

**TITLE:** **A LEGAL OVERVIEW OF NAMIBIA'S  
MINING INDUSTRY**

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## Declaration

I Siphwe Winfred Lupalezwi hereby declare that this dissertation is my original work and all sources used are cited and acknowledged for.

Signed.....

Date.....

This dissertation has been submitted for examination through my Supervisor at the University of Pretoria.

Signed.....

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University of Pretoria

Date.....

## Certification

I declare that this Mini-Dissertation which is hereby submitted for the award of Legum Magister (LLM) in International Trade and Investment Law in Africa at International Development Law Unit, Centre for Human Rights, Faculty of Law, University of Pretoria, is my original work and it has not been previously submitted for the award of a degree at this or any other tertiary institution.

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Winfred Sipiwe Lupalezwi

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Date

## Acknowledgements

First of all I would like to thank God almighty for making all of this possible and bringing me this far. I would also like to thank my late parents Lovemore and Gertrude Lupalezwi for teaching me to dream big and to never underestimate what God is capable of, especially my father whose dream was that one day his youngest child follows in his footsteps and earn a Master's degree. I would also like to thank my siblings Cecilia Sibatani, Thelma Mukwaso and Terman Lupalezwi for all their love, support and prayers during the writing of this mini-dissertation, all I had was you three, even though resources were limited for me to come to South Africa and pursue this LLM degree, you made sacrifices for me and made sure I pursued my dream, I am so grateful. To my two brother-in laws: Mr. Michael Sibatani and Mr Charles Mukwaso, thank you for the encouragement given to me during the writing of this mini-dissertation. I also want to express my gratitude to the Molepo family. As my foster parents, Mr. Edward Molepo and his loving wife, Mrs. Evelyn Molepo, I would like to thank you for all your love, encouragement and support, I am very grateful. To my auntie Gladys Lupalezwi and my uncle Joetam Ndlovu and his wife Matilda Ndlovu, I am thankful. I would further like to take this opportunity to thank my course-co coordinator and supervisor Dr Olufemi Soyaju for all his support and encouragement throughout the LLM programme, for urging me to not give up at all times, thank you so much! I am also grateful to Miss Angela Bukenya for always offering us a helping hand at IDLU. To Mrs. Emily Laubscher I would like to take this time to thank you for all your encouragement and financial assistance offered me at the Centre for Human Rights, thank you. Lastly, I would like to thank the Centre for Human Rights for this amazing opportunity to pursue a LLM degree in International Trade and Investment Law in Africa, thank you all.

## List of Acronyms

|       |  |
|-------|--|
| AGOA  | African Growth and Development Opportunity Act             |
| AIDS  | Acquired Immune Deficiency Syndrome                        |
| BIT   | Bilateral Investment Treaty                                |
| CMN   | Chamber of Mines Namibia                                   |
| CSI   | Certificate of Status Investment                           |
| ETR   | Effective Tax Rates  |
| FTA   | Free Trade Agreement                                       |
| GDP   | Gross Domestic Product                                     |
| HIV   | Human Immune Virus   |
| ICJ   | International Court of Justice                             |
| ICSID | International Centre for Settlement of Investment Disputes |
| ILO   | International Labor Organization                           |
| IRR   | Internal Rate of Return                                    |
| MAI   | Multilateral Agreement on Investment                       |
| MNE   | Ministry of Mines and Energy                               |
| MPRDA | Mineral and Petroleum Resources Development Act            |
| NIC   | Namibia Investment Centre                                  |
| NDP   | National Development Plan                                  |
| NGO   | Non-Governmental Organization                              |
| SDAC  | Sustainable Development Advisory Council                   |
| SADC  | Southern Africa Development Community                      |
| SACU  | Sothern Africa Customs Union                               |
| SWA   | South West Africa  |

|       |  |
|-------|--|
| UN    | United Nations                                     |
| USAID | United States Agency for International Development |
| WHO   | World Health Organization                          |
| WTO   | World Trade Organization                           |

## **Directory of cases**

Disposable Medical Products v Tender Board of Namibia and Others.

Sedudu/ Kasikili Island (Botswana v Namibia) ICJ Reports 1996.

Serbians Loans case

## **List of Treaties and instruments**

Benguela Treaty.

Convention on the Long Range Trans Boundary Air Pollution of 1979.

International Labor Organization (ILO) Convention 169 on Indigenous and Tribal People in Independent Countries.



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## **Abstract**

Namibia has since gaining its independence managed to build a strong mining industry and a solid regulatory framework to govern it. Many foreign investors have looked to Namibia's mining industry to invest in this growing sector over the years. However, the 2008 global economic recession saw the mining industry of Namibia suffering tremendously from the diminishing ore reserves and low commodity prices.

However, in spite of these challenges, the mining industry has continued to attract foreign investments into the industry. This has also come with its share of implications which are felt by the sector as a whole. This research raises the need for the government of Namibia to amend existing legislation on mining and introduce laws and policies that will aid in overcoming these challenges.

In the light of the above, this study argues that while there has been a recent decline in the mining sector of Namibia since 2008 as a result of diminishing ore reserves and low commodity prices, which have negatively affected the mining industry in Namibia, the amendment of the laws in extant and enactment of new ones with improved policies could turn the evil tide presently besetting the mining companies and the Namibian mining industry as a whole.

## CHAPTER ONE

### INTRODUCTION

#### 1.1 Background to the research

Accounts of Namibia's mining industry dates back to the year 1761 when Hendrik Hop, a national of the then Union of South Africa, travelled to the Southern part of Namibia and witnessed mining being carried out there. While on this expedition, Hop and his crew discovered copper.<sup>1</sup> In his diary, Hendrik Hop recorded accounts of Namibia's mineral resources which he discovered.<sup>2</sup>

German rule in Namibia began in the late 1900's, and this marked the beginning of transition into one of Africa's fastest growing industries.<sup>3</sup> It is through the Imperial Mining Decree of 1905 which was introduced by Germany that accommodation for prospecting and mining of precious and base metal was made for the first time.<sup>4</sup> The Decree was the most prominent instrument at that time available in regulating the mining sector of Namibia (known as South West Africa prior independence in the year 1990).<sup>5</sup>

In 1908, one very precious mineral, diamond, was discovered in South West Africa,<sup>6</sup> and a sudden "diamond rush began". In the year 1909, a Board specifically dealing with diamonds was established in order to control the marketing of diamonds; this Board was called the 'Diamanten Regie'.<sup>7</sup> Special diamond taxation was then put in place in order to ensure the levying of tax directly coming from the mining industry.<sup>8</sup>

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<sup>1</sup>Doing business in Namibia 'A guide for UK companies 2014'.

<sup>2</sup> Ibid.

<sup>3</sup>Unpublished: John E. Odada 'Sources of Growth in Africa...unpublished thesis, University of Namibia, 2002.

<sup>4</sup>ibid

<sup>5</sup>ibid

<sup>6</sup>ibid

<sup>7</sup> ibid

<sup>8</sup>ibid

German colonial rule in Namibia came to an end in the year 1915. After Germany ceased control of South West Africa, the Union of South Africa took control of the mining industry of Namibia.<sup>9</sup> The year of 1920 saw the government of Namibia introducing the Proclamation No. 59 of 1920 which cancelled all mining rights that companies operating in South West Africa held at that time.<sup>10</sup> The decision to terminate mining rights of companies was done in order to ensure open existing territory for more exploration.<sup>11</sup> This process helped evolve the manner in which mining was carried out then to what it has become today.

After gaining her independence in the year 1990, the Ministry of Mines and Energy was formed. The main objective of forming this industry right after independence was me a necessity because the government of Namibia wanted to help improve this industry from what it was during German and South African rule to an even better, stronger and much transparent one.<sup>12</sup> After 1990, the Ministry of Mines and Energy set goals which needed to be achieved within this sector which included the development of a multidisciplinary land-using strategy that would work closely with other ministries in Namibia.<sup>13</sup>

One other aim of the newly formed Ministry of Mines and Energy was to monitor existing legislation and enact any further legislation if so required.<sup>14</sup> Other vital objective of the Ministry of Mines and Energy was the need to promote regional and international cooperation within the mineral and energy sectors, to name a few.

Presently, all minerals and issuing of mining and exploration permits are regulated by the government of Namibia in whom all rights are vested. Mining activities continue not only in the mining of diamonds but also of copper, uranium, gold and other minerals. The Ministry of Mines and Energy and the various Acts mentioned above form the fulcrum of the laws driving this ever dynamic mining industry.

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<sup>9</sup> ibid

<sup>10</sup>ibid

<sup>11</sup>ibid

<sup>12</sup> Ministry of Mines and Energy also available at <http://www.mme.gov.na/history.htm>.(accessed 14 May 2014)

<sup>13</sup> ibid

<sup>14</sup> ibid



The independence of Namibia also made possible the promulgation of Acts and instruments to govern and regulate the mining industry of Namibia. These Acts include the Minerals Prospecting and Mining Act 33 of 1992, the Diamond Act of 1999, Minerals Development Fund Act of 1996, and even the Foreign Investment Act of 1992 which also encourages investment within all sectors of Namibia.

## 1.2 Research problem

In comparison to other African countries, Namibia's legal framework governing its mining sector seems to be progressing, efforts are on-going to improve and make it much more investor-friendly for foreign investors to invest in Namibia's mining sector and one of these efforts is the enactment of the Foreign Investment Act.<sup>15</sup>

The problem is that though the mining sector plays a significant role in Namibia's economy, the sector has had a decline in the past few years,<sup>16</sup> particularly from the year 2008 onwards. This could be as a result of several mining ventures closing down due to diminishing ore reserves and low commodity prices.<sup>17</sup> If this situation continues, the mining sector of Namibia may come to a standstill.

From a foreign investor's point of view, investor confidence is of paramount importance. A recent report on mining shows that as a result of several cancellations and referrals of many mining projects across the continent, governments of many mining African states have had to revise their policies to re-attract investments capital to their mining industries.<sup>18</sup>

Therefore, this investigation will seek to make case for the need to strengthen the legal framework underpinning the Namibian mining industry with the focus on attracting foreign investment inflows into the mining sector.

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<sup>15</sup> Act of 1990.

<sup>16</sup> MBendi information services, mining in Namibia overview <http://www.mbendi.com/indy/ning/af/na/p0005.htm> (accessed 17 February 2014).

<sup>17</sup> *ibid*

<sup>18</sup> 'Decline in global development mining affects Africa' *Namibian sun Johannesburg mining weekly* 10 November 2013.

### **1.3 Research questions**

Broadly, this research seeks to interrogate the legal framework for Namibian mining sector and its appropriateness in delivering the intended objectives of the sector through attraction of quality foreign investment into the industry. In pursuit of this research agenda, the following questions will be answered:

- i. How has the mining industry evolved to what it is today?
- ii. What does the legal environment of the Namibian mining industry look like and how conducive is it to foreign investment?
- iii. What are the gaps that need to be plugged in the legal framework for Namibian mining industry?

### **1.4 Thesis Statement**

This study argues that while there has been a recent decline in the mining sector of Namibia since 2008 as a result of diminishing ore reserves and low commodity prices, which have resulted in an “adverse effect” to the mining industry in Namibia, the amendment of the laws in extant and enactment of new ones with improved policies could turn the evil tide presently besetting the mining companies and the Namibian mining industry as a whole.

### **1.5 Significance of the study**

This study is significant in that it makes a case for the reform of the legal framework undergirding the Namibia’s mining that would restore investor’s confidence in the Namibia’s mining sector and attract the needed foreign capital for the revival of the almost moribund industry. The study shows how other African countries had to “bend” their laws to enact laws favorable to foreign investors in their respective mining sectors.

As for academics, this study will expand their horizon and add more to the existing literature on the broad subject of international investment law particularly as it relates to Namibia and its

mining industry. This investigation will further underscore the critical role of foreign investment in the development of Africa as a continent.

## 1.6 Literature review

Many literatures exist on the stable on the topic of mining in Namibia. Most of the successes and challenges of the mining industry of Namibia have been dealt with in depth. As a member of the World Trade Organization (WTO), as well as a member of the Southern Africa Development Community (SADC) and the Southern Africa Customs Union (SACU), Namibia has surely had its share of participation in trade and investment matters.

The most common way in which Namibia participates in foreign investment is through Bilateral Investment Treaties (BIT'S) and other trade and investment agreements, both concluded locally and internationally.<sup>19</sup> The government of Namibia is in full support of foreign investment as a measure to enhance economic growth and employment through its Foreign Investment Act.<sup>20</sup>

There are two schools of thought on this subject; one school argues for foreign investment while the other school argues against it. Although a considerable amount of literature in the form of newspaper articles, international conventions, and journals have attempted to clarify and broaden this issue, no books have been written just yet that target this particular topic specifically.

Sonarajah seems to agree with the whole notion of supporting and encouraging foreign investment.<sup>21</sup> In his book, Sonarajah opines that “foreign direct investment is advantageous to any society in that when foreign capital is brought into the host state, it ensures that domestic capital is available for uses for public benefit; he further states that the foreign investor usually brings with him technology which is not available in the host state and this leads to diffusion of technology in the host economy”.

Guzman<sup>22</sup> is in support of Sonarajah’s view that foreign investors are the “engines” of most developing countries but that the whole notion of investor and host state does seem reasonable to

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<sup>19</sup> Bureau of economic, energy and business affairs; Investment climate statement Namibia March 2011 Report

<sup>20</sup> Bureau for energy and business affairs, March 2011 Report. See also the Namibia Investment Centre, (works with the Foreign Investment Act of 1990 as primary legislation in dealing with foreign investment matters).

<sup>21</sup> *M Sonarajah (2004) The International Law on Foreign Investment (2<sup>nd</sup> ed). Cambridge University Press.*

<sup>22</sup> Andrew T Guzman *why LDC's sign treaties that hurt them: Explaining the popularity of investment treaties.*

him. Guzman argues that “BIT’s have become the preferred method of governing the relationship between foreign investors and the host government in developing countries.

Not all countries may be keen in accepting foreign investment into their economies,<sup>23</sup> Tobin and Ackerman<sup>24</sup>“argue that while most developing countries accept FDI agreements with developed countries, not all of them are keen on the idea. The two authors further state in their article that “developing countries fear a sense of loss of control over their internal economic activities through restrictions on their employment and development policies as well as through challenges to national industries. The loss of sovereignty may be too high a burden for some developing countries and lead them to refuse to sign BITs.”

McCarthy<sup>25</sup>argues against foreign investments into the mining sectors of many African countries based on the fact that mining development can have a beneficial impact on income creation and foreign exchange earnings but that mining has other characteristics that are not so favorable from a development point of view.”

