THE POLITICAL ECONOMY OF MINING LAWS AND REGULATIONS IN NAMIBIA FROM 1884 TO 1986

BY

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LIST OF ABBREVIATIONS

AMAX = American Metal Climax

BYIL = The British yearbook of International Law

CANUC - Campaign Against Namibian Uranium Contract

Carbocol = Corbones de Colombia

Cde. = Comrade

CDM = Consolidated Diamond Mines

CEA = Commissariat a l'Energie Atomique

CEGB = Central Electricity Generating Board

CONOCO = Continental Oil Company of the Niger

CSO = Central Selling Organisation

DDG = Deutsche Diamanten Gesellschaft

DITRA = Diamond Trading Ltd

DKG = Deutsche Kolonial Gesellschaft fur Sudwest Africa

DPA = Diamond Producer's Association

GFSA = Gold Fields of South Africa

ICJ = International Court of Justice

ICLQ = International and Comparative Law Quarterly

ILM = International Legal Materials

ILR = International Law Report

Intercor = International Colombia Resources Corporation

MLR = Modern Law Review

OME = Otavi-Minen-und-Eisenbahngesellschaft

PURTRA = Diamond Purchasing and Trading Company Ltd

RCM = Roan Consolidated Mines

RST = Roan Selection Trust

RTZ = Rio Tinto Zinc

SA = South Africa

SC = Supreme Court

SIEROMCO = Sierra Leone Ore and Metal Company Ltd

SWANLA = South West Africa Native Labour Association

SWAPO = South West Africa People's Organisation

TCL = Tsumeb Corporation Ltd

UNIN = United Nations Institute for Namibia

WLD = Witwatersrand Local Division

ZIMCO = Zambia Industrial and Mining Corporation Ltd

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DEDICATION

This work is dedicated to the oppressed and exploited people of Namibia and to the success of their struggle for national liberation.

TERMINOLOGY

In this study, a number of terms have been used. The terms "African" and "black" have been used to describe all Namibians with the exception of whites. For the sake of clarity, however, it has been necessary to use the terms "Africans", "Coloured", "Whites", "Homelands", and "Reserves" when referring to South African legislation and policies based on race.

Finally, the term "Colonial administration" as used in the text refers to the administrative structure in Namibia set up by the South African Government.

ABSTRACT

This thesis deals with the political economy of mining laws and regulation in Namibia from 1884 to 1986. Mining laws and regulations have played an important role in the exploitation of Namibia's mineral resources since the colonial period. They have also played an important role in the exploitations by foreign mining companies of Namibia's mineral resources. The study shows how this process has evolved.

Chapter I discusses the link between colonialism and exploitation. It also shows the special interest of the colonial administration in mineral development. The formal and substantive rules governing the acquisition of mineral rights are discussed in detail in Chapter II. An important element in the exploitation of Namibia's mineral resources is the international market. Chapter III examines the marketing of Namibia's minerals. It shows that the colonial administration is unable and unwilling to exercise control in this area. Special attention is paid to the marketing of diamonds as it illustrates very well the dominant position of the mining companies. Marketing of minerals is closely linked with taxation. This is examined in Chapter IV. The chapter reveals that the inadequacies of the legislation enables mining companies to achieve their objective, maximisation of profits without corresponding benefits to Namibia. The exploitation of Namibia's mineral resources has a direct effect on the environment. Chapter V shows that the spread of multinational mining companies and their operations have a direct effect on the environment, health and safety of mine employees and the community in surrounding areas. It also shows that mining laws and regulations are inadequate to cope with this problem.

South Africa's continued occupation of Namibia since the termination of the mandate in 1966 has important legal consequences. The legal status of the mining concessions granted by South Africa before and after the termination of the mandate are examined in Chapter VI in the light of the United Nations action in this respect. In order to clarify the options for independent Namibia, Chapter VII discusses the experience of other developing countries in mineral development and their relationship with multinational companies. In Chapter VII, we recommend that mining laws and regulations of an independent Namibia should reflect the needs of the Namibian population.

GENERAL INTRODUCTION

The social and economic structure of Namibia is heavily distorted by colonialism mainly because foreign multinational mining companies have dominated the political economy of the territory. The illegal racist South African actions have taken many forms: from illegal colonial occupation and economic plunder to forced labour. Although there have been many studies on Namibia, these have tended to focus mainly on South Africa's illegal occupation and the economic situation in the territory. There have been relatively few attempts to identify and analyse in detail mining laws and regulations and to assess the effect they have on the political, economic and social structures of the territory.

To understand the role of mining law in the regulation of natural resources such as minerals, a formalistic conception of law is inadequate. It is necessary to relate the legal forms used in mining law generally to the concrete social and economic setting in which they operate. This approach will enable lawyers and non-lawyers alike to gain a better understanding of what we describe as the political economy of mining laws and regulations. In the contemporary world the modern nation state regulates the enjoyment of property. In this context, property has both legal and economic meaning. Law tend to answer the following questions: What things may be reduced to the status of property? How are rival claims to property adjusted? If the state is obliged to protect property, to what extent and in what manner may

it legitimately restrict, expropriate or nationalise property? These questions raise economic and political issues of fundamental importance, thus showing how the normative questions raised by law cannot be studied in isolation.

The main conclusion of our study is that the mining legislation in Namibia has enabled foreign private mining companies to plunder the territory's mineral resources while the African population remains one of the poorest in Africa. The issues are discussed in eight chapters.

Chapter I, begins with a brief discussion on the structure and functions of the pre-capitalist institutions which existed in Namibia before the colonial period. It explains that the institutions existed to serve the needs of the Namibian community as a whole. It also examines the colonial institutions and how they affect the pre-colonial concept of property rights and shows how most of the early mining companies actually acquired their mineral 'rights' through theft and fraud. Finally, it discusses how the administration of the territory changed from Germany to South Africa, and how the illegal South African regime introduced apartheid into the territory. Legislation is required to establish rules and regulations to control mining activities. Chapter II discusses the legal framework within which the orderly development and operations relating to the activities of mineral exploitation are carried out in Namibia. While the South African regime has always 'owned' minerals <u>in situ</u>, once the minerals have been extracted,

ownership is usually vested in the mining rights holder. Thus, mining laws and regulations which regulate the acquisition and tenure of mining rights are not designed to protect the interests of Namibia.

