysis stating the projected profitability of the venture; management analysis, describing the ownership, control and the management of the operations; and technical analysis giving details of vessel (s) and processing factory to be used. When the applicant, or any of its shareholders in case the applicant is a company, has a familial, business or economic relationship with an officer of the Ministry, it shall disclose it in its application.

....

ANNEXURE 5

Transfer of rights, exploratory rights, quotas and licences

42. (1) No right or exploratory right may be transferred to another person except with the approval of, and subject to the conditions determined by, the Minister, but such approval may only be granted if the quota, if any, or a portion thereof, connected with the right or exploratory right is also transferred to the same person.

Further, such person shall comply with the criteria set forth under section 33(4) that were considered by the Minister when granting the corresponding right.

(2) No quota for any marine resource, except a quota held by a person nominated under section 3 5(2), may be transferred to the holder of a right valid for the same resource, except with the approval of the Minister. Further, such person shall comply with the criteria set forth under section 33(4) that were considered by the Minister when granting the corresponding quota.

TEAM BIOGRAPHY

PROFESSOR JENIK RADON, ESQ.

Jenik Radon is founder and director of the Eesti and Eurasian Public Service Fellowship, which has provided students from Columbia, Stanford, Tuck School of Business at Dartmouth and other institutions the opportunity to intern in emerging nations such as Cambodia, Ecuador, Estonia, Georgia, India, Kenya, Mozambique, Nepal, Philippines, and Uganda. Radon is a recipient of SIPA's "Top Five" teaching award for his work during the spring 2010 semester; and his 2012 Capstone class won the Dr. Susan Aurelia Gitelson Award for Human Values in International Affairs for the report "Oil: Uganda's Opportunity for Prosperity." He was selected as a Fulbright Specialist (2012) at the Law School of Makerere University, Uganda in the field of extractive industry.

Radon served as a lecturer at Stanford University, where he taught access to medicine, human rights, privatization and international investment management, and as a visiting professor at the Indira Gandhi Institute for Development Research in Mumbai, India, where he taught "Dynamics of Corruption." Radon was the Ashton J. and Virginia Graham O'Donnell Visiting Professor/Educator at Whitman College. He regularly teaches at Monterrey Tech, Queretaro, Mexico, which named him Distinguished University Professor.

Radon participated in the constitutional peace process in Nepal and served as a drafter of the interim peace constitution, which granted citizenship to millions of stateless people in the Terai region, among other things. He served on the UN Global Compact Academic Initiative taskforce which seeks to have business schools incorporate the Compact's 10 human rights principles into their curriculum and teaching. He supports the Zawadi Africa Education Fund, Kenya, in bringing education to the next generation of Africa's women leaders.

In the early 1980s, Radon founded Radon and Ishizumi, an international law firm representing international corporations and foreign public entities. From 1999 to 2007,

Radon was one of the executors/trustees of Vetter Pharma, a privately-held German pharmaceutical company, the world leader in the production of aseptic pre-filled injectable systems.

In 1980, Radon co-founded the Afghanistan Relief Committee that sought freedom for Afghanistan and supported refugees displaced during the Afghan-Soviet war. Serving as an advisor during Estonia's independence struggle, Radon co-authored the country's foreign investment, mortgage/pledge, privatization and corporate laws and was an architect of Estonia's privatization. In 1990, he was the first to officially raise the U.S. flag in Soviet-occupied Estonia since the 1940 Soviet invasion and was awarded the Medal of Distinction of the Estonian Chamber of Commerce.

Radon served as Georgia's key foreign advisor and negotiator of the multi-billion dollar and multi-nation oil and gas pipelines from Azerbaijan to Turkey (the BTC), featured in the James Bond movie, *The World is Not Enough*. In 2000, he was awarded Georgia's highest civilian award, the Order of Honor. Radon presently advises public authorities and civil society in number of developing and emerging nations around the world, including Cambodia, Ecuador, Kenya, Mozambique, Nepal, Philippines, and Uganda, particularly in respect of the negotiation of extractive industry agreements, especially oil and gas, and sustainable natural resource development, as well as Afghanistan, among other things, in respect of the prospective multi-nation TAPI gas pipeline from Turkmenistan to Afghanistan to Pakistan to India.

Radon has lectured in almost 40 (and visited 100) nations, including Azerbaijan, Bhutan, Cambodia, China, Germany, India, Kazakhstan, Laos, Mexico, Mongolia, Mozambique, Nepal, Nigeria, South Sudan, Turkmenistan, Uganda, and UK. He has written numerous articles, including *Resolving conflicts of interest in state-owned enterprises*, *International Social Science Journal* (UNESCO); *Staatsfonds vor den Toren* (Sovereign Wealth Funds Before the [Trojan] Gates), *Wirtschaft* (Economy) section, *Frankfurter Allgemeine Zeitung* (FAZ); *Getting Human Rights Right*, *Stanford Social Innovation Journal* (December, 2007); *How To Negotiate Your Oil Agreement*, in *Escaping the Resource Curse*, ed. Macartan Humphreys, Jeffrey Sachs and Joseph Stiglitz (Columbia University Press, June 2007); *Ethics*

in Business (MBA) Education - A New Must, International Management Development Research Yearbook, Technology, Structure, Environment, And Strategy Interfaces In A Changing Global Business Arena (June 2006); Sleepless, Clueless, Dangerous, in Ergo-Med (Haefer Verlag, Germany, March 2006); The New Mantra: Bribers Beware! The Journal for Transnational Management (Vol. 11, No. 4, 2006); Hear No Evil, Speak No Evil, See No Evil Spells Complicity, (UN) Compact Quarterly (Volume 2005, Issue 2), published by the (United Nations) Global Compact. Radon obtained his B.A. from Columbia University, a M.C.P. from the University of California, Berkeley and a J.D. from Stanford Law School.