Shimutukweni argues that developing countries are in a race of competing to attract more foreign investment into their various economies.<sup>26</sup> The author goes further in stating that the competitiveness of a fiscal regime would usually come with geological risks and rewards.<sup>27</sup> According to Shimutukweni, political and macro-economic risk is essential in attracting more foreign investment for any developing country.<sup>28</sup>

Shimutukweni goes further in stating why countries are in need of foreign investment. According to her, “International competition for foreign investment has obliged the countries to adopt an

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<sup>24</sup>Jennifer Tobin and Susan Rose Ackerman *yearbook on international investment law and policy* (2009-2010), Yale research paper number 293.

<sup>25</sup> Colin McCarthy., *opportunities and challenges facing Africa in the development of key export sectors under the WTO agreement- A focus on mining, manufacturing and services. Africa and the world trading system*, department of economics, University of Stellenbosch, Chapter 5 volume 1, selected issues of the Doha round.

<sup>26</sup>Ndapwilapo Selma Shimutukweni *what is a competitive fiscal regime for foreign investment? With special reference to Namibia and Botswana*.

<sup>27</sup>Ibid.

<sup>28</sup>Ibid.

investor-friendly regulatory framework to balance the interests of the investors, government, the community and the environment”.<sup>29</sup>

The writers are more inclined to stating reasons why foreign investors should be welcome to help develop the mining and other industries of developing countries without addressing the related issues of legal and regulatory framework which is critical to the subject of discussion in this study.

### **1.7 Methodology**

This study is a library and desk-based research and it emphasizes the need for a legal framework for the Namibian mining industry that will cater for foreign investors wanting to invest more in Namibia’s mining sectors in spite of the present challenges that have been identified in the course of writing this investigation.

The initial primary sources utilized in this paper are: Mining Acts as well as other relevant Acts like the Constitution of the Republic of Namibia.

The secondary sources consulted in this investigation include: relevant books on this topic, which also include journals, academic writings on the topic, and newspaper articles. This investigation relies extensively on internet sources, and policy papers and recent speeches by government officials on the topic.

The angle to this study is analytical and detailed as it conducts a critical overview of the legal framework of Namibia’s mining industry and how best it can be improved to attract foreign investment into the sector.

### **1.8 Limitation to the study**

This study is relevant in trying to identify if Namibia should reform some of the laws governing its mining sector, especially the Minerals Prospecting and Mining Act of Namibia.

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<sup>29</sup>Ibid.

The limitation in this study is the challenges in obtaining information for the writing of this mini-dissertation. There is a dearth of relevant sources like books and articles written by specialist in this area of study.

## **1.9 Overview of chapters**

Chapter one introduces the study which primarily consists of the background to the research, identifying the research problem, formulating the research questions, thesis statement, significance of the study, literature review, methodology, limitation to the study, and finally, the outline of chapters.

Chapter two examines in detail the various mining contracts which Namibia has engaged in over the years and their implications.

Chapter three will lay down in great detail the legal framework regulating the mining industry of Namibia.

In chapter four, the study will expound on various outcomes of the proposed mining legal framework, while placing focus on concerns, constraints and benefits and some lessons to be drawn from the legal framework governing the mining sectors of other African countries.

Chapter five outlines the summary of findings, the concluding remarks and the recommendations.

## CHAPTER TWO

### MINING CONTRACTS WITH FOREIGN COMPANIES AND THEIR IMPLICATIONS

#### 2.1 Introduction

This chapter will examine various mining contracts between the government of Namibia and foreign companies as part of the measures to ensure development within the mining sector and its continual ability to grow.

The Constitution of Namibia in terms of section 95 (1) offers protection of the environment in order to ensure that the environment and its natural resources are preserved for the future generation of Namibians to enjoy as well.

Contracts, mutual agreements and tenders have been used by many international mining companies as a tool to affect their plans of investing within Namibia's mining sector. However, cautionary measures should be taken by the government of Namibia to ensure that they are well informed of the implications that the activities of those companies would cause the Namibian economy and environment at large.

#### 2.2 Thresholds of foreign mining companies in Namibia

Namibia is a country rich in natural resources which also are non-renewable and under the management and regulation of the government. Though obstacles are present which tend to almost threaten this flourishing sector, the country continues to attract even more investment which may come in the form of contracts and agreements with foreign mining companies.

There are a considerable number of foreign mining companies operating in Namibia<sup>30</sup> namely: De Beers Marine Namibia, Namdeb, Navachab, Rosh Pinah Zinc Coporation, Rossing Uranium and lastly, Langer Heinrich Uranium, and lastly, the Husab Uranium mine which will begin operation in 2015. Most of these mines having been operating for many years continue to generate tons of revenue within the mining sector alone as majority of these mines are owned by

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<sup>30</sup> DLA Piper, Mining in Africa, a legal overview, page 44.

foreign entities who have invested considerable amounts of money to keep this sector up and running<sup>31</sup>.

### 2.2.1 Fiscal regime regulation

The fiscal regime of Namibia responsible for guarding its minerals includes the State Finance Act, the Income Tax Act, the Mineral Development Fund Act and lastly, the Foreign Investment Act.<sup>32</sup> The Acts listed above are there to ensure that the government of Namibia is responsible for the mining sector, while the private sector on the other hand is responsible for leading operations within the mining industry.<sup>33</sup>

The fiscal tax regime with regard to diamonds is slightly different. For instance, the government of Namibia has stated that it will not cut Namdeb's Diamond tax rate as that rate is to review its fiscal regime.<sup>34</sup> The main fiscal tax regime rate of Namibia being reviewed is that diamonds should not be taxed at the same rate as other mining companies.<sup>35</sup>

As of the year 2013, the tax rate on diamonds has been set at 55 percent in order to enable Namibians to also share in the benefits of the revenue generated from diamond mining, as stated by Finance Minister, Saara Kuugongelwa Amadhila.<sup>36</sup> The Namibian diamond fiscal tax regime remains one of the highest in the world as it exceeds the 55 percent on profits which also includes a 10 percent on turnover.<sup>37</sup>

### 2.3 International mining companies in Namibia

There are a considerable number of international mining companies operating in Namibia currently which continue to work closely with the government of the Republic of Namibia to develop this industry further. International mining companies are of paramount importance to the government of any developing country as author Sonarajah states in his book.<sup>38</sup>

These international mining companies will now be discussed below.

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<sup>31</sup> Ibid.

<sup>32</sup> Dugald Hammerslacht "Uranium mining 2000-2015: What impact on the Namibian economy".

<sup>33</sup> Ibid.

<sup>34</sup> 'Namibia says it won't cut tax rate for Anglo's Namdeb Gem miner' *Bloomberg* 1 October 2013.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

<sup>38</sup> M. Sonarajah (2004) *The International Law on Foreign Investment* (2<sup>nd</sup> ed). Cambridge University Press.



### 2.3.1 De Beers

De Beers is an international company making billions of dollars each year and whose primary goal is to produce world standard gem quality diamonds. De Beers “A diamonds is forever” as it is also known, holds operations in many countries around the world, which include Botswana and Namibia.

Namdeb Diamond Company is in a partnership with De Beers and the Namibian government.<sup>39</sup> Namdeb, De Beers and the Namibian government share equally in all profits generated from marine mining in Namibia.<sup>40</sup>

Namibia has the richest marine diamond deposits in the whole world. In the year 2005, Namibia’s production of diamonds came to a total of 1.8 million crates which put marine mining in Namibia at a high record of 56 percent of all the diamonds mined.<sup>41</sup>

Modern deep water mining methods have developed rapidly as it currently involves the use of drill systems or sea bed crawlers.<sup>42</sup> This system loosens and removes seabed sediments which are simultaneously airlifted or pumped to a moored vessel for processing.<sup>43</sup>

Due to the advancement of this unique method of extracting diamonds at sea in Namibia, technology has improved significantly over the years, placing Namibia’s mining industry at an all-time high as far as innovation and development within Namibia’s mining industry is concerned.<sup>44</sup>

De Beers is of great significance to the government of Namibia; it would be impossible to predict where the economy of Namibia would be without De Beers. This company conducts land based alluvial in the Northern and Southern coastal regions of Namibia and marine mining is also carried out at the Atlantic Ocean off the coast of Namibia.<sup>45</sup> Presently, the Government of

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<sup>39</sup><http://www.benguelacc.org/index.php/en/about/ecosystem-services/marine-mining> (accessed 27 May 2014)

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup><http://www.debeersgroup.com>.

Namibia has entered into a joint venture with Namdeb to regulate all diamond mining activities in Namibia.<sup>46</sup>

De Beers's growth continues to be steady since it owns at least five licenses. The areas which De Beers operates include MA1, along the Orange River, Bongenfelas, Elizabeth Bay and lastly, at Douglas Bay.<sup>47</sup>

Namdeb has since hit rock bottom due to the global crisis. However, in 2008, it made a massive recovery.<sup>48</sup> When the economy of Namibia was going through the global crisis of low commodity prices, it was almost impossible to sell diamonds as buyers could not afford them as they were saving for rainy days. As lucrative as diamonds may be, sales have continued to flourish since the rate of recession stabilized in 2011.

### **2.3.1.1 Contributions of De Beers towards Namibia's economy**

There is clearly no doubt that no other mining international company brings in as much revenue as De Beers does since it has added more to Namibia's Gross Domestic Product(GDP) than all mining activities combined.<sup>49</sup>

So much effort goes into producing world quality gem diamonds than most would assume. De Beers Namibia and Namdeb continue to work as team in not only extracting minerals from nature but also ensuring that these diamonds are of good standard; that they are cut and polished as required by international standards.

De Beers does not only enrich itself through the mining of diamonds in Namibia, it should be pointed out that development of the mining sector has gone as far as creating development opportunities for the government of Namibia. Namdeb has managed to create Namibia's very own diamond cutting and polishing company.<sup>50</sup>

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<sup>46</sup> <http://www.de-beers-group.com> (accessed 3 March 3, 2014).

<sup>47</sup> Inge Zamwani-Kamwi "Investing in Namibia's mining sector": The Namibian experience.

<sup>48</sup> Namibia's diamonds shining again *The Namibian* 21 May 2014.

<sup>49</sup> [Http://www.de-beers-group.com](http://www.de-beers-group.com). (accessed on 3 March 3, 2014).

<sup>50</sup> [Http://www.de-beers-group.com](http://www.de-beers-group.com) (.accessed on 3 March 3, 2014).

De Beers international and Namdeb is Namibia's biggest foreign investment earner, contributing every one Namibian dollar of foreign earnings.<sup>51</sup> The benefits go further in that Namdeb remains to be the largest employer in Namibia and also it is the largest taxpayer.<sup>52</sup> This company does not only enlarge the amount of revenue going into Namibia's economic basket but also continues to play a role in sustainable socio-economic development in Namibia.<sup>53</sup>

De Beers had indicated that as a lesson drawn from the economic crisis of 2008, it has since changed its regulatory framework with the Diamond Act in order to create an atmosphere that would invite people to come to Namibia and invest in this kind of business.<sup>54</sup>

### **2.3.1.2 De Beers towards social economic development**

Apart from making significant contributions to revenue, employment and infrastructural development, De Beers Namibia's continual involvement in sustainable-economic development cannot be ignored. De Beers values its employees and their health and well-being. Living in a time where diseases like HIV/AIDS are on the rise in counties like Botswana, South Africa and Namibia, De Beers is committed to making a lasting impression by establishing the De Beers Anti-Retroviral Treatment Programme. This programme provides HIV/AIDS treatment to infected employees and their families.<sup>55</sup>

### **2.3.2 Rio Tinto mine**

Rio Tinto is a mining international company involved in the mining of uranium in Namibia. The company deals primarily with mining and is headquartered in the United Kingdom.<sup>56</sup> The largest uranium mine in Namibia is the Rossing Uranium Mine located in the Namib Desert near the town of Arandis in Namibia, however the Husab Uranium mine is said to become the largest mine in Namibia upon completion. The mining company deals with open cast mining of uranium.

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<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> "De Beers, A focus on HIV/AIDS management", HIV/AIDS case study 2006.

<sup>56</sup> Rio Tinto, *Building our future*, Rossing Uranium working for Namibia.

Rio Tinto owns 69 percent of the Rossing uranium mine, while Iran owns 15 percent and 10 percent is owned by the government of South Africa, while the government of Namibia holds only 3 percent of ownership.<sup>57</sup>

### **2.3.2.1 Challenges faced by Rio Tinto's uranium mine in Namibia**

As thriving as the mining industry of Namibia is, the fact still remains that commodity prices keep plummeting and this in turn poses a risk for loss of closure of many mines. The Rossing uranium mine in Namibia is no exception to the reality of rising commodity prices as the mine has continued to face challenges in the past years.<sup>58</sup>

According to its geology, Namibia is a semi dry country and experiences severe draughts every time and again. For a mine to operate successfully there is a need for large amounts of water. Recently, Rossing Uranium mine has been experiencing severe water shortages and such a situation curbs mining process and results in millions of losses worth of Namibian dollars.<sup>59</sup>

The Erongo region primarily relies heavily on the desalination of its water since the water comprises of salt which makes it unsuitable for human consumption. Already, inhabitants of the Erongo region where the mine is situated and where most of these operations take place spend quite a high amount of money on water. It is hard to imagine how mining operations would continue to operate on less water.<sup>60</sup>

It is imperative that a solution be found if the life span of Rossing mine is to be prolonged. Government has found measures to ease this obstacle by finding a private investor to help fund the building of the country's second desalination plant which would cost around 1.5 billion Namibian dollars.<sup>61</sup>

Rio Tinto also has other obstacles which threaten its production process. Recently, Japan experienced an earthquake that devastated and resulted in the shutting down of its Fukushima

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<sup>57</sup> Ibid.

<sup>58</sup> "Draught hits Rio Tinto"; *Paladins Namibia's uranium mines*, 19 November 2013.

<sup>59</sup> Rio Tinto, *Building our future*, Rossing Uranium working for Namibia.

<sup>60</sup> "Draught hits Rio Tinto" *Paladins Namibian Uranium mines* 19 November 2013.

<sup>61</sup> Ibid.

Dai-Ichi plant.<sup>62</sup> Prior to the earthquake and tsunami, the Fukushima mine was Rio Tinto's biggest buyer of uranium. As a result of this, Rio Tinto mine has experienced 105 million Namibian dollars in loss.<sup>63</sup>

It is not only Rio Tinto as a mining company that felt the blow of dropping uranium prices, other consequences surfaced as well such as loss of employment for close to 276 workers.<sup>64</sup> Obstacles faced by Rio Tinto are a reality and the draught issue can still be resolved if another desalination plant is set up, though it is safe to point out that water is a non-renewable resource and if reserves get depleted, there would be no other alternative but to shut down the mine for good. The other obstacle faced by the mine is less demand of uranium from its biggest buyer which is Japan. Again, little can also be done in such a scenario where Mother Nature is again responsible.