While acknowledging that the private foreign investor has to realise a fair return on his investment, mining companies have consistently taken advantage of their privileged position and of the inadequacies of the legislation. This is discussed in detail in Chapter III (marketing arrangements) and Chapter IV (taxation). The study concludes with an assessment in Chapter V of the mining operations on the environment. The conclusions in Chapter V stress the fact that there is a need for effective provisions in the mining legislation and regulations to cope with environmental problems. There is also a need to introduce legislation and regulations to control uranium mining operations in Namibia.

The importance of mining projects to Namibia has long been recognised. The development of large-scale industrial projects is vital to the creation of employment and the raising of revenues. However, the exploitation of mineral resources presents considerable problems including those associated with pollution. It is an obvious fact that various phases of mining operations such as prospecting, mining, and processing are all potential sources of damage to the environment. In the case of uranium mining, it is arguably the most critical of all mineral resources as regards its effect on the safety and health of the community

and the environment. Our discussion of environmental safeguards reveals that mining companies have been mainly concerned with the simplest and cheapest recovery of mineral resources with little concern about the effects such operations have on the environment. Furthermore, mining legislation and regulations are not sufficiently developed to cope with problems associated with pollution. The problem is compounded by the fact that even existing laws and regulations are not strictly enforced by the colonial administration.

The chapter attempts to discuss and analyse the role played by mining laws and regulations in environmental protection. It also evaluates, under a section on minimum international environmental standards, the experience of other mineral producing countries and how independent Namibia could learn from them. The comparative section shows that most mineral producing countries seek a solution to the underlying problem, namely how to manage mineral resources in such a way that their exploitation does not pose a serious threat to the environment and the safety and health of the community. The mineral industry is regarded as of particular importance to their economy and the welfare of their people. As a result, its wise management and utilisation is considered to be imperative. The chapter concludes by recommending that independent Namibia should follow the example of other mineral producing countries by adopting minimum international environmental standards.

Since the termination of the mandate in 1966 by the United Nations General Assembly and the International Court of Justice ruling in 1971, the territory's future has presented a relatively straightforward question of self-determination. It is submitted that any proper and objective analysis of the mining legislation cannot be achieved without a discussion on the legality of mineral rights under international law. An attempt is made in Chapter VI (international law and natural resources) and Chapter VII (mining agreements in developing countries) to analyse and assess the relationship between host developing countries and private foreign investors in the exploitation of natural resources.

The conclusion which emerges from the two chapters is that since the Second World War, there have been fundamental changes in which private property and property rights have been acquired. The change has taken into account social, political and economic pressures which have acted as constraints upon traditional forms of ownership. In addition, the whole pattern of world politics has dramatically changed. Freedom, throughout history the privilege of the few, has become the acknowledge birthright of all nations. Political independence is seen as the first step in a long and arduous struggle. Most developing countries are determined to achieve a more prosperous and just future for all their peoples. They are committed to pursuing policies designed to achieve specific targets for economic growth as well as a more equitable distribution of income and wealth.

Aspirations for greater human dignity were the main driving force behind former colonies' struggle for national independence. However, this cannot be achieved without economic self-determination which is necessary to provide a solid material basis for the wider enjoyment of human dignity and social justice. Therefore, political independence is meaningless without economic self-determination which alone can give meaning to it. Mining agreements between private foreign investors and most developing countries reflect these aspirations. We have discussed in Chapter VII that developing countries have taken steps to bring their mining industries in line with their mineral policy objectives. They have, in particular, reformed their mining laws and regulations with the objective, inter alia, of achieving economic development and social progress. Moreover, mining laws and regulations have clarified and strengthened the conditions which private foreign investors should meet before they can be allowed to play any part in their mining industries. All this is aimed at making mining laws and regulations relevant tools for the economic development and social progress of their countries.

Contractual and statutory provisions are analysed in Chapter VII. Although the main parties to the Master Agreement are the host states and the foreign investor, the trend is to employ a state holding company to be the legally prescribed partner of a foreign investor or a group of investors. Contractual regulation, codification and the combination of the two are the three most visible legal approaches and are discussed accordingly. The decision by the host state to

utilise one or the other form remains a matter of legal tradition, convenience, and the relative institutional development of the host country. Therefore, the structural merits of each modality are theoretically explored. Finally, concessions, joint ventures and service contracts as forms of state participation are examined in greater detail.

If Namibia is to draw a useful lesson from the experience of other developing countries, it will be necessary to develop a national minerals policy. However, it is pertinent to note that the mere incorporation of the mining legislation into the national economic policy would not automatically bring about the desired results. Much will depend on the other factors and practical constraints (e.g., political and economic). The effectiveness of the legislation should be governed by the criteria of public interest, particularly that of national economic development and social progress. This means that in order for the legislation to be effective, it must reflect and be relevant to the economic situation and political environment of the territory. It is for these reasons that independent Namibia would need to undertake a comprehensive revision of the current mining laws and regulations.

The main objective of this study is to assist future government planners, legislators and others who will be responsible in formulating policy in the mining industry by providing a practical framework for decision making. We have, therefore, put forward some suggestions and

recommendations in the hope that they would rectify some of the inadequacies of the said laws and regulations. Whatever policy the future government takes concerning mining, it will have to be based on a full and systematic understanding of the underlying mining laws and their political and economic implications. At the same time, it is hoped that the study will be of interest to all those who are concerned with the problems of the country, as it provides insights into the relationship between legislation and international capital. The study also provides lawyers with information, hitherto unavailable on current mining law, decisions and comments on many issues affecting mining rights in Namibia.

It is also hoped that the study will be of interest to the general public insofar as it illustrates how Namibia's mineral resources are being plundered.

This study is based on information collected from various primary sources such as legislation, cases, official reports and newspapers. I have also drawn upon a growing body of secondary source materials such as textbooks, specialised studies and articles.

CHAPTER I - NAMIBIA'S HISTORICAL BACKGROUND AND THE GRANTING OF MINERAL RIGHTS

1 INTRODUCTION

To understand the role of the mining legislation in Namibia's colonial context, this chapter pays special attention to the nature of the pre-capitalist mode of production in the country. We will also examine the colonial capitalist mode of production as restructured by capitalist penetration during the nineteenth century. This will enable us to explain the historical process by which capitalist mining laws were imposed upon the indigenous society. We will also analyse the impact of these laws on the indigenous social and political institutions.