Namibia Capstone Team Biographies

Riza Aryani is a 2016 master degree candidate for a Master of International Affairs at Columbia University's School of International and Public Affairs where she studies energy and environmental policy, focusing on gender, natural resources management, and conflict resolution. Prior to SIPA, she worked for the Center for International Forestry Research (CIFOR) and a consulting firm in Indonesia focusing on energy efficiency financing. Last summer, she worked for the United Nations Development Programme (UNDP) Peru, conducting field research in the Andean region on social and environmental conflicts related to mining projects in Peru.

Mobeen Inshad Bhatti graduated from Columbia University's School of International and Public Affairs in 2016 with a Master of International Affairs. He has previously interned at the Executive Office of the Secretary-General of the United Nations. He earned his Bachelors of Business, Organizations & Society and Mathematics, Liberal Arts and Sciences/Liberal Studies from Franklin & Marshall College.

Joanna Eileen Capones received her B.S. Business Economics (*magna cum laude*) and J.D. (Dean's Medalist for Academic Excellence) from the University of the Philippines-Diliman, and is a Master of Laws from Columbia Law School, Columbia University. She works as a policy and legislative officer at the Senate of the Philippines, where she has also been active in corruption investigations. Previously, she worked as an associate at Sycip Salazar

Hernandez & Gatmaitan. Her practice focused on banking and finance, labor relations, and mining and energy projects.

Andreina Martínez received her J.D. (First in Class) from Universidad de los Andes, Chile and her Master of Law from Columbia Law School (Harlan Fiske Stone Scholar). Previously, she worked in the Energy practice of Philippi, Prietocarrizosa, Ferrero DU & Uría, Chile, where she advised in matters of energy regulation, public utilities and natural resources, to both private corporations and public entities.

Caitlin O'Donnell received a Master of International Affairs from Columbia's School of International and Public Affairs (SIPA), concentrating in Energy and Environmental policy, in May 2016. She served as the Co-President of the Environmental Coalition (ECO) at SIPA and Co-Director of the Women in Energy program, which is part of the SIPA Energy Association (SEA). As a Global Policy Initiative fellowship recipient, she produced a documentary about the gendered impacts of deforestation in East Kalimantan, Indonesia and how the intersection between gender and environment is understood – and measured – more broadly in the international development sector. She was a member of SIPA's student delegation to COP21 in Paris. Prior to Columbia University, she received her undergraduate degree from University of California at Berkeley and then served as a Peace Corps volunteer in northeastern Ukraine from 2009-2011. At World Resources Institute, she worked on environmental governance issues as a member of the Access Initiative team, which focuses on access to environmental information, public participation, and justice.

Mevelyn Ong recently completed her LL.M degree at Columbia University, focusing on international disputes (trade & investment) and anti-corruption/political risk management. Spanning the Asia-Pacific region, she has worked as Deputy Counsel to the International Chamber of Commerce (ICC's) Court of International Arbitration, as an associate in the construction/energy litigation practice of an Australian firm, and as a Judicial Associate at the highest appellate court in the state. She holds a Bachelor of Arts/Laws (First Class Honours) from the University of Melbourne (Australia), and a Certificate in Global Arbitration and Disputes Law and Practice from Queen Mary, University of London (UK).

Erika Yvonne Piquero is a Master of International Affairs from the School of International and Public Affairs at Columbia University with a focus on human rights and environmental policy. Her main interests involve human rights advocacy and research, indigenous rights, environmental justice, and land rights issues. Prior to SIPA, she received B.A.s in International Studies and Linguistics, and worked with the Indigenous Peoples' Biocultural Climate Change Assessment initiative in Peru. She also worked as an International Human Rights Accompanier in Honduras and has written extensively on the human rights situation in Honduras.

Ketaki Purohit graduated with a Master of International Affairs from Columbia University, School of International and Public Affairs (SIPA), specializing in Human Rights and Conflict Resolution. She also has a Master in Public Policy from the National University of Singapore. Prior to coming to SIPA, she worked as a Mergers and Acquisitions attorney at J.Sagar Associates, Mumbai for three years, and as a Judicial Clerk at the Supreme Court of India.

Amy Slipowitz is a Master of International Affairs from the School of International and Public Affairs, Columbia University, with a concentration in human rights and humanitarian policy. Previously, she worked as an associate at a private fund of hedge funds firm, where she focused on researching and reporting upon innovative investment strategies. She graduated from Colby College with B.A.s in Economics and American Studies.

Katherine Sullivan is pursuing a dual masters degree in Journalism and International Affairs at Columbia University, with a focus on energy and environment. Before SIPA, Katherine lived in Rwanda for over three years, where she worked for a local newspaper and as a freelance journalist for regional and international media. She's reported for the Associated Press, Foreign Policy, The Guardian, and others on a wide range of east African issues.

Lauren Waugh graduated from the Australian National University with a combined Bachelor's degree in Arts/Law with first class honours. Having held roles in the public and NGO sector in Australia, she graduated from the LLM program at Columbia University in

2016 as a James Kent Scholar. Her research interests include law, development, governance, and trade and investment.

Haotian Zhang is a second year student at Columbia University School of International Public Affairs (SIPA) with a concentration in International Finance, expecting to graduate in May 2016. Prior to coming to SIPA, he worked at HSBC in Hong Kong at the Equity Capital Market team. Haotian received his Bachelor's Degree from Emory University Goizueta Business School.