### **2.3.3 Anglo Gold Ashanti Ltd**

Namibia's gold mine Navachab is a mine dealing with the extraction of gold a few kilometers outside Karibib. The mine began operation in the 1980s and has been running for many years. It is only in 2003 that the company almost to closedown but production picked up again in 2011.<sup>65</sup>

It has recently been confirmed that the mine will be sold by Anglo Gold Ashanti for 110 million dollars to QKR Corporation.<sup>66</sup> The mine has been bought by foreign investor Quarter Holdings, a sovereign wealth fund and will be sharing ownership with Jan Kulczyk, a Polish billionaire who is a large shareholder in SAB Miller.<sup>67</sup> Even though the Navachab mine has been sold to CKR Cooperation, it is vital that an international company has bought it and mining operations of gold will still be able to go forward.

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<sup>62</sup> Japan earthquake and Tsunami, March 11 2011 [www.earthmagazine.org/.../japans-megaquake-and-killer-tsunami](http://www.earthmagazine.org/.../japans-megaquake-and-killer-tsunami). (accessed on 24 April 2014).

<sup>63</sup> [www.mining.com/rio-tinto-cuts-workers-at-namibian-uranium-mine-](http://www.mining.com/rio-tinto-cuts-workers-at-namibian-uranium-mine-) (accessed on 7 March 2014).

<sup>64</sup> [www.mining.com/rio-tinto-cuts-workers-at-namibian-uranium-mine-](http://www.mining.com/rio-tinto-cuts-workers-at-namibian-uranium-mine-) (accessed on 7 March 2014).

<sup>65</sup> Namibia mining journal.

<sup>66</sup> Cecilia Jemasme, "Namibia wants piece of Anglo Gold Ashanti \$110 million mine", mining.com.

<sup>67</sup> Ibid.

### 2.3.4 Husab uranium mine

The Husab Uranium mine is located at Swakopmund Namibia and is said to benefit all Namibians.<sup>68</sup> The mine only began operations in the year 2014 and is estimated to be worth N\$ 20 billion, of which the Chinese Taurus Limited company will own about 90% of the holdings while the remaining 10% will be owned by the Namibian mine Epangelo mining company.<sup>69</sup>

The Husab uranium mine project was discovered in 2008.<sup>70</sup> The mine received environmental clearance from the Namibian Ministry of Environment and Tourism in 2011 of which the mining license was the only obtained towards the end of 2011 from the Ministry of Mines and Energy.<sup>71</sup> Full production of the mine is expected to begin in the year 2015. Husab will be the largest grade uranium deposit found in Namibia.<sup>72</sup>

The Husab mine is expected to produce a total of 7000 tons of uranium each year when it starts production and is fully operational and will be the second largest mine producer in the world after the MacArthur River mine of Canada.<sup>73</sup> The Husab will operate as an open pit mine and will use the truck and shovel method of mining.<sup>74</sup> The development of this open cast mine alone is estimated to cost around \$ 1.4 billion which includes infrastructure and a processing plant.<sup>75</sup>

As the Husab Uranium mine is expected to become the second largest uranium mine in the world it will also become the biggest investment that Namibia has ever had since gaining its independence in 1990, and also the largest single investment that China has ever contributed in Africa.<sup>76</sup>

This above-mentioned mines will create a total of 1600 permanent jobs while contributing a five percent to Namibia's coffers; as a result of this, exports will increase to about 20% each year.<sup>77</sup> The president of Namibia, His Excellency, Hifikepunye Pohamba, has stated that the development of the Husab uranium mine demonstrates that Namibia remains to be a preferred

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<sup>68</sup> 'Big Husab project kicks off' *The Namibian* 21 May 2014.

<sup>69</sup> Ibid.

<sup>70</sup> <http://www-technology.com/projects/husab-uranium-project-Namibia-Swakop>(accessed on 26 May 2014).

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

destination for foreign direct investment due to its political stability and also its macro-economic policies.<sup>78</sup> The President of Namibia stated further that for Namibia to continue to attract more foreign investment, the government should continue to improve the investment climate through the development and review of laws and policies governing Namibia's foreign investment framework.<sup>79</sup>

### 2.3.5 Other mining ventures in Namibia

Presently, the government of Namibia already has other international mining companies involved within and looking to invest within the mining sector of Namibia. The company looking to invest in Namibia is China. The company is called Namibia East Non-Ferrous Metal Investments.

The above mentioned company has been looking to invest in any African country and has been fortunate enough to invest in Namibia. As part of its long term investments, the company is planning an industrial park around an iron ore mining facility in Kunene, Namibia.<sup>80</sup>

If all goes as planned, the iron ore mine will be in operation for 100 years and will be expected to produce about 3 billion tons of iron ore.<sup>81</sup> There are underlying reasons why the Chinese government is investing in this kind of project, as one of the companies' spokesperson says that it is wrong for people to view Chinese mining company as one that "grabs resources and not put anything back".<sup>82</sup>

The company insists that this initiative will transform the local economy while bringing about local employment to at least 10 000 people.<sup>83</sup> The Namibia East Non-Ferrous Metal Investments also promises to develop local infrastructure, including rail links and ports.<sup>84</sup> There is no other steel manufacturer in Namibia presently, and such a project could bring positive changes in the level of development that the government of Namibia could be exposed to.

Namibia welcomes foreign investments within its mining industry and continues to enrich its sector through such ventures. Russia has also entered into and signed an agreement with Namibia

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<sup>78</sup> Ibid.

<sup>79</sup> Ibid.

<sup>80</sup> "Chinese firm in Namibia for the long haul" *China daily*, 19 March 2013.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

worth \$ 1 billion.<sup>85</sup> The agreement between these two countries will aid in the development of uranium deposits found in Namibia. Once executed, the mining venture will lay a foundation for exploration, processing and uranium enrichment.<sup>86</sup>

## 2.4 Impacts of foreign mining activities in Namibia

It is customary to recognize the fact that each time the foreign investor comes to invest in another country, his main goal is to attain profit, but through his profit gain, his activities may either bring development or destruction to that country. When dealing with mining in Africa, a lot of attention has to be given to most of these countries' mining sectors.

It is vital to place much emphasis on the issues influencing mining in many African countries like Namibia. It is important because many African countries mining sectors are still developing or even worse, far from developing at all.

The uranium rush which began two decades in Namibia ago is now threatening the biodiversity of unique and rare plant species, some of which are only found in Namibia.<sup>87</sup> These plant species which include Lichens are being extracted as a result of the mining activities taking place along the Rossing uranium and Langer Heinrich mines which are located within the surrounding area along the Namib Desert.<sup>88</sup> In most instances, most foreign companies coming to invest in any country's mining sector might bring positive development that may result in growth.<sup>89</sup> Consequently, mining operations tend to go wrong where disaster instead of development transpires<sup>90</sup>

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<sup>85</sup>“Russia’s Rosatom applies to develop Namibia’s Uranium deposit” *Ria Novosti* 20 May 2010.

<sup>86</sup> Ibid.

<sup>87</sup>Theo Wassenaar “Landscape Level Assessment and Vulnerability Study of the Namibian Uranium Province”.

<sup>88</sup>Ibid.

<sup>89</sup> For instance the development that De Beers has brought on the mining sector and economic growth of Namibia.

<sup>90</sup> See Bhopal India disaster. In 1982 a pesticide plant leaked methyl isocyanate gas and other toxic gases which ascended as a dense cloud and left thousands dead within hours as their lungs were filling up and most of them died due to cardiac and respiratory arrest. The operation was supposed to bring agricultural and growth to the government of India but instead resulted to the worst chemical gas spill ever recorded in the world. Although action was taken against the CEO of the factory, Warren Anderson who was charged with culpable homicide, and other serious offences in 1992. Even though it has been over thirty years since the disaster, the residents of Bhopal still experience severe coughs, cancer and other terminal illnesses. This disaster could have been prevented had there been more caution and safety measures practiced. Innocent people had to pay with their lives or ill health all because of a “agricultural development scheme “gone wrong. Also available at: <http://www.greenpeace.com> (accessed on 27 March 2014).



## 2.4.1 Other impacts of mining activities

### i. Environmental impacts and article 95(1) of the Namibian Constitution

The government of the Republic of Namibia states clearly in its Constitution in Article 95(1) that:

The state shall actively promote and maintain the welfare of the people by adopting inter alia, policies aimed at 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, in particular, the government shall provide measures against the dumping or recycling of foreign nuclear and toxic waste on the Namibian territory.

Article 95(1) is very clear in that it offers protection of ecosystems and the environment because the state understands that without the environment and if natural resources are misused, there will be no further investment going forward especially in the mining and fisheries sectors which rely heavily on the natural environment. The other reason that the state identifies in Article 95(1) is that the environment and all its gifts from nature, which are in the form of natural resources, should be utilized accordingly if the future generation of Namibia is to enjoy the same privileges.

Article 95(1) is very important in that it is also a guiding principle for foreign investors wanting to invest in Namibia as it states clearly what is expected of them as or if they plan to invest in any of Namibia's mining or fisheries sectors which primarily rely on the natural environment in order to remain in operation.

### ii. Long-term impacts of foreign mining operations in Namibia

Every mine has a lifetime, as does everything in life, it should be noted that as much as a mine can successfully operate and generate large profits, if and when the natural resources being mined and exploited get depleted, the mine has to shut down.<sup>91</sup>

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<sup>91</sup> As was the case with Kombat mine and Tsumeb mine which have been shut down.

A recent study conducted by the University of Namibia and the Czech Republic in Central Europe establishes the evidence that mines that were operating in the 1970s but which have since been shut down contain high levels of copper, zinc, and mercury in their soil and food crops grown on such contaminated soil and is hazardous to human health in terms of the World Health Organization (WHO).<sup>92</sup>

It is unfortunate that mines like Kombat and Tsumeb have since been shut down in Namibia. It is terrible that other areas which were once booming mines closed down when all mining operations ceased. All life surrounding those mining areas also came to a standstill, turning such once a vibrant mining areas into ghost towns.<sup>93</sup>

## **2.5 Application of principles of International Law and treaty obligations in Namibia's mining industry**

International Conventions are a source of International Law and consulted whenever there is a dispute in question. Namibia may have her own laws that govern her mining sector and all other sectors but when it comes to International Law, the principles of customary international law and treaty obligations will prevail over all the domestic laws.

Even though International Law may take precedence, especially when it is nations having a dispute, some of these countries will take the liberty to take their matters to the International Court of Justice (ICJ). Namibia has had its share of international disputes.<sup>94</sup> It cannot be denied though that such cases as the one listed above lays a platform for direction and precedent should a similar mining issue arise.

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<sup>92</sup> “Research highlights severe pollution from mining” *The Namibian* 4 March 2014.

<sup>93</sup> An example of a Ghost Town in Namibia is found at Luderitz, Koolmanskoop Namibia which was a flourishing mining town where diamonds were discovered in 1908 and soon became a successful mining town but was later abandoned when the diamond rush was no more.

<sup>94</sup> See Sedudu/Kasikili, *Botswana v Namibia*. The two African countries had a border dispute over the Kasikili/Sedudu area which is located in between Namibia and Botswana. Both countries had interest in the area due its political history and an economic hub for tourists. In the case, the Court looked at the case closely at the exact location of the Kasikili and to what “extent” Namibia had exercised ownership over the area.

### 2.5.1 Dispute settlements mechanisms

Dispute settlement between the foreign investor investing in all the government sectors of Namibia is regulated by the Foreign Investment Act.<sup>95</sup> The Foreign Investment Act allows for disputes of a foreign nature to be resolved by way of International Arbitration for foreign investors who have obtained a Certificate of Status Investment (CSI).<sup>96</sup>

In most instances, the CSI should include a provision for international arbitration which should be interpreted and carried out in terms of the Arbitration Rules of the United Nations Commission on International Trade Law.<sup>97</sup> Namibia does not have any domestic arbitration body that is primarily responsible for resolving disputes automatically between the foreign investor and any natural or juristic person who is a Namibian citizen.<sup>98</sup>

Most disputes involving a foreign investor are often referred to the Namibian Courts, or in other instances, if the investor's contract includes a clause on dispute settlement, the matter may be dealt with according to the investor's contract, the jurisdiction then remains with the investor.<sup>99</sup> In other words, the jurisdiction will be determined by the contract of the foreign investor, depending also on the circumstances of the dispute.<sup>100</sup>

The Namibian courts act independently and do not experience any involvement and interference from the government.<sup>101</sup> Foreign precedents are also often consulted and accepted in terms of the Namibian Criminal Law Procedure Act of 2004 of which the legal system emanates from the principles of Roman Dutch Law.<sup>102</sup>

### 2.5.2 Other dispute settlement mechanisms

As already stated in this research, Namibia has entered into Bilateral Investment Treaties with international mining companies that have seen the economy of Namibia experience economic growth, especially within the mining sector. International mining companies that Namibia has

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<sup>95</sup> Namibia- Country profile.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

<sup>99</sup> Ibid.

<sup>100</sup> Ibid.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid.

come into mining agreements with include De Beers, Anglo Gold Ashanti (which is now owned by QKR Cooperation) and Rio Tinto mine respectively.

These are the major mines in Namibia, and thus far, no dispute has arisen between the government of Namibia and these mining companies. Just because no serious disputes have arisen that does not exclude Namibia of the possibility of any mining disputes to arise in future.

It is the sole duty of the International Centre for Settlement of Investment Disputes (ICSID) to hear investment disputes specifically.<sup>103</sup> Namibia is not a signatory to the ICSID but according to the principles of this Convention, should Namibia (or any other country that is not a signatory to the ICSID) conclude a mining contract with a state that is a signatory to the ICSID, the principles of the ICSID will automatically apply in terms of Article 1 (b) of that international convention.

### **2.5.3 India and Nepal BIT settlement strategy- a shining example**

In building its dispute settlement system, Namibia cannot rely on the courts system all the time to resolve disputes but should also look into entering into an amicable agreement with the foreign investor to instill confidence in a foreign investor in case problems arise that will threaten the mining industry in Namibia.<sup>104</sup> India is a country which Namibia could draw lessons from as far as instilling foreign investor confidence is concerned. Till date, India is by far still the largest source of foreign investment which Nepal has.

From the year 1996, Indian businesses were being threatened due to political instability that was going on in Nepal.<sup>105</sup> Realizing that it would lose its biggest source of foreign investment, Nepal and India entered into a new agreement in 2011 which was known as the Bilateral Investment Promotion Agreement.<sup>106</sup>

This new agreement between the two countries made provisions for a more flexible and innovative international mechanism for the resolution of investment disputes.<sup>107</sup> This agreement

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<sup>103</sup>This body provides facilities for conciliation and arbitration of international disputes.

<sup>104</sup> Surya P. Subedi 'India's new Bilateral Investment Promotion and Protection Treaty with Nepal: A new trend in State Practice.

<sup>105</sup> Ibid.