Whenever a colonial power moves into a new territory, it inevitably effects immediate and profound changes in the native social structure. This results in taking away the indigenous peoples' independence and limiting or even completely abrogating the powers of the native political leadership. In Namibia, forces of colonialism established a new territorial legal order that did not exist before. This resulted in severe curtailment and in some cases, complete obliteration of the pre-colonial order and its replacement by a new system of controls subordinated to the colonial administration.

During the early colonial period, fundamental change took place through the medium of laws or legal institutions whose

content is clearly contrary to the perceived and accepted aboriginal social structure. Therefore, the imposition of capitalist values in Namibia required the development of an institutional framework within which they could be expressed. This was necessary because colonialism had a specific objective, to exploit the natural resources. The concept of traditional (customary) property rights which existed during the pre-colonial period was not an adequate framework for the colonial exploitation of natural resources.

It was perceived that the exploitation of Namibia's natural resources was possible only under a system of tenure that gave the white settlers maximum freedom of control. Thus, the stage was set for the imposition of capitalist laws and institutions that were to have fundamental consequences for mineral exploitation in Namibia. This resulted in the restructuring the flow of the pre-colonial natural resources in a manner that produced great inequality in the distribution of benefits between the international capital and white settlers on the one hand, and the indigenous population on the other.

2 PHYSICAL FEATURES AND MINERAL RESOURCES OF THE TERRITORY

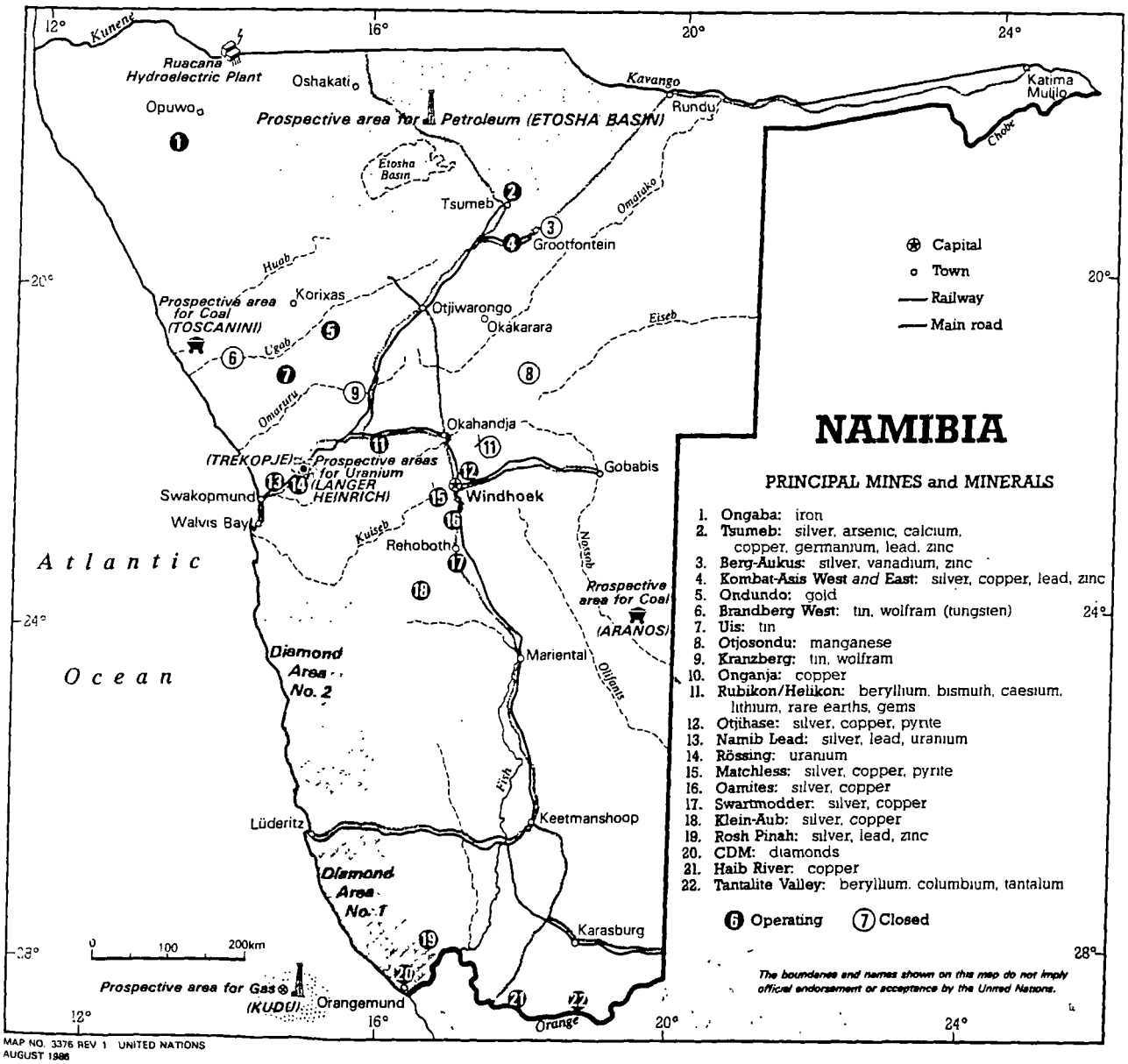
The territory of Namibia is very large. It covers an area of 824,269km2, almost four times the size of the United Kingdom. Its northern border stretches eastwards from the Atlantic Ocean and is shared in the first instance over a length of some 1,000km with Angola and to a lesser extent Zambia. In the east, it shares a border of approximately similar length

with Botswana, and it touches Zimbabwe at the extreme east of the Caprivi Strip. The border continues southwards, more or less on a straight line until it reaches the Orange River, which forms the southern border with South Africa.

Apart from a narrow strip along the Namib Desert, Namibia is situated on a plateau. It is topographically divided into three areas, namely: the Namib Desert, the Central Plateau, and the Kalahari Desert. Due to its low rainfall, the Namib Desert is one of the most inhospitable deserts in the world. For a long time, it formed a natural barrier, preventing all entrance to the interior from the coast. Indeed, this is one of the reasons why the territory was among the last countries in Africa to be colonised by the Europeans. The desert varies from 80 to 130 kilometres in width. The place contains enormous mineral resources such as diamonds, uranium, zinc, tin, lead, salt, natural gas, and guano among others. In addition, the coastline is very regular. The only two important places suitable for harbours are Luderitz Bay in the southern part of the country, and Walvis Bay in the centre.