<sup>106</sup> Ibid.

<sup>107</sup> Ibid.

between India and Nepal has since come into existence and set a trend for other countries to follow.<sup>108</sup>

## 2.6 Sovereignty and applicability with regard to minerals

The issue of ownership and sovereignty often arise where a state is in absolute control of its minerals and natural resources, but problem arises where a state in the exercise right within its borders causes harm to the environment of another state.

The Convention on the Long Range Trans-boundary Air Pollution of 1979 states that:

“The sovereign right of a state to exploit mineral and other natural resources within its jurisdiction is one of the basic principles of resource utilization in international law.

The Convention goes further in stating that this right, however, is not absolute and has been qualified by the corollary responsibility of a state to ensure that activities within its jurisdiction or control do not cause damage to the environment beyond its national jurisdiction.”<sup>109</sup>

The answer to all these questions of applicability was laid to rest by the judgment in the *Serbians Loans case*.<sup>110</sup> In this particular case, the Permanent Court of Justice held “that any contract which is not a contract between states in their capacity as subjects of international law is based on municipal law of some country.”<sup>111</sup>

## 2.7 Considerations of indigenous people’s rights

In terms of International Law and Human Rights Law, the plight of indigenous people cannot be ignored. Indigenous people are usually victims of agreements between the host state and the foreign investor which does not in any way consider the position that their agreements and operations may place on these people. In most instances, when a foreign investor wants to invest

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<sup>108</sup> Surya P. Subedi ‘India’s new Bilateral Investment Promotion and Protection Treaty with Nepal’: A new trend in State Practice.

<sup>109</sup> Celia G Dulapan “*Mining and sustainable Development: Insights from international law*”. Other Chapters and Conventions also exist which go along with the Convention on Long Transboundary Air Pollution of 1979, these include the Stockholm Declaration on Human Environment (1972), the Rio Declaration on Environment and Development (1992) and lastly, the UN Convention on Biological Diversity (1992).

<sup>110</sup> Reflections on Transitional Reflections on commercial law, “Applicable law under section 42 of the ICSID Convention, received on 19 October 2011.

<sup>111</sup> See *Serbians Loans case*, also available at

[http://www.worldcourts.com/pcij/eng/decisions/1929.07.12\\_payment1.htm](http://www.worldcourts.com/pcij/eng/decisions/1929.07.12_payment1.htm) (accessed on 9 March 2014).

in a particular project, he usually signs a contract with the government of that state. Within a specific period of time, the foreign investor would have been granted a mining and prospecting permit by that state and that is the time mining operations may begin.

The likelihood is that when exploration begins, the government of that country will have to vacate the indigenous people living in that area of land, usually without notice and such a community would be forced to leave behind their indigenous home.<sup>112</sup>

In such instances like the one stated above the International Labor Organization (ILO) Convention 169 on Indigenous and Tribal People in Independent Countries (1989) states that:

The rights of indigenous people to the natural resources pertaining to their traditional lands, including the right to participate in their use, management and conservation, shall be specifically safeguarded.

It further provides that in cases where the state retains the ownership of mineral or sub-surface resources, governments shall establish or maintain procedures through which they shall consult these people, with a view to ascertaining whether and to what degree their interests would be prejudiced before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their land.

The people concerned, where possible, shall participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

The issue of indigenous people and their rights is vital for Namibia because Namibia still has indigenous people existing to this very day in the north-eastern part of the country.<sup>113</sup> Most of these indigenous people of Namibia still rely primarily on hunting and gathering.

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<sup>112</sup> An example is that of Aquino in the Philippines where indigenous people have since 1995 seen their land being expropriated by government. The Mining Act of 1995 promotes that the land be used for mining purposes. However so, the fruits of these mining policies and laws are enjoyed by the mining foreign investors. Because of this, the indigenous people of Aquino face the biggest threat to their ancestral lands and also their self-determination. Also available at <http://www.katutubongmamamayan.org/node/>.

<sup>113</sup> [www.refworld.org/docid/49749cdac.html](http://www.refworld.org/docid/49749cdac.html). (accessed on 27 March 2014).

Areas and the people within those types of communities also require protection from expropriation of foreign investors if their land were to be ever considered for mining and expropriation of any natural resources if any existed there.

The leaders of the Himba people of Namibia issued a statement to the United Nations stating their grievances and sentiments on this issue of being vacated from their indigenous homes in order to make way for foreign mining companies investing in Namibia.<sup>114</sup> The grievances of the Himba people have been made worse by the government of Namibia's refusal to recognize 33 of them as traditional leaders.<sup>115</sup>

The Himba people of Namibia have on countless times called on the government to remove mining companies from the Himba territories. Most of these Himba leaders want an opportunity to be given a voice about decision-making about mining permits and mining revenue.<sup>116</sup>

## 2.8 Concluding remarks

There are a considerable number of international mining companies looking to and already investing in Namibia's mining industry. However, as much as the foreign investor may contribute towards bringing development to this sector, other aspects have to come to question and should be considered as well.

While the Constitution of Namibia provides state custodianship and protection of all minerals and natural resources for the future generations of Namibia, it is baffling as to the level of damage being done to the natural environment of Namibia as a result of mining activities by foreign investors.

International Conventions on mining and environment law offer protection should disputes arise and underline the vitality of international law in that it will prevail where municipal law is silent.

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<sup>114</sup> Minority Rights Group International, *State of the World's Minorities and Indigenous Peoples 2013 - Namibia*, 24 September 2013, available at: <http://www.refworld.org/docid/526fb73b5.html> (accessed on 15 April 2014).

<sup>115</sup> Ibid.

<sup>116</sup> Ibid.

More considerations need to be given by the Government of Namibia and even those of other African countries in combating factors that come to being when they enter into mining agreements with foreign investors. All is not lost; the government of Namibia needs to re-assure foreign investors within the mining sector all the possibilities that could emanate from these mining operations which could ultimately be positive or negative.



## CHAPTER THREE

### LEGAL FRAMEWORK OF NAMIBIA'S MINING INDUSTRY

#### 3.1 Introduction

In the previous chapter, the various international mining agreements which Namibia has concluded have been identified. It was pointed out that the legal framework regulating the mining industry of Namibia forms the basis that enables mining agreements between Namibia and its foreign mining investors to be concluded in the first place.

The conclusion in the chapter was that, mining contracts have a significant role to play in the fate of Namibia's mining industry and that the government of Namibia should pay closer attention to the implications brought about from mining agreements. The enactment of laws within the mining sector would offer alternatives to present obstacles in this industry, both for the government of Namibia and foreign mining companies.

This chapter will cast critical eyes on the legal framework of Namibia's mining sector. However, as a run up to this, space will be devoted to the industry's evolution of the mining legislation in Namibia. Importantly, emphasis will be placed on the legislation of mining and prospecting permits for foreign investors. A reform to this industry's legal framework may just be the solution needed to solve these challenges.

#### 3.2 Brief History of the Namibian mining industry

Prior to her independence, South West Africa (SWA) or Namibia as is presently known and called, had its mineral rights and administration controlled by the South African government whose sovereignty began after German colonial rule came to an end in 1915<sup>117</sup>. Section 2(1) of the then Mines, Works and Minerals Ordinance of 1968 vested all the administration of the Mines in the administration of that time in South Africa<sup>118</sup>.

It is only after Namibia gained its independence on the 21<sup>st</sup> of March 1990 that the mining laws were revised and reviewed and a new legal framework was drafted to accommodate the new and

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<sup>117</sup> Unpublished Gaynor Alberts "A critical analysis of the efficacy of the Namibian Minerals Act 33 of 1992 to provide for the exploration of minerals and other related matters".

<sup>118</sup> Ibid.

ever dynamic sector of mining. The new laws and policies governing the mining system of Namibia were set up through the Ministry of Mines and Energy for a simple purpose of developing the country's mineral wealth to the benefit of all Namibians as these minerals were the common property of all the Namibian people.<sup>119</sup>

Most sectors in Namibia currently operate independently and each year, a sum of money is set aside to assist with developing those sectors. The mining sector also receives money to upgrade its infrastructure and other developments needed, however, such money mostly emanating from taxpayers money does not increase revenue from the sector, and that explains why foreign investment in particular is needed.

### 3.3 Mining of minerals in Namibia

The mining of uranium though fluctuating overtime still remains a leading mining activity in Namibia and it is fourth in the whole world.<sup>120</sup> Unlike diamonds, uranium does not seem so popular for its uses. Unknown to many, uranium is a very important mineral with many uses.<sup>121</sup> This commodity is also unique in that its physical properties give it the potential to generate incredible amounts of energy.<sup>122</sup>

There was little or no interest in uranium as a commodity during the 1980s and 90s. Interest in the mineral only began to increase with the dawn of the new millennium which saw sustainability and the rise in demand for renewable energy as a new measure and source of energy. Uranium is a very useful mineral which will continue to be used, provided the reserves of uranium would not be depleted.

Diamonds on the other hand remains to be a leading mineral in Namibia which has attracted the investments of foreign companies like De Beers which is the investment company controlling all

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<sup>119</sup> Sparks, D.L & Green, D. 1992. *Namibia: The Nation after Independence*. Oxford USA: Westview Press. page81.

<sup>120</sup> <sup>h</sup>Merkel, Broder; Schipek, and Mandy; ' *The New Uranium Mining Boom: Challenge and Lessons Learned* ' (2011) Library of congress control number 2011936159.

<sup>121</sup> Uranium can be used to power nuclear power plants, also used to generate electricity, is used in radioactive dating and lastly can be used in nuclear fusion-Australian Government department of resources energy and tourism, uranium council, available at <http://www.innovation.gov.au/.../uranium/1Us> (accessed 21 November 2013).

<sup>122</sup> Namibian mining by the numbers *The Namibian* 21 May 2014.

affairs of diamonds in Namibia<sup>123</sup>. Diamonds in Namibia were first discovered in 1908 near Luderitz.

When the issue of mining is brought up, it would be instantly assumed that the mining activity spoken of is land mining. But where the mining of diamonds is concerned in Namibia, mining at sea is a mining activity that is seemingly popular, even surpassing land mining which will also be dealt with in the course of this research<sup>124</sup>.

### 3.4 Current mining laws of Namibia

With a vast majority of non-renewable minerals, Namibia's laws governing its mining sector have been transformed since gaining independence. The main laws governing the mining sector of Namibia are vested in the Diamond Act of 1999; the Minerals Prospecting and Mining Act 33 of 1992; and also Minerals Development Fund of Namibia Act of 1996.

Ultimately, all these Acts governing Namibia's mining sector must be applied in tandem with the spirit and purport of the Constitution of Namibia which remains the *grundnorm* in Namibia.

It is also safe to say that although the mining sector of Namibia is driven by the laws mentioned above, the Foreign Investment Act of 1990 and the Namibian Investment Centre ensure that Namibia is marketed as an investment hub in the region, attracting both Foreign Direct Investment (FDI) and local investment as well.<sup>125</sup>

Article 100 of the Namibia Constitution also lays a foundation for who regulates and holds over all natural resources. The Article further states that all natural resources below and above the surface of the land are owned by the state.

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<sup>123</sup> *De Beers group*, exploration and mining.

<sup>124</sup> 'Phosphate mining banned' *The Namibian* 19 September 2013.

<sup>125</sup> Republic of Namibia, Ministry of Trade and Industry; Department: Namibia Investment Centre (NIC) Available at [www.mti.gov.na/downloads/1%20Foreign%20Investment%20Act.pdf](http://www.mti.gov.na/downloads/1%20Foreign%20Investment%20Act.pdf) (accessed on 21 February 2014).

### 3.5 Relevance of the Minerals Prospecting and Mining Act 33 of 1992

The Minerals Prospecting and Mining Act is a very important instrument in regulating and administering the mining sector of Namibia. This Act was promulgated just two years after Namibia gained its independence in 1992. The Act is relevant and vital as it is a piece of legislation which provides for the licensing procedure, the rights of holders, the administration and finally the ownership of minerals.<sup>126</sup> The Minerals Act was amended in the year 2008 in order to make provisions for the introduction of mining royalties of up to 5 per cent of gross sales.<sup>127</sup> The amendment was necessary because of the increasing number for new uranium exploration licences which by the beginning of 2014 still had not been lifted.<sup>128</sup>

Legislation governing the mining sector should be transparent and make room for innovation, if not; it may prove difficult and futile to attract foreign investors to such a sector. Luckily, Namibia's Minerals prospecting and Mining Act 33 of 1992 is such a tool as compared to other mining Acts and policies.

There had been doubts by the then Chamber of Mines of Namibia (CMN) as to whether increased state involvement in the affairs of mining should be wholly vested in the state. The then president of the Chamber of Mines envisaged that "increased involvement of the state in mining would be a discouraging factor for future private investment."<sup>129</sup> It appears this aspect of ownership of minerals will not change any time soon.

Section 2 of the Minerals Prospecting and Mining Act of 1992 which provides for rights in relation to minerals clearly states that ownership of all minerals is to be under the administration of the state.

The Section states that:

Subject to any right conferred under any provision of this Act, any right in relation to the reconnaissance or prospecting for, and the mining and sale or disposal of, and the

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<sup>126</sup> Unpublished Gaynor Alberts "A critical analysis of the efficacy of the Namibian Minerals Act 33 of 1992 to provide for the exploration of minerals and other related matters".

<sup>127</sup> Doing business in Namibia "A guide for UK companies 2014".

<sup>128</sup> Ibid.

<sup>129</sup> Unpublished Gaynor Alberts "A critical analysis of the efficacy of the Namibian Minerals Act 33 of 1992 to provide for the exploration of minerals and other related matters".

exercise of control over, any mineral or group of minerals, vests, notwithstanding any right of ownership of any person in relation to any land in, on or under which any such mineral or group of minerals is found in the state.

The Minerals Prospecting and Mining Act of 1992 also grants the Minister of Mines and Energy the authority to appoint a person who shall exercise and or perform to the direction of the Minister, powers, duties and functions conferred under the Act by the Minister upon the Commissioner.<sup>130</sup>

From the above stated section, it is very clear to see that all mining affairs are vested in the state, which is the government of Namibia. It is therefore almost impossible to deny the relevance of this Act and its transparency. What makes it more relevant is the fact that unlike the previous Act which was based on enriching the colonial powers, the Minerals Prospecting and Mining Act of Namibia is meant to benefit all the people of Namibia.

Apart from the Diamond Act of 1999, the Minerals and prospecting Act of 1992 as well as the Minerals Development Fund of Namibia Act of 1996, the government of the Republic of Namibia has come up with the Nationals Mineral Policy since 2002.<sup>131</sup> The Nationals Mining Policy states that in order to achieve a sustained contribution from the mining sector to the economy, the government must create a conducive and enabling legislation, fiscal and institutional environment to attract private sector driven exploration.<sup>132</sup>

### **3.6 Amendment of mining laws as a measure to attracting foreign investment**

The existing debate that Namibia should amend some of its mining laws is gathering much intensity by the day. So much emphasis is placed on the Minerals and Prospecting Mining Act 33 of 1992 at the expense of the mining sector itself and other factors that influence the coming into effect of these laws, regulations and policies.