The Central plateau is a mountainous area with savannah and bush. it contains most of the territory's base minerals such as copper, zinc, lead, tin, silver, vanadium, cadmium, wolfram, lithium, etc. The northern part of the plateau is suited for agriculture, especially cattle ranching, while the southern part is suited for Karakul sheep.

TABLE I.1 Principal Mines and Minerals In Namibia



Source: United Nations, United Nations Council For Namibia Report on the Activities of FOreign Economic interests Operating In Namibia (New York, 29 April 1987) p.31

TABLE I12 **NAMIBIAN MINERAL RESOURCES**

MAJOR MINERALS	MINOR MINERALS	ALLEGED DEPOSITS
DIAMOND, URANIUM, COPPER, ZINC, LEAD, SILVER, TIN, LITHIUM, CADMIUM, SALT, ARSENIC, PYRITE, VANADIUM AND GERMANIUM	TANTALITE, BISMUTH, MOLYBDENUM, MANGANESE, BERYLIUM, CAESIUM, GRAPHITE, TOURMALINE, AMETHYST, TIGER'S EYE, CHALCEDONY, GOLD, KYMATE-SILLIMANITE, PHOSPHATES, WOLFRAM, LIME AND MARBLE, GREEN AND ROSE QUARTZ, HELIODOR, SMOKEY, CITRINE, AGATE, AMAZONITE, JEREMEJEVITE, TOPAZ, GALLIUM, NIOBUIM, RUBIDIUM, BORGHIUM, TELLURIUM, TELEMIUM, TUNGSTEN, SILICA, MICA, FELDSPAR, SULPHUR AND SODA	NATURAL GAS, OIL, COAL, FOUSPAR, IRON AND PLATINUM

SOURCE: Leake S.Hangala, Structure of Namibian Mineral Industry, p.17; UNIN Namibia: Perspectives for National Reconstruction and Development, p.293; and Namibia foundation, Mining in SWA/Namibia, pp.7-13

Namibia is one of the largest producers of minerals in Africa. The minerals are found both on land and offshore, and can be divided into four categories: precious stones, source materials, base metals, and industrial minerals. In the exception of industrial minerals, each sector is dominated by one giant company - CDM controls diamonds, Rossing exploits uranium, and Tsumeb Corporation exploits base metals. As Table I:2 above indicates, the territory produces a wide variety of minerals.

It is the world's leading producer of gem diamonds, has the largest open-cast uranium mine in the world, and it is the second largest producer of lithium and vanadium in the world. It is also alleged that it has half of the world's reserves of germanium (produced as a by-product of other minerals at Tsumeb mines), and it is potentially one of the world's leading producers of high grade industrial salt. Compared with other Africa countries, it is one of the leading producers of refined lead, second largest producer of cadmium, and fourth largest producer of both zinc and silver. In addition, a large gas deposit has been discovered, and it is also reported that oil has been discovered in the northern part of the country.[1]

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[1] see Leake S.Hangala, (1985), Structure of Namibian Mineral Industry University Printing Press Helsinki, p.16

3 PRE-COLONIAL CUSTOMARY LAND USES AND MINERAL RIGHTS

While the rules of customary land law may have provided a skeleton upon which mineral exploitation was regulated before the colonial period, modern mining legislation fundamentally departed from it in order to meet the needs of the miners and the mining industry. Thus, a body of legal concepts developed which is peculiar in its application to mining activities and which are studied in detail in Chapter II.

The reader should not draw too close an analogy between the modern mining law and customary land law because the current mining law has acquired a status of its own. The reasons are numerous. Mining activities today present many novel and sometimes intricate questions that are based upon developments in technology, multiple use of mineral bearing lands, multiple methods of taxation, and techniques of financing and operating mineral properties. Notwithstanding these considerations, it is important that this chapter should seek to present the law in historical perspective. Therefore, in order to comprehend the adverse origins and application of Namibian law on the subject of mining, it is desirable to give a brief history of customary land law. This will help the reader to comprehend different sources from which mining law is derived and the extent to which the various sources are important to the subject at hand.

Finally, this approach will help the general reader because any genuine attempt to identify the major determinants of the

structure and nature of mining legislation in Namibia must first consider the territory's historical past. As the President of Swapo Cde., Sam Nujoma, pointed out, "Society is only fully intelligible when it is studied in terms of its history and of the economic, social, political and spiritual factors which helped to form it".[2]

3.1 Characteristics of customary land tenure

During the pre-colonial period, a capital value or a rental value was not applicable to land which was communally owned. Land was regarded as the property of the whole community from which it derived its livelihood and subsistence. As such, a claim to the private ownership of special pieces of land within the community was generally not recognised.

The main characteristic feature of customary land tenure was that the principal source of individual property was derived from labour e.g., the building of a house. A man's property was that upon which he did some work, something which he acquired by his own effort. That which occurred naturally was regarded as something given by nature to all equally, the earth, the trees, the minerals, etc. Every community had its own piece of land into which strangers could not intrude without first obtaining the permission of that particular community. Communal land could be allotted to families. Family lands were at the disposal of the head of the family,

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[2] see UNIN, (1986), Namibia: Perspectives for National Reconstruction and Development, UNIN, p.5

and every member of the family had a right to a share in the land - a right which was not forfeited even by prolonged absence. The holder and his descendants had undisturbed possession, except that they could not alienate the land so as to deprive the whole community its ultimate control over it. Communal tenure exhibited a remarkable resemblance everywhere in its basic principle. In practically all cases under customary law (before it became modified by alien conceptions) the rights of an individual user, even though he could consider himself the owner of the land, fell far short of those of a full owner in the modern sense. Therefore, the feature of communal land embodied an unbroken chain of responsibility - the responsibility of the headman for his people, of the head of a family for its members, and of every individual of a community to the chief.