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<sup>130</sup> Section 4 Minerals (Prospecting and mining) Act 33 of 1992.

<sup>131</sup> See mining journal special Publication, London, November 2005, page 3.

<sup>132</sup> Ibid.

It is no secret that the government of Namibia wants to amend some of its laws governing the mining sector as the majority of mines are owned by foreign investors.<sup>133</sup> Namibia is currently in the process of developing its infrastructure to promote growth within its mining sector.<sup>134</sup> Not only is there infrastructure development within the mining sector, the government of Namibia is also in the process of reviewing its mining and taxation laws to improve attractiveness to foreign investors.<sup>135</sup>

As stated above, clearly there are gaps in some of Namibia's mining and tax laws as they appear to be attractive, but not enforceable enough to bring in more foreign investment inflows within the mining sector. Such powers to amend lie with the Ministry of Mines and Energy (MME).

However, the Minister of Finance, Dr Saara Kuugongelwa Amadhila, has recently announced of the intention to tax income from the sale of rights or licenses to explore mine or retrieve natural resources in Namibia<sup>136</sup>. If approved, the amendment would be in the form of capital gains tax and would generate revenues from the taxation of profits made outside of Namibia with respect to the sale of mining rights and mining permits.<sup>137</sup>

Amendment of some specific sections within the Mineral Prospecting and Mining Act 33 of 1992 has already occurred by virtue of the newly amended Minerals Act of Namibia.<sup>138</sup> The Foreign Investment Act of 1990 has also sets out a legal framework by which investors can operate in Namibia, assuring foreign investors equal legal status and tax treatment with locally owned or domiciled businesses.<sup>139</sup>

The Foreign Investment Act 1990 of Namibia in itself is unique by accounting for operations of businesses and mining companies, while providing protection at the same time. The Foreign Investment Act of Namibia provides investors with guarantees in respect of investment security, repatriation of capital, access to foreign currency and international arbitration in case of

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<sup>133</sup>DLA Piper mining in Africa, a legal overview (2012) also available at [www.dlapiper.com](http://www.dlapiper.com) (accessed 27 March 2014).

<sup>134</sup> Ibid.

<sup>135</sup> Ibid.

<sup>136</sup>Delliotte Namibia tax alert issue no/8 'Future tax amendments announced (2011).

<sup>137</sup> Ibid.

<sup>138</sup> Act 8 of the Minerals (Prospecting and Mining) of 2008 has replaced Act 114 of the old Minerals Prospecting and Mining Act 33 of 1992.

<sup>139</sup> Tjitja Harases "Royalties in Namibia: A comparative study with mining regimes in South Africa, Tanzania and Australia.

disputes.<sup>140</sup> The reason for the success of the Foreign Investment Act could be due to the fact that it works closely with the Namibia Investment Centre (NIC) which in the end does not require much amendment.

### **3.7 Regulation of mining and reconnaissance permits in Namibia**

The regulation and operation of mining activities in Namibia is overseen by the Minerals Prospecting and Mining Act 33 of 1992 which regulates mining and exploration of minerals. According to the above mentioned Act, six types of licenses are available which comprise of the Exclusive Prospecting License, the Mining claim, the Mining License, the Mineral Deposit Retention License, and lastly, Reconnaissance License.<sup>141</sup>

In this instance, much emphasis is placed on the Mining License as most companies that invest in Namibia's mining sector are issued with it. The Mining License is different as compared to the other Licenses as it gives the holder the exclusive mining right within that area for a period of 25 years or for the period consistent to the life of the mine.<sup>142</sup>

The Mining License may be renewed for a period of up to fifteen years and gives the license holder the exclusive power to approve the development of other mines on the same property.<sup>143</sup>

### **3.8 Duty of the Namibian Nationals Minerals Policy**

As much as there is enabling legislation that sees to it that all mining and prospecting laws in terms of the Minerals Act are complied with, it is still the duty of the Namibian Nationals Minerals Policy to add value to the laws governing the mining sector of Namibia.

Mining as an industry can be set up but one thing to note is that without a robust enabling legal framework regulating it, it becomes weak, fragile and may ultimately crumble down.

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<sup>140</sup> [www.mti.gov.nic.html](http://www.mti.gov.nic.html) (accessed 24 February 2014).

<sup>141</sup> Special Publication, Namibia Mining Journal.

<sup>142</sup> Ibid.

<sup>143</sup> Ibid.

### 3.9 Question of applicable law

As any other sector, the mining sector of Namibia has experienced disputes. However, most disputes are usually among Namibian mine owners with local mining companies. The legal framework governing Namibia's mining industry is very clear, especially in light of the Minerals Prospecting and Mining Act 33 of 1992 as applied.

The High Court of Namibia is responsible for hearing such kind of matters and where one of the parties still feels aggrieved he or she may approach the Supreme Court of Namibia.

The judgment in *Disposable Medical Products v Tender Board of Namibia and others* offers direction as to how the Courts in Namibia ought to interpret the circumstances surrounding each case before coming up with the verdict.<sup>144</sup>

In the case, the court stated that “in deciding whether there was unreasonable delay before review proceedings were instituted, each case must be judged on its own facts and circumstances. The Court further stated that what may be unreasonable in one case may not be so in another instance and vice-versa”. The case laid precedent that may be followed in mining disputes between locals and international investors alike.

### 3.10 Concluding remarks

As stated in this chapter, Namibia has a growing legal framework governing its mining sector, as much as it is growing and expanding, the legal framework still has transparent lacunas which need to be filled up through the enactment of new laws, policies and provisions aimed at targeting the pressing issues identified in this study.

It is only after the independence of the country that saw the promulgation of the Minerals Prospecting and Mining Act 33 of 1990 and the Ministry of Mines and Energy also began to take full responsibility and accountability to ensure transparency within the sector. The Minerals Prospecting and Mining Act has clearly played a major role in the granting of mining permits to both local and international mining companies, thus, the importance of this Act should not be overlooked.

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<sup>144</sup> *Disposable Medical Products (pty) Ltd v Tender Board of Namibia and Others* 1997 NR 129 (HC).



As diminishing ore reserves and low commodity prices have raised the necessity to formulate a governing legal regulatory body which will offer alternatives and answers as these new challenges continue to threaten the progress of the mining industry of Namibia. The amendment and restoration of laws to govern the mining sector of Namibia may just be the answer needed to combat the challenges identified in this study easily.

## CHAPTER FOUR

### THE IMPERATIVE FOR REFORM OF THE LEGAL FRAMEWORK FOR MINING INDUSTRY AND LESSONS FROM OTHER CLIMES

#### 4.1 Introduction

In the previous chapter, it was said that Namibia has a growing legal framework governing its mining sector, as much as it is growing; it is still “not yet there”. Having being one of the most successful industries that country has, the sector has come a long way since colonial times.

It is only after the independence of the country that saw the promulgation of the Minerals Prospecting and Mining Act 33 of 1990 and the Ministry of Mines and Energy also began to take full responsibility and accountability to ensure transparency within the sector.

The conclusion in the chapter was that as diminishing mining ore reserves and high commodity prices continue to take its toll on the mining sector and the economy of Namibia, , it appears that it is only through the enactment of a set of laws, that is, a conducive legal framework within the mining sector that will offer alternatives to this situation while at the same time ensuring that foreign investment inflows continue to pour within the mining sector.

Since there have been obstacles facing the mining sector of Namibia such as low prices of commodities, resulting in the closure of many mining operations, the government of Namibia is in the process of reviewing its tax and royalties system in order to harmonize its laws to secure further investment for the mining sector.

As it stands today, the government of Namibia itself has seen the need for this reform of some of its laws governing its mining sector, and the government is aware of the fact that such a move could come with its own implications. Certain concerns, constraints and benefits will inevitably arise should the mining sector’s legal framework reform take place.

## 4.2 Concerns

A recent survey on investment states that over 30 African countries have identified the regulatory and legal framework as having a negative impact on the investment decisions in less than 5 percent on every given case scenario.<sup>145</sup> The study further argues that Multilateral Agreements on Investment (MAI) will not really have a noticeable impact on foreign direct investment inflows in Africa.<sup>146</sup>

What is more upsetting about the debate on how FDI's in the form of Bilateral Investment Treaties (BITs) affect Africa is that so far there is still no evidence of whether bilateral investment agreements do in fact increase FDI inflows in African countries.<sup>147</sup> It is however paramount to point out that BIT agreements have shown to generate an increase in those countries' GDP but somehow it is just not enough to elevate those countries to a level that qualifies them to be classified as "developed countries".

Other concerns as contained in 2007's Grotius Lecture include the concern as to what could transpire should countries heed to the demands of foreign investors seeking to invest in any sector of those countries.<sup>148</sup> The lecture sheds more light as to what transpires when a country changes its policies and laws as a measure of securing foreign investment.

Joseph E Stiglitz raises another concern and opines that:

BIT's do not, of course stop governments from changing regulations, taxes or other government policies but they may require the government to compensate those adversely affected by the change and in so doing increase the cost a government will incur when it changes its regulations or other government policies. It should be clear that these agreements are not symmetric. Many government policies and investments lead to unanticipated increases in the value of assets.

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<sup>145</sup> Joseph E. Stiglitz, "Regulating Multinational Cooperation's: Towards Principles of Cross-Border Legal Framework in a Globalized World Balancing Rights With Responsibilities" (1997) ,American University International Law Review, Article 1, Series 3 Conference: The Ninth Annual Grotius Lecture series, volume 3.

<sup>146</sup> Ibid.

<sup>147</sup> Joseph E. Stiglitz, "Regulating Multinational Cooperation's: Towards Principles of Cross-Border Legal Framework in a Globalized World Balancing Rights With Responsibilities" (1997) ,American University International Law Review, Article 1, Series 3 Conference: The Ninth Annual Grotius Lecture series, volume 3.

<sup>148</sup> Ibid.

As stated above, the research makes it very clear as to what concerns would arise in a given scenario should a country like Namibia wish to sign more FDI treaties, especially within its mining sector? It all goes to underscore how much more African countries still need to learn before entering into these international BITs.

It may not only be compensation which governments will have to consider but other concerns may arise if and when the proposed mining legal framework is reformed and transformed. The government of Namibia also need to consider other factors like the depletion of non-renewable natural resources, more toxic waste generated from mining operations which could have adverse effects on the environment and all organisms depending on the environment for survival and lastly, if the enactment of such measures could result in the revival of ever-growing number of abandoned mines in Namibia.

#### **4.2.1 Depletion of non-renewable resources as a concern**

There is a global concern over the depletion of natural resources and how activities of human beings are causing damage to the environment and the ozone layer as well. Since natural resources are gifts from nature, the rate at which they are being utilized is astronomical. The Constitution of Namibia itself makes provisions in Article 95(1) aimed at conserving the environment and its natural resources so that it can be enjoyed by all Namibians and also the future generation of the country.

Namibia has abundance of reserves of natural mineral resources which include: diamonds, gold, pyrite, uranium, copper, semi-precious stones, and base metals.<sup>149</sup> All the stated minerals which Namibia has and which account for most if not all profits generated within that industry is non-renewable.

The government of Namibia has through an initiative with USAID made findings that human activities do in fact lead to degradation and depletion of natural resources.<sup>150</sup> The study also found that there is a high rate of decline in marine fisheries as a result of marine mining operations which tend to extract diamond components from beneath the sea bed and in the

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<sup>149</sup> Tjitja Harases “Royalties in Namibia a comparative study with the mining regimes in South Africa, Tanzania and Australia.” Unpublished honors thesis, University of Namibia, 2011.

<sup>150</sup> Bruce A Byers, “Environmental threats and opportunities in Namibia”, a comprehensive assessment (1997) number 21.

process catch fish and other marine life like coral reefs which form part of the natural biodiversity within the ocean.

The government of Namibia also offers protection for the environment through the Environmental Management Act of 2007 whose purport is to:

Promote the sustainable management of the environment and the use of natural resources by establishing principles for decision making on matters affecting the environment; to establish the Sustainable Development Advisory Council; to provide for the appointment of the Environmental Commissioner and environmental officers; to provide for a process of assessment and control of activities which may have significant effects on the environment; and to provide for incidental matters.<sup>151</sup>

At any given time, foreign investors may enter into agreement with the government of a country, and through that agreement accord to foreign investors the right to conduct exploration. Through this process, the foreign investors may not have consideration for the environment and the organisms existing therein.

When some ecosystems are exploited and damaged, it may be very difficult or in some cases impossible to reverse the damage as rehabilitation may not always be an option for all environments. Since foreign investors are allowed to invest in Namibia's mining sector, it should be underscored that such agreements should at all times include an environmental clause that will bind the foreign investor to compensate the government of Namibia should the provisions of such clause not be followed and should the mining operations of that foreign investor cause extensive damage to the environment of Namibia.

Caution must be taken as most mining operations are done on land. Forests may be cleared in order to make way for and establish such projects. It must also be noted that during this process, roads and other infrastructure will be built to make transporting of minerals easier, and besides, whenever mining operations are discussed, it ought to cause concern because human beings, animals and other organisms depend on the environment for life, without it, planet earth as a habitat would not be conducive for life.

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<sup>151</sup>Environmental Management Act 7 of 2007.

#### **4.2.2 Increase of abandoned mines as a concern**

The increase of abandoned mines should not be overlooked by countries, especially those affected. The issue of abandoned mines has now transitioned from where it was to become a global concern. It is a growing concern because of its diverse impacts on the people, and the environment.

Namibia not an exception in that it has a growing number of mostly open cast mines which have been abandoned because the foreign companies investing in those projects have completed their operations and the mine came to the end of its life; or closure could be as a result of the foreign company running out of funds to continue with operations or simply because the mineral being explored has been depleted.

There are many reasons why a mine was abandoned, but it is only the implications of such abandonment that raise concern. A case study conducted by the United Nations which was based on the protection of indigenous people and the protection of the environment explains how activities by foreign investors may cause adverse effects to an environment while leaving a number of abandoned mines behind.<sup>152</sup>

#### **4.2.3 Case study on the impacts of mining and dams (Benguet Philippines)**

The case study on Benguet is relevant for this study because it lays the foundation for Namibia to be well informed of the mining impacts that will cause concern where foreign investors are primarily the cause. The case study shows that the province of Benguet in the Philippines has since 1903 hosted 13 foreign companies of which of those 13, some closed down while others continue.<sup>153</sup>

The other concern identified in the case study is that three hydrolic dams built along the Ango River, the Ambuklao, Binga and San Roque dams that blocked the river flow in the opposite direction were used to generate electricity required by these foreign companies.<sup>154</sup> The electricity

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<sup>152</sup> Cordillera Peoples Alliance' case study on the impacts of mining and dams on the environment and indigenous people in Benguet, Cordillera, Philippines.

<sup>153</sup> Cordillera Peoples Alliance study on the impacts of mining and dams on the environment and indigenous people in Benguet, Cordillera, Philippines.

<sup>154</sup> Ibid.

generated by these dams was not used for the benefit of the people of Benguet but was used instead to supply the power needs of these foreign mining companies.<sup>155</sup>

Residents of the Benguet province had complained that the dams blocked the flow of water resulting in swamping of farmlands and communities within reach. The case study also showed that the local people began to suffer from ailments such as headaches, dizziness, coughs, chest pain, itching of skin, diarrhea and eye irritations as a result of the activities of the foreign companies.<sup>156</sup>

The biggest obstacle facing indigenous people in our present day is that when their respective countries sign BITs with these foreign companies, they also tend to ‘sign away’ the rights of indigenous people. Ultimately, the study conducted on Benguet recommended some alternatives that should be offered to the inhabitants of Benguet since the indigenous people especially had already and still continue to suffer damage to their environment as a result of long term impacts created by these foreign mining companies.

The study then suggested that all the people affected should be provided with adequate monetary compensation, sustainable livelihood, sustainable land, employment and other sources of regular income.<sup>157</sup> The case study also recommended Pilipino national legislation and policy on the liberalization of mining and energy needed to be reviewed and revised because these laws proved to be detrimental to the rights and protection of the indigenous people of the Philippines.

Again, it is imperative to point out that governments of developing countries should not be too quick in signing BITs with foreign companies (as illustrated in the Benguet case study) because there is a hidden danger in doing so, and it is mostly the environment and the indigenous people who will suffer the most, as a result of their government’s inability to offer protection through enacting laws that should protect these people.

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<sup>155</sup> Ibid.

<sup>156</sup> Ibid.

<sup>157</sup> Ibid.

Therefore, it is vital to note that the government of countries like the Philippines and Namibia exercise their responsibility to formalize these laws so that even indigenous people are not exploited.

#### **4.2.4 Namibia's tax regime**

Based on the internal rate of return (also known as the IRR) and the overall effective tax rates (ETR), it was determined by current Namibian system that Namibia can compete internationally as far as mining is concerned. That explains the reason why the government of Namibia offers an almost fair sharing of revenues between the foreign investor and the government.<sup>158</sup>

Namibia's tax regime states that:

Any increase in taxation, other than a well-crafted excess profits tax, could shift the fiscal system into a higher a "high tax" jurisdiction which over the longer-run could result in the lower government revenues as companies seek to invest their capital elsewhere.<sup>159</sup>

#### **4.3 Constraints**

It should be noted again that the strength of any country is found within its legal framework. A country may have the rarest natural resources on earth, be blessed with beautiful vast rivers and oceans, but if its legal framework guiding all its sectors is weak, then it can crumble.

The statement stated above is not a myth but a reality in many countries, especially in Africa. Due to poor laws and policies, some countries' mining sectors do not experience growth and development but remain stagnant. An example could be found in the Democratic Republic of the Congo.<sup>160</sup> It has been noted by UN experts, NGO's and scholars that there exists a documented linkage between the pursuit of the war and the scramble for DRC's natural resources.<sup>161</sup>

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<sup>158</sup> Inge Zamwani-Kamwi "Investing in the Namibian mining sector: the Namdeb experience.

<sup>159</sup> Ibid.

<sup>160</sup> Democratic Republic of the Congo, also known as the DRC.

<sup>161</sup> Unpublished: Lukanda Kapwandi Francky, 'Flexibility of long-term investment contracts; the case of mining contracts in the DRC'.



In the circumstance, it is safe to say that Namibia's Minerals Prospecting and Mining Act is quite reasonable and friendly to foreign investors as compared to that of other countries. However, the point is that there is still room for improvement.

#### **4.3.1. Position of mining with locals and the government of Namibia**

As much as foreign investment is required by the government of Namibia and the fact that the country has many international mining companies operating within Namibia's mining sector, the position of local small scale investor is seldom taken into consideration. The Minerals Prospecting and Mining Act 33 of 1992 contain a different type of permit that deals primarily with the needs of local small scale mining investors.

The type of mining permit available to Namibian citizens is called the mining claim. The permit is only available to Namibian citizens for the development of small scale mines and mineral deposits. This kind of permit is valid for three years. Once the claim expires, it can be renewed for a period of two years, provided that the mine is being developed and worked.<sup>162</sup> The government of Namibia is very much aware that there is not much competition between international mining companies and locally owned mining companies.

Because of the uncertainty between internationally-owned and locally-owned mines, the government of Namibia has through the Ministry of Finance gone as far as announcing that there are plans underway to introduce new tax measures which will then increase government revenue from mining.<sup>163</sup> The Minister of Finance at that time said that "we only want to make sure that we get a fair share from mineral value".<sup>164</sup>

It appears government does not want all the profits to be reaped by international mining companies but that government itself should participate in all activities concerning mining in Namibia. That explains why the government of Namibia started its very own state-owned mine called Epangelo.

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<sup>162</sup> Namibia mining journal, special publication.

<sup>163</sup> Deloitte & Touche Namibia " Who benefits from mining"

<sup>164</sup> Chamber of mines news 2012.

As for the position of local mining investors, the government of Namibia has been involved in small scale mining projects that help local farmers to launch themselves within this industry.

The Namibian government has since the birth of the Epangelo mine come up with principles which will place Namibia in a position of maintaining public and private ownership. By launching this initiative, the Namibian government will strive to make the Namibian government and the people of Namibia to become meaningful participants in the mining sector.<sup>165</sup>

As much as foreign investment helps bring in more foreign investment inflows, the government of Namibia should not always rely on foreign investment inflows within its mining sector but should not also rule out small scale mining investment schemes because it can build capacity and allow Namibian citizens to be involved actively in the mining of minerals within their country.

#### **4.3.2 Electricity shortages**

Namibia may have a flourishing mining sector that keeps on growing; however, the sector is affected by an obstacle which could threaten its viability which is continual shortage of electricity. Like its SADC neighbouring countries, Namibia continues to face electrical power cuts and shortages in most parts of the country.

It is unimaginable the damage to the economy that electricity power cuts can cause. Due to this, the mining sector can also experience difficulties in keeping its current mines running and also in gaining the confidence of other foreign mining investors who would be interested in investing in Namibia's growing sector.

This problem of electricity shortage is serious because electricity drives the economy of any country, without it, it is very difficult, if not impossible to produce anything at all. According to a report conducted by NAMPOWER, the company responsible for providing Namibia with

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<sup>165</sup>Deloitte Namibian mining, 'putting the record straight'.

electricity, warns that; ‘‘Namibians need to reduce the usage of power by at least 10 % or face load shedding’’.<sup>166</sup>

In the report, NAMPOWER further warned that Namibia can’t look to Eskom (South African electricity Power Company) for a supply of more power in the midst of electricity shortages which Eskom is also experiencing. The same report by NAMPOWER also states that Namibia relies on Eskom for 22 % of the power supply which it receives.<sup>167</sup>

Namibia does not rely on South Africa for all its electricity, apart from Eskom; the country has the Ruaccana hydroelectric power station on the Kunene River, and also the Van Eck thermal station in Windhoek. The country is trying but it is still not enough to curb looming power shortages.<sup>168</sup> This electricity crisis faced by Namibia could be as a result of the rapid demand of electricity due to high demand, urbanization and a growing mining sector.<sup>169</sup>

Another report by a Namibian economist also proved the above stated facts when he states that:

there is a substantial shortage of electricity in the Southern Africa region at this stage, and this situation will prevail over the next several years until enough new generation capacity has been built, thus putting pressure on energy tariffs not only for Namibia but in all the counties in the SADC.<sup>170</sup>

Countries within the SADC region continue to sign regional agreements and treaties which are aimed at generating revenue in the mining sectors of these African countries. An example of such is the Benguela Treaty.<sup>171</sup> The Benguela Treaty is an agreement between, Angola, Namibia and South Africa. The three countries aim to work together for the sustainable use of the Benguela Current Large Marine Ecosystem.<sup>172</sup>

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<sup>166</sup>The Namibian ‘‘power shortage looms’’ 23 May 2013.

<sup>167</sup>ibid

<sup>168</sup>Finpro Namibia country report.

<sup>169</sup> Available at <http://go.worldbank.org/1B6KN88H10> Namibia: country brief October 2012.

<sup>170</sup>The Namibian economist ‘‘Namibia ECB Addresses Electricity shortage supply challenges’’ 1 June 2012.

<sup>171</sup> Namibia signs Benguela Treaty *Namib Times* 3 May 2013.

<sup>172</sup> ibid.

The Benguela Current is rich in offshore oil and gas, not forgetting marine diamond mining agreement which could generate at least US \$ 54.3 billion each year.<sup>173</sup> By way of such a treaty, Namibia can help alleviate some of the electricity challenges it has been facing. Such a move will help the mining sector of Namibia to continue growing.<sup>174</sup>

### 4.3.3 Unequal distribution of income

Namibia is known for many things, for instance, it is known to the global community as “the land of the brave” and also prides itself with its high quality diamonds which are termed as “a gem worth investing in”. It is very unfortunate that the country is also known internationally as a country with the most inequitable distribution of income in the world.<sup>175</sup>

This unequal distribution of income or disparity in wealth puts Namibia in a position where gaps between the rich and the poor become wider. As much as Namibia is doing its best to combat diseases like HIV/AIDS, Tuberculosis and Malaria, these challenges crafted by disparities in distribution of income persist.

Unemployment continues to be a huge problem, not only in the mining sector but also in all other sectors of Namibia as well. In a survey done by the human development conducted in 2011, the report shows that in terms of unemployment, Namibia ranked 120 out of 187 countries.<sup>176</sup>

The report goes further by stating that:

Although Namibia has enjoyed economic growth and prudent macroeconomic policies, these have not generated the jobs needed to overcome the inequitable distributions of income, assets (notably land), and raise living standards in rural areas and among the urban poor.<sup>177</sup>

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<sup>173</sup> Ibid.

<sup>174</sup> Ibid.

<sup>175</sup> Namibia: Country brief October 2012 Available at <http://go.worldbank.org/1B6KN88H10> (Accessed on 4 April 2014).

<sup>176</sup> Ibid.

<sup>177</sup> Ibid.

In order to combat this ever present issue of unequal distribution of income, Namibia has come up with the Fourth National Development Plan (also known as the NDP4). This proposed plan will enact policies that will guide Namibia into implementing growth, job creation and increased income equality.<sup>178</sup>

#### **4.3.4 Close link to South Africa**

Namibia is closely linked to South Africa through trade and investment as well as similar monetary policies.<sup>179</sup> After independence, Namibia came up with its own currency, which is the Namibian dollar of which one South African Rand is equal to or equivalent to one Namibian dollar.

The closeness between the two countries is also strengthened by the FTA agreement of SADC and also a customs union of SACU both of which Namibia is a member.

When South Africa and the rest of the world were facing a global economic recession, Namibia also got affected because of the closeness it has with South Africa. The obstacle which is created by the closeness of South Africa and Namibia could clearly be seen in 2008 when there was a global recession. During that year, both South Africa and Namibia were facing similar circumstances; it is very typical that whenever South Africa faces economic challenges, Namibia will follow in pursuit because of this its closeness to South Africa.

#### **4.4 Benefits**

There are specific benefits which would accrue if the legal framework governing Namibia's mining industry is reviewed.

Should the laws of Namibia's mining sector be amended to suit and encourage further investments within this sector, specific benefits would also automatically arise. The benefits may include: creation of jobs, infrastructure development and it may also improve good relations between Namibia and its foreign investors. These benefits will now be considered below.

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<sup>178</sup> Ibid.

<sup>179</sup>The Namibian economist "Namibia ECB Addresses Electricity shortage supply challenges" 1 June 2012.

#### 4.4.1 Increase in employment

Namibia has a huge advantage as far as the mining industry is concerned. The mining industry keeps growing at a rapid speed and this rapid growth creates employment. For more employment opportunities to be created in Namibia, more money needs to be invested and then spent to create jobs.

The Minister of Trade and Industry himself recognises the significance of foreign investment and the role it plays on the growth of the economy and the creation of employment. The honourable Minister stated that-

A combination of domestic and foreign investment will result in the desired level of gross fixed investment and capital formation necessary for the realisation of high levels of growth in the country's production and export sectors. Such growth is in turn expected to fuel high levels of employment, industrial development and diversification.<sup>180</sup>

In terms of the Foreign Investment Act of Namibia, and the Investment Centre of Namibia, the Government of Namibia aims to keep encouraging further foreign investment within all its sectors. One thing to be noted is that for a country to grow and also acquire the ability to create employment, it needs to grow in all its sectors. As much as the mining industry of Namibia is growing at a rapid speed, it is also vital to note that all sectors should grow at great succession as a whole. Vision 2030 of Namibia supports this notion of harmonization and growth of all sectors.<sup>181</sup>

It is not Namibia and South Africa alone that are experiencing power shortages and losing billions of Rands as a result of this disruption in their sectors. Swaziland, Lesotho, Botswana and Zimbabwe have also begun to look for other alternatives in electricity supply. Zimbabwe and Zambia were the most hit in 2008. A report conducted in 2008 by the Southern African Research

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<sup>180</sup> Namibia, export processing zone (EPZ), industrial development strategy, harnessing Namibia's manufacturing and exporting potential; Investor guide.

<sup>181</sup> Vision 2030: A vision for Namibia.

and Documentation Centre shows that due to the electricity blackouts in that year, the two countries experienced disrupted industry and commerce difficulties.<sup>182</sup>

It is very apparent from all reports gathered on the aspect of electricity, how much the SADC countries are in need of more power in order to drive its industries. Namibia is no exception, for its mining industry to grow and develop innovations, other measures to deal with this obstacle should be explored. More importantly, as amendments and reforms come to place, this subject of electricity and what could transpire if this constraint is not dealt with need to be shown.

#### **4.4.2 Infrastructural development**

Infrastructural development plays a vital role within the mining sector. The only obstacle which Namibia is facing is that it still needs to build its infrastructure within this sector. It is only De Beers's international which has invested in Namibia's infrastructure and which has helped the industry to establish its very own industry responsible with the extraction of world standard diamonds, polishing and exportation.

As much as Namibia engages in further investments within the mining industry, the more the foreign investors, the better the chances of employment creation within the sector. Foreign investment within most sectors of most African countries usually results in massive infrastructural development.