The main characteristics of individual responsibility to the whole community was that it was the duty of every individual to preserve the use of land for its members. An individual user was restricted from full ownership, especially alienation of land to outsiders, by the privileges which other members of the community enjoyed on the same land. This meant that once the individual was regarded as part of the community, his interests became interwoven with those of the community and he was under customary obligation to share the land with the community. The chief and everybody under him was accountable to his counsellors, headmen, family, and to the community as a whole. In this sense, the chief and his counsellors were regarded as guardians of the land on behalf of the community. Therefore, as far as customary land

law was concerned, land was not saleable. Sale of freehold rights over land is a comparatively modern innovation which was not only unlawful but unthinkable in Namibia's history.

3.2 Pre-colonial mining activities

The history of mining in Namibia is largely the history of copper exploitation, though over the years, deposits of other minerals such as diamonds and uranium have been opened. Minerals have been extracted from surface deposits for centuries by Namibian small miners. One of the earliest written references to copper mining in Namibia was published by a Hungarian explorer in 1853.[3] The growth of the superior social, economic and political organisation in the northern part of Namibia caused the trade in and use of copper to increase greatly.

Ancient methods of mining and prospecting were simple but effective. During the early colonial years, European prospectors directed their efforts almost exclusively towards the "discovery" of ancient workings, and major copper mines of today originated from them. Tsumeb mine is a good example where Namibians smelted copper before the arrival of the Europeans.[4] However, prior to the industrial revolution, simple labour - intensive operations, primitive communications and marketing systems effectively limited

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[3] see Nicholas De Kun, (1965), The Mineral Resources of Africa, Elsevier Publishing Company - London, p.32

[4] ibid.

output. It was only during the German colonial period that Namibia rose to become one of the world's leading producers of minerals. This resulted in the full exploitation of the minerals when the enormous potential of the country came to be fully appreciated.

4 COLONIALISM, EXPLOITATION AND THE REPLACEMENT OF TRADITIONAL INSTITUTIONS

The expansion of Europe was a process by which European peoples made themselves heirs of the newly acquired territories overseas. This was, at first, made possible by their achievements in the science of navigation. This period saw the expansion of maritime trade into a world commerce. It was under the advance in science and trade interests that Africa was first explored and later conquered. The acquisition of colonies by the European powers implied consolidation in an economic sense as well. Industry and trade began to be organised for national objects, and on a national basis.

The concentration of economic resources was necessary for the task of expansion of colonisation and world trade. The colonists possessed not only the sovereign rights but also property rights over the conquered territories. Every privilege and position, economic, political, or religious came from the colonists. In order to consolidate their economic power, the laws and institutions of the colonies became modelled on those of the metropolitan colonial powers.

They were sometimes modified in form and in function to meet colonial needs.

The motives for the colonisation of Namibia were much the same as in all cases in other former colonies, despite what apologists for colonialism have said to the contrary. Among these writers is Esterhuyse, who states that it "was not the economic aspect but the spiritual need of the native tribes which ... drew the attention of Western civilisation to the Transgareip (i.e., Namibia)".[5] The desire for adventure and "civilisation" was insignificant to the main reason for colonisation. In addition, they were motives that influenced individuals and religious institutions rather than governments or trading companies. The first Europeans landed on the shores of Namibia in the XVth Century. They were Portuguese seafarers. The inhospitable Namib Desert constituted a formidable barrier to any explorations into the interior until late in the 18th century. In the 19th century, a succession of travellers, traders, hunters, and missionaries, mostly British and Cape Dutch in origin, explored the area.

Before Germany assumed formal control of the territory, there were a number of trade contacts between outsiders (mainly European traders) and Namibians. Trade between them and Namibians was mainly in guano and copper. Rich guano deposits were discovered during the early nineteenth

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[5] see J.H.Esterhuyse, (1968), South West Africa 1880-1894, C.Struik (Pty) Ltd. Cape Town, p.7

century.[6] It is reported that one island "had a guano deposit of 72 feet deep and hundreds of thousands of tons of guano were removed between 1843 and 1848".[7] The trade was dominated by Europeans, there could be as many as three hundred ships in one island alone collecting guano. Since there were no legal regulations regarding the exploitation of the guano deposits, serious disorders which sometimes led to sporadic shooting among the Europeans were common.

From 1847 onwards, the monopoly of the guano trade became dominated by one company called A and E de Pass. It is interesting to learn that the exclusive mining right was granted not by Namibians but by the Cape Government in South Africa. The company was granted the sole right to exploit the Namibian islands for the period of 21 years.[8] This effectively eliminated free competition in the guano trade, and the interests of the other traders turned to copper.

A number of companies were established with a view to obtaining mining rights from the local chiefs. In 1854, a company called Great Namaqualand Mining Company started prospecting for copper in the territory.[9] In 1856, one of the first copper mines to be operated by the Europeans started production. Other companies such as the Walwich Bay

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6 ibid., p.9

7 ibid.

8 ibid.

9 ibid., p.10

Mining Company began copper prospecting activities in Central Namibia, and in February, 1855, it started exploiting the Matchless mine which still exists today.[10] Apart from the trade in guano and copper, other trade activities included cattle, ivory, and ostrich feathers. According to trade statistics of import and export through Table Bay in South Africa to the various Namibian harbours, it appears that the Namibian trade was very profitable. It must be noted that trade between Namibia and South Africa was much larger than the figures provided below because they do not include the trade carried on overland between South Africa and Namibia. The trade figures are provided as follows:

	Import	Export
1850	R530	R4,496
1860	R19,290	R14,292
1870	R18,824	R40,982
1880	R48,940	R68,206[11]

During the scramble for Africa, the ganglia of empire spread inexorably from metropolis to colony. The greatest of all was the British Empire, the most extensive sovereignty in history. Britain even went to the extent of claiming Namibia as her sphere of influence. This policy was clearly stated by the Earl of Derby on 19th May, 1884 in these terms: "The language we have held with regard to that territory is that ... we have claimed the right to exclude Foreign Powers on

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10 ibid.

11 ibid., p.13

the general ground of its nearness to our Settlements, and the absence of any other claims".[12] Other colonial powers such as Germany, France, Portugal and Spain contended with Britain and among themselves but together establishing an unprecedented world hegemony of the west.

During the struggle between Britain and Germany over Namibia, a compromise was reached whereby Germany was to colonise Namibia on condition that she supported Britain against France over Egypt. Namibia's colonisation by Germany began unofficially in 1883 when a German trader called Frans Adolf Eduard Luderizt claimed the rest of the coastal region until the territory was effectively colonised by Germany in 1884. On 1st July 1890, Anglo-German agreement was reached to define the inland boundaries of the territory.[13] During the early years of German colonisation, the white settlers were limited to a handful of imperial civil servants. It was only in the early 1890s that white settlers were encouraged to settle in large numbers.