Namibia is said to have 'excellent infrastructure' by the Namibia Investment Centre. This infrastructure includes railway lines, telecommunication lines, and the ever-growing deep water port at Walvis Bay which is expected to be a vital commercial gateway to the whole of the Southern-Africa.<sup>183</sup> Mining infrastructure and excellent roads connect the entire country, while the trans-Caprivi highway makes export and import trade easier.

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<sup>182</sup>Southern African Research and Documentation Centre, "Southern Africa grapples with energy shortages".

<sup>183</sup> Namibia report: General Operating Environment, Energy and Renewable Energy, Environmental Governance, Organization, Sources and references.

Since Namibia is still a developing country and freely encourages foreign investment within all its sectors, it also has a dynamic Constitution that is one of the most modern in the world.<sup>184</sup> As much as the infrastructure of Namibia may be classified as “excellent”, there is still a need for the mining sector specifically to upgrade and develop this industry in terms of infrastructure.

#### **4.4.3 Good relations**

Namibia has a dual Constitution with one of the most flexible laws in the world. With the Constitution being the supreme law of the country and no other person being above the law, it is a country that is worth investing in as such a Constitution can offer protection not only to its own citizens but also to its foreign investors.

Since independence, Namibia has accepted and entered into many BIT agreements with many foreign countries and this has in turn created good relations between Namibia and those countries. Good relations or “allies” are very important. As was seen during the first and second world wars, countries who engaged in trade and investment relations with each other assisted one another during the long hard years of those wars.<sup>185</sup>

Finland for instance has long standing relations with Namibia which began when the Finish came to Namibia in 1870. The two countries continue to benefit directly from each other to this day. Namibia has been a huge contributor to development for Finland, while Finland has also contributed and participated in Namibia’s development of water, forest, environmental protection, mining, healthcare and other sectors as well.<sup>186</sup>

One prominent and lasting benefit that foreign direct investment would have for Namibia is the formation of good relations, which in turn would allow growth and development in all sectors of Namibia, and importantly, within the mining industry.

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<sup>184</sup> See [www.mti.gov.nic.html](http://www.mti.gov.nic.html) ( accessed on 19 April 2014)

<sup>185</sup> Robert Wilde” the countries involved in world war 1”. Also available at About.com.European History.

<sup>186</sup> Finpro Namibia country report



#### 4.4.4 Namibia's mining industry remains backbone of the economy

The mining industry of Namibia accounts for most of the yearly exports taking place in the country.<sup>187</sup> The mining industry is the biggest contributor to the country's financial health. Mining remains a very important activity to the people of Namibia.<sup>188</sup> This is so because it contributes a great proportion towards employment and wealth creation.<sup>189</sup>

In a bid to expand its robust mining industry, the government of Namibia is making effort to establish a strong domestic market which will be responsible for diamond cutting and polishing in the South Western Country.<sup>190</sup> The goal which the mining industry of Namibia has set is to establish itself as Southern-Africa's most dynamic and strongest mineral industry.<sup>191</sup>

The mining industry of Namibia is developing and expanding its mineral industry to become one which will become the third-largest supplier of uranium oxide in the world.<sup>192</sup> Investment in Namibia continues to increase since gaining its independence in the year 1990.<sup>193</sup> To ensure that investment continues to pour into Namibia's mining industry, the government has adopted measures which will revitalise while promoting mining through reviews of legislation and policies that will place Namibia in a position that will be in good standing with investors and appear to them as an ideal destination to invest in.<sup>194</sup>

Namibia as a country remains in the top five list of Africa's most competitive economies according to the World Economic Forum.<sup>195</sup> Some of the aspects which contribute to Namibia's attractiveness to foreign investors include political stability, a good governance system, respect for the rule of law, low crime rate, investment-friendly legislation and regulatory framework,

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<sup>187</sup> 'Mining industry backbone of Namibia's economy' *Creamer Media's mining weekly* 14 May 2010.

<sup>188</sup> Ibid.

<sup>189</sup> Ibid.

<sup>190</sup> Ibid.

<sup>191</sup> Ibid.

<sup>192</sup> Ibid.

<sup>193</sup> Ibid.

<sup>194</sup> Ibid.

<sup>195</sup> African Mining "The most comprehensive mining resources for investors in Africa.  
[http://www.africanmining.com/country\\_info.php?id=11](http://www.africanmining.com/country_info.php?id=11)(accessed on 24 April 2014).

comparative incentive regimes and lastly, attractiveness for business and investment.<sup>196</sup> All these make Namibia an ideal destination for investment for foreign investors.<sup>197</sup>

There are still a large number of “untapped” mineral deposits in Namibia, resulting in exploration companies flocking into the country in large numbers.<sup>198</sup> Diamonds and uranium remain the leading export products in Namibia.<sup>199</sup> As much as diamonds remain in dire demand on the world market, demand for uranium has increased globally due to the fact that there is a worldwide drive to lower carbon emission by switching to nuclear energy.<sup>200</sup>

Namibian mining Commissioner, Erasmus Shivolo, predicts that Namibia’s mining industry will continue to grow significantly, while creating a better environment to make way for the promotion of private-sector investment and making sure that all Namibians benefit.<sup>201</sup> The Ministry of Mines and Energy remains adamant that what will help the mining sector of Namibia to grow even more is the establishment of more mines.<sup>202</sup>

The mining industry alone employs 3 percent of the Namibian population.<sup>203</sup> The Ministry of Mines and Energy of Namibia has further stated that the private sector will take lead in mineral beneficiation which in turn will help Namibia’s mining industry to gain international recognition for its excellent mining standards.<sup>204</sup>

After independence, Namibia consisted of 20 mines in operation, as of the year 2010; the country has about 62 mines in operation.<sup>205</sup> That aspect of increment in the number of mines is a strong indicator that foreign investors are still seeking for opportunities in developing countries like Namibia.<sup>206</sup> The other striking factor that has helped the mining industry of Namibia to be

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<sup>196</sup> Ibid.

<sup>197</sup> Ibid.

<sup>198</sup> ‘Mining industry backbone of Namibia’s economy’ *Creamer Media’s mining weekly* 14 May 2010.

<sup>199</sup> Ibid.

<sup>200</sup> Ibid.

<sup>201</sup> Ibid.

<sup>202</sup> Ibid.

<sup>203</sup> Ibid.

<sup>204</sup> Ibid.

<sup>205</sup> Ibid.

<sup>206</sup> Ibid.

stronger than it was prior 1990 could be attributed to the stable political environment, a strong and conducive atmosphere and lastly, the availability of precious and important mineral deposits found in the country.<sup>207</sup> Foreign investors continue to play a crucial role in the mining industry of Namibia, bringing with them capital and expertise necessary to aid in building international commodity markets.<sup>208</sup> As much as Namibia's mining industry employs world-class technology, the industry has deployed measures that constitute the highest safety standards.<sup>209</sup>

To begin with mining operations, foreign investors would always be required to set up infrastructure and approach the Chamber of Mines of Namibia to represent them in discussions with the government of Namibia.<sup>210</sup>

#### 4.4.5 Preferential access

Namibia, a growing Sub-Saharan African country, continuously enjoys and reaps the benefits of its involvement, participation and membership in bilateral, regional and multilateral markets and trade agreements.<sup>211</sup> Namibia is a member of the World Trade Organisation and also has a duty and quota free access to the United States and European Markets through the channel of the African Growth and opportunity Act (AGOA), not forgetting the Cotonou Agreement.<sup>212</sup>

The Cotonou Agreement, which used to be known as the Lome Convention, continues to secure the bond between the EU and Namibian relations. In a speech by President Hifikepunye Pohamaba, he stated that “the on-going relations between the EU and Namibia have produced excellent relations between the two countries”.<sup>213</sup> The President of Namibia further stated that Namibia has gained in terms of growth and development as a result of this relation with the EU, which includes the development of democratic governance, human rights, trade, water and

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<sup>207</sup> Ibid.

<sup>208</sup> Doing business in Namibia ‘A guide for UK companies 2014’, also available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/301482/Doing\\_Business\\_in\\_Namibia\\_2014.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/301482/Doing_Business_in_Namibia_2014.pdf) (accessed on 27 May 2014)

<sup>209</sup> Ibid.

<sup>210</sup> Ibid.

<sup>211</sup> African Mining “The most comprehensive mining resources for investors in Africa. [http://www.africanmining.com/country\\_info.php?id=11](http://www.africanmining.com/country_info.php?id=11) (accessed on 24 April 2014).

<sup>212</sup> Ibid.

<sup>213</sup> Raul Funes Milani “The European Union: Relations with Namibia.

sanitation, rural economic growth, environmental protection, human resources development, science and technology.<sup>214</sup>

## 4.5 Lessons from other climes

### 4.5.1 Botswana

Botswana continues to have one of the most dynamic and strong mining sectors in the whole of Africa. The country is known for its high quality diamonds. Apart from its diamonds, Botswana is also involved in the mining of other minerals which include copper, nickel, gold, soda-ash and coal.<sup>215</sup> Like Namibia, all minerals in Botswana are vested in the state which holds all ownership and controls all operations of mineral exploration in Botswana.

#### 4.5.1.1 Legal framework governing Botswana's mining sector

Botswana's laws governing its mining sector are enshrined in the Mines and Minerals Act of 1999. The country also promotes foreign investment and has three classes of mining permits which it issues both to locals and foreign investors,<sup>216</sup> and these are:

- i. **Retention licence**-This type of licence provides retention for prospectors who deem a project economically unviable within the short-term;
- ii. **Mining licence**-This type of permit is valid for a mining period of up to 25 years as mining operations take place;
- iii. **Minerals permits**-This kind of permit allows companies to conduct small-scale mining operations for any mineral other than diamonds over an area not exceeding a half square kilometre; it is valid for five years with unlimited renewals of up to five years.

#### 4.5.1.2 Challenges incurred in Botswana's mining industry

Botswana has a strong and growing legal system and the mining sector contributes more revenue to the economy than any other sector that Botswana has.<sup>217</sup> The only obstacle which this country

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<sup>214</sup> Ibid.

<sup>215</sup> DLA Piper "mining in Africa" a legal overview.

<sup>216</sup> Ibid.

<sup>217</sup> Lesego Sekwati "Botswana: "A note on economic diversification" BOJE: Botswana Journal of Economics.

continues to face is that the economy of Botswana remains heavily dependent on diamond mining while little emphasis and attention is placed on the private sector.<sup>218</sup>

#### **4.5.1.3 Lessons to be drawn for Namibia**

Both Botswana and Namibia have very small populations but have successful mining sectors which bring in more revenue and attract foreign investment within those sectors. However, Namibia has a lot to learn from its neighbouring country and its mining sector. Botswana is considering the enactment of beneficiation law as the government of Botswana has observed the importance of its citizens' benefitting directly from the massive revenue that foreign investment contributes to the economy of Namibia.<sup>219</sup>

Both Botswana and Namibia in maintaining the level of attracting foreign investors to their mining sectors need to consider their investment climate. This investment climate will most probably depend on two things: the first one is the expected rate of return the country offers investors on their investment in domestic projects; and secondly, it is the level of risk incurred which is associated with those projects.<sup>220</sup>

#### **4.5.2 Morocco**

Morocco is a mining African country with a very strong services sector. The economy of Morocco has experienced major growth due to government's reforms and major infrastructure investment while also experiencing major growth every year since the beginning of the 21<sup>st</sup> century.<sup>221</sup>

Morocco has one of the highest levels of Gross Domestic Product (GDP) within the Arab world.<sup>222</sup> Phosphate mining is a vital mineral that creates revenue for Morocco and one of the largest producers in the world. Mining products account for the majority of all rail and sea

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<sup>218</sup>Ibid.

<sup>219</sup> Unpublished: Kuda Tshiamo "The likely impacts of enactment of beneficiation law on foreign investment and trade commitments under the WTO: The case for Botswana" unpublished Master's thesis, University of Pretoria 2014.

<sup>220</sup> Unpublished: Tjitja Harases "Royalties in Namibia a comparative study with the mining regimes in South Africa, Tanzania and Australia," unpublished honours thesis, University of Namibia, 2011.

<sup>221</sup> DLA Piper "mining in Africa" a legal overview" page 38.

<sup>222</sup> Ibid.

freight.<sup>223</sup> Compared to other countries, Morocco's laws are very precise and in particular, as they target all aspects which affect mining.

#### 4.5.2.1 Legal framework governing Morocco's mining industry

Morocco's mining sector is regulated by the Mining Law of 1951 which includes law no 11-03 of June 2003 which relates to environmental protection.<sup>224</sup> Law no 12-03 of 19 June 2003 which deals with the impacts studies on the environment and lastly, Law no 18-95 of December 1995 which establishes the investment charter.<sup>225</sup>

Morocco has three types of licences which govern and regulate its mining sector. These are.<sup>226</sup>

- i. **Exploration Licence**-This type of licence confers the exclusive right to explore within the licenced area, and the exclusive right to obtain a mining concession. The licence is usually issued for a period of three years and may be extended or renewed for a period of four years.
- ii. **Mining Permit**-This type of licence is issued if workable deposits are discovered. The licence confers the exclusive right to produce and exploit specified minerals in the licenced area for a period of four years and may be renewed for a period of four years with an open possibility of special extension for a period of up to 12 years.
- iii. **Concession**-This type of licence is issued if a large discovery is made using an exploration or mining permit. The licence is valid for a period of 75 years and renewable for a period of another 25 years.

#### 4.5.2.2 Challenges faced by Morocco mining industry

The mining sector of Morocco has been facing some challenges in the recent years which include the need to discover new mineral deposits.<sup>227</sup> Other challenges within Morocco's mining sector are closely related to globalization of the economy, globalization of competition and competitiveness and instability of commodity markets.<sup>228</sup>

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<sup>223</sup> DLA Piper "mining in Africa" a legal overview" page 38.

<sup>224</sup> Ibid.

<sup>225</sup> Ibid.

<sup>226</sup> Ibid.

<sup>227</sup> Morocco "Mineral, Mining sector investment and business guide" volume I Strategic Information and Regulations.

<sup>228</sup> Ibid.

The above challenges faced by Morocco are being experienced by many other African countries whose mining sectors are developing and who strive to attract more foreign investment. Namibia is also facing the same challenge of the uncertainty of low commodity prices which keep on fluctuating on the markets which has in turn resulted in the closure of many mining operations in Namibia.

#### 4.5.2.3 Lessons to be drawn for Namibia

The Moroccan Mining Law of 1951 is being reviewed and is estimated to be complete between the year 2014 and year 2015. The new Mining Law of Morocco should incorporate some principles contained in current legislation and will introduce new provisions including:<sup>229</sup>

- i. Abolishing categorisation of mines and restrictions of permits in respect of these categories;
- ii. Abolishing concessions and introducing new mining authorisations including an exploration authorisation enabling the holder to carry out exploration programmes while giving priority to holders for exploration permits; and
- iii. Defining the statutes applicable to the mining companies.