The desire for wealth, on the part of those Germans who emigrated to Namibia and of those in the government at home was the most important reason for colonisation. A large number of merchants, soldiers, poor families,and artisans who hoped to improve their lot in Namibia where land and

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12 House of Commons Debates, 19th may, 1884, col.646

13 The boundaries were defined in article three of the agreement. See op.cit., H.Esterhuyse, South West Africa 1880-1894, p.168

opportunity were more plentiful than in Germany opted to emigrate to Namibia. The desire to obtain a more abundant supply of natural resources which were not available in large quantities in Germany and to make a profit induced the formation of chartered companies and the development of other forms of cooperative enterprise. The desire for wealth and for more direct access to and control of mineral resources formed a principal incentive to exploration and settlement.

Since its inception at the turn of the nineteenth century, colonialism in Namibia spelled the domination of people of colour. Throughout the history of colonialism, the German Imperial government and white settlers sought colonial super-profits through the acquisition of mineral resources, new investment outlets, and an exploitable supply of cheap labour. This led to direct interference in the economic, social and political affairs of the indigenous population. An inevitable consequence was resistance which led to prolonged colonial war with the white settlers. Given the fact that the population was sparse and had inferior weapons, colonial resistance resulted in the killing of more than 60 per cent of the population of central and southern Namibia.[14]

Once the dispute was settled in the battle field, there was no longer a conflict between the law of the conquerors and the law of the aborigines. Indigenous institutions were simply destroyed and their law perished with them. The

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[14] op.cit., UNIN Namibia: Perspectives for National Reconstruction and Development, p.25

victors transplanted their Western law. The net result of the colonial expansion and conquest meant that the economic and social life of the Namibian indigenous population was totally disrupted and reorganised to suit the needs of colonialism and capitalism. We have already stated that colonisation was initiated by the need of the colonial power (Germany) to expand economically and to bring within its web of domination the land, resources, and market potentials of Namibia. It spelt the total disorganisation of traditional life and the transformation of the indigenous population into colonised work forces.

Since those colonised were non-European and non-christian people of colour, it was easy to rationalise and maintain what was to become a racially defined class system of exploitation. This policy was clearly laid down by the German Imperial government. During the Berlin Conference of 1884-5, Bismarck, the German leader at the time stated that: "All the governments share the wish to bring the nations of Africa within the pale of civilisation by opening up the interior of the continent to commerce, by furnishing the natives with the means of instruction".[15] It was perceived by Germany that the exploitation of Namibia's natural resources was only possible under a system of tenure that would give the white settlers maximum freedom of control to the exclusion of the indigenous population. Bismarck's policy was effectively put into practice. As Dr Paul

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[15] see Ruth First, (1975), South West Africa, Peter Smith Publisher Inc., p.69, emphasis added

Rohrbach, a highly placed official in the German Colonial Office put it, colonisation meant that "the native tribes would have to give up their lands ... in order that the white man might have the land".[16] As will be discussed below, this was to mean an outright seizure without compensation.

In order to consolidate economic control, political and social institutions were erected to maintain the relations of power and privilege that lay at the heart of the colonial situation. With the establishment of these early colonial relations by Germany, the beginning of a class system of domination and exploitation that was to manifest itself largely in racial terms developed.

Thus, racial differences were not only used in making social distinctions, but they were used in the organisation of the economic structure of colonial society. The racial realities of the colonial situation in Namibia has a material basis in the organisation of the social relations of production, and it still today plays an important role in the mining industry. The rise and expansion of capitalism marked a new period in the history of Namibian natural resource exploitation. In the earlier periods of German colonialism, economic exploitation of the territory's natural resources was largely based on commerce.

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16 ibid.

After the discovery of mineral resources, the labour of the African population became an integral factor in the development of the German economy. In addition, the economic development of capitalist Germany was to be based directly on the continued exploitation and underdevelopment of Namibia. Without the massive plunder of Namibia's natural resources and the eventual appropriation of this wealth to Germany, the growth of large-scale capitalist manufacture and industry in Germany would have been delayed. This massive accumulation of capital was therefore a crucial prerequisite for the development of German capitalism. The development of heavy industry and financial institutions were directly or indirectly financed by colonial exploitation. Indeed, the motto throughout the process of colonisation was "Give Germany Colonies and the Germans will be as prosperous as the English".[17]

5 THE PARCELLING OF LAND AND MINERAL RIGHTS

Once the European powers agreed that Namibia was to become a German colony, German concessionaires (at first individual traders and later companies) began to negotiate and conclude dubious agreements with local chiefs for land and mining rights.

The most extensive agreements were concluded with a famous German trader called Luderitz. On 1st May 1883, he "bought"

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[17] op.cit., J.H.Esterhuyse, South West Africa 1880-1894, p.66

the harbour of Angra Paquena together with the surrounding land with a radius of 5 miles (8km).[18] The alleged price was £100 in gold to be paid to Chief Josef Fredericks, but it was never paid.[19] The second transaction took place on the 25th August 1883 and involved "the whole of the coastline from Angra Pequena to the Orange River, including all the harbours and bays together with the interior, to a width of 20 geographical miles measured from every point along the coast".[20] On 19th August 1884, he "purchased" the whole coastline from 26 degrees south latitude to 20 degrees south latitude, together with all land stretching into the interior within "20 geographical miles" of the coastline. This deal meant that the whole territory of the Topnaars community under Kaptein Piet Haibib passed to Luderitz. By 1885, he claimed ownership of more than half of Namibia.

It is interesting to note that Luderitz's land and mineral rights deals were interpreted by him as outright sale. Being unable to provide enough funds for the exploitation of his various rights (including, as he claimed, sovereign rights), he sold all his rights to the German Colonial Company for South West Africa (Deutsche Kolonial Gesellschaft f"ur S"udwest Afrika) on the 3rd of April, 1885.[21] The company consisted

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18 see I.Goldblatt, (1971) History of South West Africa from the beginning of the nineteenth century, Juta and Company Ltd - Cape Town Wynberg Johannesburg, p.80

19 ibid.

20 ibid., p.82

21 ibid., p.102

of leading figures in German financial circles and was incorporated in Germany on 13th April 1885. Further land purchases were carried out by the company, and by late 1888, it held approximately 240,000 square kilometres of land.[22] On the 25th March 1888, it was granted a certificate recognising its possession as private rights. In addition, it was vested with quasi-sovereign rights, this was an approximation to a chartered company.[23] Since the formal acquisition of Namibia as a colony in 1884, the German Colonial Company for South West Africa was the colonial administering authority on behalf of the German Imperial government.

Not surprisingly, a serious dispute arose as to the interpretation of the land and mineral deals. The white settlers interpreted them as ceding land and mineral rights in perpetuity to their exclusive enjoyment. On the other hand, the local chiefs interpreted the agreements in accordance with customary law. As we have already discussed above, customary law recognised the rights of individuals to use the land and everything under it subject to the rights of other members of the community. Under customary law, a purported alienation was void or invalid because it was contrary to law, in that where this happened, there was a strong implication of an intention on the part of the chiefs

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22 see Horst Drechsler, (1966), Let Us Die Fighting, Akademie Verlag, Berlin, p.30

23 op.cit., I.Goldblatt, History of South West Africa from the beginning of the nineteenth century, p.108

to treat the land as their own absolutely. They gave an impression that the land and the minerals under it belonged to them and as such, there was an attempt by the chiefs to give away what they did not have. It is also submitted that although the chiefs' rights varied from community to community, none of the communities in Namibia had a chief with power that could entitled him to dispose of the land.

Customary land use had almost universal application in Africa before the colonial period. In the former British colonies of West Africa, the nature of customary land was well stated in the 1898 report on Land Tenure in West Africa.[24] It was stated by the Chief Justice Rayner in these terms: "'The next fact which it is important to bear in mind in order to understand the native land law is that the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, ... village or family have an equal right to the land, but in every case the chief or headman of the community or village or head of the family, has charge of the land, and in loose mode of speech is sometimes called owner. He is to some extent in the position of a trustee, and as such holds the land for the use of the community or family. He has control of it, and any member who wants a piece of it to cultivate or build a house upon, goes to him for it. But the land so given still remains the property of the community'".[25]

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24 see Sunmonu v. Disu Raphael (1927) A.C.881

25 ibid., p.884, emphasis added

Therefore, the chiefs could not give away what belonged to the community.

In addition, the concessions could not grant exclusive mineral rights in perpetuity. Customary law would not recognise such a grant as such interests were unknown to it. According to customary law, it was a use by the community at large, not an appropriation of any portion of the land into the subject's exclusive possession and occupation. Therefore, it is submitted that the exercise of land rights did not confer upon the individual who used the land any right, title or interest in the portion of the land over which the right is exercised. it was an incident of the community's absolute ownership of the land.

Finally, the facts of the land and mineral rights deals suggest that traders and companies' officials fraudulently misrepresented the nature of the documents.[26] The probability of the widespread use of fraud in obtaining the concessions is significantly increased when it is realised that the concessions were not only written by the traders and companies but were also written in German, as well as using technical jargon which local people could not have understood. Notwithstanding this fact, the concessions were presented as being from the chiefs, people who could not even read and write.

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[26] op.cit., I.Goldblatt, History of South West Africa from the beginning of the nineteenth century, p.102

It is interesting to note that even the German colonial officials had knowledge of Luderitz's widespread fraud. It is reported that Theodor Leutwein, one of the colonial Governors in Namibia, was also aware of Luderitz's fraud. he is even reported to have stated that: "'of all the dubious land acquisition treaties negotiated by Luderitz, the one concerning the coastal area between Swakop and Omaruru is the most dubious'".[27]

On 30th October 1888, one of the largest communities in central Namibia publicly declared that all the mineral rights which had been granted to the Germans were null and void, and the German "protection" treaty was also repudiated.[28] This development led the German Colonial Company for South West Africa to request direct intervention from the Imperial government. On 25th June 1889, the Government responded by assuming direct administration of the territory.[29] As a result, the white settler's interpretation of the mineral and land rights prevailed. From this day on, Namibia became the most savagely exploited country in Southern Africa, and became oppressed by the most aggressive and most delinquent fascist state in the world.

We have already discussed that the imposition of capitalist values in Namibia required the development of an

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[27] op.cit., Horst Drechsler, Let Us Die Fighting, p.25

[28] op.cit., I.Goldblatt, History of South West Africa from the beginning of the nineteenth century, p.105

[29] ibid.

institutional framework within which they could be expressed. Colonialism had a specific objective, to exploit the resources found in the colony. The concept of traditional property rights which existed before colonisation could not form a basis for the exploitation of the territory's natural resources. In 1905, the Colonial Department in Germany called on the Colonial administration in Namibia to expropriate African property movable and immovable. The Colonial Deputy Governor in Namibia, Hans Tecklenburg, stated the policy as follows: "'with the confiscation of their land, the natives will be deprived of the possibility of raising cattle ... any form of tribal organisation would be eliminated. ... No major community of natives must be left to their own devices ... Freedom of movement will be abolished and passes will be introduced as a compulsory measure ... Here in this settler colony the natives must never be allowed to forget for a single moment that they are in a country ruled by the white men and that they are subject to German legislation'".[30]

This policy was followed by the 'Imperial Decree of 26 December 1905 Pertaining to the Sequestration of Property of Natives in the Protectorate of South West Africa'.[31] The decree enabled the colonial Governor to sequester the land of Africans, and it provided him with the legal means to do so. It empowered the Governor to declare the whole of central

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[30] op.cit., Horst Drechsler, Let Us Die Fighting, p.215

[31] ibid., p.106

Namibia (the then Hereroland) Crown land. Lindequist, the Colonial Governor at the time wrote to the Colonial Office in Germany on 8 August, 1906, stating that: "'All legal impediments have thus been removed that stood in the way of granting the numerous applications made for the acquisition of farms and homestead in Hereroland'".[32] Southern Namibia was confiscated from the indigenous population on 8 May 1907.