The Moroccan government does promote foreign investment within its mining sector. The right to explore or exploit mineral substances may be granted both to physical and legal persons alike, with an exception to that which the permit-holder has ownership of a subsidiary or branch in Morocco.<sup>230</sup>

The Investment Charter of Morocco states that foreign investors may benefit from tax and other regulatory advantages with the condition that the investment in question complies with certain requirements such as the size and the number of workers.<sup>231</sup> As illustrated above, Morocco has included vital policies within its mining legal framework which Namibia should draw closer attention to, especially with regards to its Investment Charter.

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<sup>229</sup> <http://www.nortornrosefulbright.com/knowledge/publications/993277/mining-in-morocco-ten-things-to>(accessed on 5 April 2014)

<sup>230</sup> Ibid.

<sup>231</sup> ibid

### 4.5.3 South Africa

South Africa is a Southern African country with diverse types of rich mineral resources. The country is the world's largest producer and exporter of platinum.<sup>232</sup> Other minerals which South Africa produces include gold, manganese, chrome, vanadium, titanium and coal.<sup>233</sup>

All these production and exportation of these minerals has resulted in South Africa also upgrading its specialised sectors which include the mining equipment industry. According to the Chamber of Mines of South Africa, the economy of South Africa is anticipated to make further growth within its mining industry by 3-4% by the year 2020.<sup>234</sup>

#### 4.5.3.1 Legal Framework

South Africa's mining industry is primarily governed by the Mineral and Petroleum Resources Development Act (MPRDA).<sup>235</sup> Foreign investors and locals can apply for prospecting rights and Mining rights for Minerals. Application for any of these rights is placed under the administration of the Minister of Mineral Resources.<sup>236</sup>

When it is approved, the right is then registered with the Mineral and Petroleum Titles Registration office.<sup>237</sup> South Africa's mining sites with rich mineral deposits include the Bushveld complex which produces metals, chromium, and vanadium-titanium iron ore and fluorospar and andalusite,<sup>238</sup> the Transvaal and the Karakoo Basin contains bituminous coal and anthracite while Phalaborwa produces igneous contains copper, phosphate, vermiculite, feldspar and zirconium.<sup>239</sup>

#### 4.5.3.2 Challenges faced by South Africa mining industry

South Africa is said to have more than 52 commodities under the earth and these commodities are estimated to bring in a value of US\$ 2.5 trillion. However, South Africa's mining companies

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<sup>232</sup> Ibid.

<sup>233</sup> Ibid.

<sup>234</sup> DLA Piper "mining in Africa" a legal overview" page 52.

<sup>235</sup> Ibid.

<sup>236</sup> Ibid.

<sup>237</sup> Ibid.

<sup>238</sup> Ibid.

<sup>239</sup> Ibid.



are facing global crisis which threatens its capacity of generating enough revenue to keep them in operation.<sup>240</sup>

Stagnant or falling global commodity prices and rising input costs are forcing mining companies to make the hard decision of short-term operations rather than long-term operations which would alleviate the issue of rising commodity prices.<sup>241</sup>

South Africa's mining industry is facing what is called the annual "strike season" in which unions and mine workers demand from these mining companies an increase in their monthly incomes and other benefits, while not fully comprehending the global crisis which mining companies are facing.<sup>242</sup>

#### **4.5.3.3 Lesson to be drawn by Namibia**

##### ***Scenario planning***

In tackling the challenges faced by companies within the mining sector, South African companies have come up with a strategy known as scenario planning. Scenario planning is to be put on the table and implement by companies since in their own words "the future cannot be predicted".

This strategy of scenario planning was developed in the 1970s as a tool to aid executives in making high stake decisions involving large investments and volatile situations, making it applicable to the mining industry.

In 2011, the Zimbabwean mining industry through its indigenisation enforced a new law limiting foreign ownership within its mining sector. This left the mining companies operating in Zimbabwe with three options:

- i. to comply with the law, ceding at least 51 % of their stake;
- ii. refuse to comply and fight for their stake; and
- iii. walk away from their investment.

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<sup>240</sup> Deloitte "Tough choices facing the South African mining industry".

<sup>241</sup> DLA Piper "mining in Africa" a legal overview" page 52.

<sup>242</sup> Ibid.

Had scenario planning been implemented, estimates show that most of those companies would have survived long term due to the tools identifying the scenario in question in Zimbabwe. In light of the above statements it is evident to see the potential that scenario planning would have on the mining industry of Namibia, in providing tools and routes to follow in the midst of a global crisis which is affecting the diverse mining sectors of many African countries.

For a country like Namibia with a population of over 2 million people, this still poses a risk especially for productivity on the side of foreign investors having interest and looking to invest in Namibia's mining sector. A country like South Africa is experiencing robust growth within its mining sector due to its large population and advancement in adopting advanced systems within its mining sector.

#### **4.5.4 Tanzania**

Tanzania is involved in the mining of coal, gold, diamonds, iron ore, tanzanite, graphite, phosphate, rubies, limestone, platinum group metals and lastly, uranium. Tanzania has continued to focus more on its economic reform and it has improved and created a better climate for investment in Tanzania.<sup>243</sup>

The government of Tanzania welcomes foreign investment but all foreign investors are to always engage with the Tanzanian Investment Centre.<sup>244</sup> No restrictions are placed on foreign ownership, however a foreign investor may be required to partner with a national company first.<sup>245</sup>

##### **4.5.4.1 Legal Framework**

The laws that govern the Tanzanian mining sector include the mining Act of 2010, the Tanzanian Investment Act of 1997; the Land Act of 1999 (and 2002 as amended); and lastly, the Environmental Management Act no 20 of 2004.<sup>246</sup>

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<sup>243</sup>DLA Piper "mining in Africa" a legal overview" page 55-56.

<sup>244</sup> Ibid.

<sup>245</sup> Ibid.

<sup>246</sup> Ibid.

Ownership of all natural resources in Tanzania belongs to the state. The Tanzanian mining sector is regulated by three types of mining licences and permits which include.<sup>247</sup>

- i. **Prospecting licence**-Any company or individual may apply for a prospecting licence, including foreign investors.
- ii. **Mining licence**-Companies and individuals can apply to mine in Tanzania by applying for this type of permit.
- iii. **Primary mining licence**-This type is only made available to citizens of Tanzania in terms of section 8(2) of the Mining Act.

#### 4.5.4.2 Challenges faced by Tanzania mining industry

Mines constructed during the colonial era have not been developed by the government of Tanzania, thus resulting in the closure of many of these mines.<sup>248</sup> Complaints by citizens of Tanzania as well as government officials that mining agreements seem to favour big mining investment companies more as they were signed and implemented in total secrecy is a major concern.<sup>249</sup>

Big mining companies in Tanzania do not pay sufficient taxes as the taxation system is poor and inadequate.<sup>250</sup> The vast natural resources that Tanzania has have not been transformed into wealth and the contribution of the mining sector of Tanzania to the national economy does not meet the expectation of the citizens of Tanzania.<sup>251</sup>

#### 4.5.4.3 Lessons to be drawn by Namibia

Citizens of Tanzania should be able to benefit from the mineral riches of their country and not forfeit all revenue generated by the mining industry to foreign investors.<sup>252</sup> The government of Tanzania must show seriousness in implementing the Mining Act of Tanzania as the Act is very strict in that it ensures that all mining companies list with local stock markets in order to ensure transparency within the sector.<sup>253</sup>

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<sup>247</sup> Ibid.

<sup>248</sup> Bomani Commission Tanzania's Mining Sector: *Challenges and Prospects for the future* Zitto Kabwe 2007-2008.

<sup>249</sup> Ibid.

<sup>250</sup> Ibid.

<sup>251</sup> Ibid.

<sup>252</sup> Ibid.

<sup>253</sup> Ibid.

More focus should also be placed on the contracts signed with international mining companies in order to ensure that there is transparency within this sector.<sup>254</sup>

#### **4.6 Concluding remarks**

To attract further investment inflows into Namibia's mining sector, it would require the enactment of laws and policies which are more investor friendly while also bearing in mind not to "sign away" the industry to foreign investors.

Concerns, constraints and benefits would ultimately arise when the tax royalties and laws were amended and reformed; the government of Namibia has stated its intention to do so. Such a call for reform of the legal framework of Namibia's mining sector should be done with understanding that such a move will come with implications, which can either be positive or negative to the economy of Namibia.

Focus was also placed on the legal framework governing the mining sectors of other African countries. It is vital that Namibia imbibes some of the lessons from other sister mineral resource-rich African countries in order to expand and improve its own laws and policies within its mining sector.

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<sup>254</sup>Ibid.

## CHAPTER FIVE

### CONCLUSIONS AND RECOMMENDATIONS

#### 5.1 Introduction

The research problem in this study is that though the mining sector plays a significant role in Namibia's economy, the sector has had a decline in the past few years, particularly from the year 2008 onwards. It was speculated that this could be as a result of several mining ventures closing down due to diminishing ore reserves and low commodity prices. From a foreign investor's point of view, investor confidence is of paramount importance. A recent report on mining shows that as a result of several cancellations and referrals of many mining projects across the continent, governments of many mining African states have had to revise their policies to re-attract investments capital to their mining industries. This study therefore sought to make case for the need to strengthen the present legal framework underpinning the Namibian mining industry with the focus on attracting foreign investment inflows into the mining sector.

#### 5.2 Summary of findings

This investigation has made a case for the government of Namibia at large to enact legislation that will attract more foreign investment inflows into Namibia's mining sector. Namibia is one of the fastest growing African countries in terms of annual GDP, not only emanating from the mining sector but from other sectors as well.

Namibia, like many other African countries, has been facing a global crisis of low commodity prices, depletion of minerals and less demand for minerals which form the backbone of this industry. It has been further shown in this study that the low rate in commodity prices continue to pose a threat to the mining industry of Namibia, forcing some foreign mining companies to shut down and cease all mining operations, even turning some once lively mines into unusable wastelands.

Namibia's mining laws are enforced by the state. The state looks to the Constitution of Namibia which also offers protection to all natural resources and also goes further in stating that the mining and exploration of all natural resources in Namibia should be done in fashion that will not cause harm to the environment, while benefits should be accorded to all citizens of Namibia.

The mining industry in Namibia continues to be regulated by the Minerals Prospecting and Mining Act which is still being used and consulted when it comes to issuing permits to foreign investors, as well as for lapsing periods, dispute settlement mechanisms and so forth. However transparent and interpretable the Minerals Prospecting Mining Act of Namibia may be, there are still gaps that must be plugged to attract foreign investors specifically. New obstacles are arising and the legal framework in extant cannot tackle these challenges.

Most international companies that have invested in Namibia's mining sector have generated large profits emanating from mining these natural resources and Namibia has also benefited directly, as job opportunities have increased following the years when foreign investors began to invest in Namibia (especially after independence in 1990) this process has brought to possibility of transfer of knowledge in various sections of the mining industry.

As far as tax and royalties placed on foreign investors are concerned, the government of Namibia is still looking closely into reviewing some of these laws. In the light of all the above stated findings, this investigation also made findings that as much as the foreign investment inflows continue to pour into Namibia's mining industry; they come with implications which are either positive or negative. Foreign mining companies that have invested on the Namibian soil have caused serious environmental damage of which some of these are protected by International Environmental Conventions.

This study also took a close look at the people who usually face the most challenges when African countries like Namibia enter into agreement with foreign mining investment companies that result in the loss of homes for indigenous people.

### 5.3 Conclusions

Namibia's mining industry has come a long way since colonial times and has continued to grow steadily. It is the legal framework which is investor-friendly that can encourage and welcome foreign investors wishing to invest in the mining sector of Namibia and other sectors inclusive. The introduction of the Minerals Prospecting and Mining Act after independence saw Namibia in a newly democratic state excising ownership over all natural resources for the very first time.

After gaining its independence in the 1990, Namibia had political stability for the first time in decades and many foreign companies were fixed on investing in Namibia. Over the past years after gaining her independence, several international mining companies have invested in Namibia's mining industry and have helped generate revenue which has contributed a great amount to Namibia's GDP.

Not only has foreign investment inflows helped generate revenue for Namibia but it has also had other positive attributes which include: the creation of employment, acquiring of knowledge and skills, transfer of knowledge between the foreign investor and the host state as well as infrastructural development.

Foreign investment in this growing industry of Namibia has not proceeded without its share of obstacles. The global crisis of low commodity prices and depletion of mineral reserves has continued to be a threat to this industry, especially after the 2008 global economic crisis. This crisis has also forced mining companies in Namibia to cut down the number of labourers or close down completely.

Mining operations in Namibia have always been attended with benefits, concerns and constrains have been present, Namibia has considered to reform and review some laws and policies governing its mining industry over the years as a measure to ensure that the country benefits directly in the revenue generated by foreign mining companies. This reform is vital and should not be taken lightly as specific laws tackling the current problems that the mining industry of Namibia is facing could be resolved. The reform is necessary and vital and if left unattended to, such challenges will continue to persist and in the long run affect the mining industry of Namibia in a negative way. Efforts have been made and continue to be made by the government of

Namibia to ensure profit-making and transparency within this industry continues, however little or no effort is being made to remedy this persistent problem.

As one of the African countries with a flourishing economy and developing mining industry, there is clearly no doubt that this sector will continue to grow and place Namibia on a platform which many foreign investors would want to invest, provided the country puts in place a strong legal and regulatory framework to drive the mining industry.

#### **5.4 Recommendations**

An amicable solution between the government of Namibia and the foreign mining companies operating in Namibia and those wishing to invest there should be reached. This is important because it will give the foreign investor the confidence to always want to invest in Namibia's mining sector without having any foreseeable fears.

An amicable solution would also grant the government of Namibia opportunity to reassure its foreign investors that in spite of the challenges facing the mining industry of Namibia it is still safe to invest their money in such a dynamic industry.

In spite of all the challenges facing Namibia's mining industry, it still remains attractive in the eyes of foreign investors as they see opportunity and growth and a 'gem' worth investing in. It is therefore recommended that the government of Namibia should enact laws and make policies specifically designed to address the perceived fears of all foreign investors within the mining sector, while not forgetting the needs of the Namibian citizens themselves.

The importance of law reform within the mining sector of Namibia cannot be over-emphasised. It is often very difficult to say that there is an African country or any other country in the world which has in place "a perfect legal and regulatory framework", all countries have experienced or may experience challenges within their mining industries, no matter how "perfect" their mining regulatory system may seem. Hence, the key does not only lie in putting in place a strong regulatory framework to govern and oversee Namibia's mining industry, but also in putting up measures that combat these challenges specifically.



Namibia as a country is developing at a steady speed and will continue to do so, provided such a legal framework for the mining sector is put in place. More importantly, it is imperative that the government of Namibia looks into designing a dispute settlement body that will deal with disputes, if any ever arise between the foreign mining investors and the citizens or the government of the Namibia.

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