The confiscation of land and property of the Africans raised some concern among liberal circles in Germany. Commenting on the severity of the Imperial Decree of 26 December 1905, a member of the Reichstag stated that it amounted to "'nothing else but robbery on a large scale ... it is not only that the tribal system is to be abolished ... but all tribal property is to be taken away from the natives. In this day and age such plunder is unworthy of a state which has inscribed law and justice on its banner. If put into operation, the Decree will leave the natives ... impoverished and enslaved ... So the ideal of 'economically oriented colonial politicians' is nearing realisation: the blacks will serve as lowly toilers for the white man. The Decree marks the entry of modern slavery into South West Africa'".[33]

At this stage, the German Government's main objective was to encourage the development of mining and land settlement. A considerable part of the territory was parcelled out to a

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32 ibid.

33 ibid.

number of syndicates and companies. Two groups of land owners and mineral rights holders emerged, (1) those companies who had acquired land or mining 'rights' from the local chiefs, and (2) those who acquired concessions from the crown. Minerals were by far the most important to Germany's industries, and the colonial administrators were expected to encourage it as much as possible.

In addition, the development of the mining industry was regarded by the colonial administrators to be the principal source of revenue. As a result, the aiding of the miners became a special duty of the colonial administration, for when the mines were prosperous, it could hope to meet its financial obligations more easily. Mining operations involved financial risks. Interest rates on borrowed capital for use in the overseas trade (colonies) were generally high, especially as in case of disaster the loss fell entirely on the capitalist lender. Bankruptcies were therefore not uncommon in the history of trade with the overseas colonies. Indeed, it was near bankruptcy which forced Luderitz to sell his land and mineral 'rights' to the German Colonial Company for South West Africa. Therefore, overseas colonial trade was a speculative enterprise fit only for German merchants with large funds and not too impatient of early returns on their capital.

As a result, only companies were suitable to undertake mining activities. Apart from the German Colonial Company for South West Africa, four other companies played an important role in the development of Namibia's mining industry. These were:

Siedelungsgesellschaft für Deutsch Südwestafrica, Otavi-Minen-und Eisenbahngesellschaft, Gibeon-Schurf-und Handelsgesellschaft, and a British Company called South West Africa Company Ltd.

When the functions of the colonial administration were assumed by the German Imperial government, the ownership of minerals became vested in the state. It should be pointed out that the origin of this legal practice had nothing to do with any objective to subject mineral resources to the requirements of Namibia's economic development. On the contrary, it was devised to further the end of colonial exploitation and racial discrimination. Crown use took the form of granting rights of prospecting and exploitation to mining companies in return for royalties payable on the quantities extracted. The granting of such rights was also, naturally, an important means of dispensing patronage.

The whole territory was opened to prospectors. Within specified restrictions, a prospector had the right to prospect, work or dispose minerals. This move encouraged a speedy discovery of minerals. By 1908, commercial copper and lead production had already started. The territory produced 3,000 tons of copper, and 5,000 tons of lead during the same period.[34] In 1910, one of the companies mentioned above, the Otavi-Minen-und Eisenbahngesellschaft, initiated copper

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[34] op.cit., Nicolas De Kun The Mineral Resources of Africa, p.166

production.[35] Diamonds were discovered in 1908, and their discovery made Namibia the most important colony for Germany.

Unfortunately for Germany, her fortunes in Namibia did not last long. She had been the last European power to acquire colonies and the first to lose them.

6 THE INTRODUCTION OF APARTHEID AND THE EXPANSION OF THE MINING INDUSTRY

The Mandates System and the League of Nations originated from the peace settlements after the First World War. At first, there was a question as to what to do with the territories conquered from Germany. On the one hand, some States strongly pressed for the annexation of the occupied territories, while other States favoured the idea of administering the territories as international mandates under which the territories would be administered on behalf of the League of Nations. The relationship between the League of Nations and the Mandatories was to be regulated by special agreement.[36]

Thus, the Mandates System was a device which existed in more enlightened form of colonial administration and was a compromise to solve a dilemma, namely, "how could the Allied

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[35] ibid.

[36] For a detailed discussion on Namibia, see UNIN (1987), Namibia: A Direct United Nations Responsibility, particularly chapter 4.

Powers be allowed to keep their gains without affronting people, especially in the US who wanted to break free from old-fashioned imperialism? The mandates system was the answer: it gave the Allies ... as rulers in the territories concerned assured possession within a scheme of international accountability through the League."[37] This explains why one of the protagonists of the mandate system was President Wilson of the United States of America.[38]

The compromise arrangement was embodied in Article 22 of the Covenant of the League of Nations which was incorporated in the Treaty of Versailles signed in 1919.[39] The Article stated: "To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them, and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization, and that securities for the performance of this trust should be embodied in this Covenant."

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[37]See Northedge, (1986), The League of Nations: its life and times 1920-1946, Leicester University Press, p. 193.

[38]See generally Digest of International law, (1963), vol. 1, Department of State Publication, p. 604.

[39]As for the provisions of the Treaty of Versailles, see Treaty Series (1917-1921) No. 4, 28 June, 1919, HMSO.

The territory of Namibia (as well as other former German colonies) was considered at the time to be "inhabited by peoples not yet able to assume a full measure of self-government". Two principles were considered to be of paramount importance: "the principle of non-annexation and the principle that the well-being and development of such peoples form "a sacred trust of civilisation". The principles were given practical effect by establishing an international regime known as the Mandates System.

The territories were divided into three categories according to what was referred to as their stages of development, namely, A, B and C mandates. Namibia was in the last group. The distinguishing feature of this group was that owing to the "sparseness of their population, or their small size, or their geographical contiguity to the territory of the Mandatory", would be "best administered under the laws of the Mandatory as integral portions of its territory" subject to overriding safeguards in favour of the "indigenous population".[40] Furthermore, in the case of 'C' mandates, it is reported that "In fact, the Allies submitted to the Council draft agreements for the 'C' mandates, and these were accepted with minor changes."[41]

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[40] see Article 22 of the Covenant of League of Nations, see particularly paragraphs 3 and 6

[41] Op. cit, UNIN, (1987), Namibia: A Direct United Nations Responsibility, p. 82.

The mandate for Namibia was conferred upon His Britannic Majesty in 1919, and Britain was given full powers of administration and legislation, to be exercised on his behalf by the Government of South Africa. With the entry of the racist South African regime into Namibia, apartheid was immediately introduced in violation of the international status of the territory. While cases of racial discrimination occur in other parts of the world, it is the systematic and official character of apartheid which makes Namibia (apart from South Africa itself) unique in the world.

The South African regime deliberately pursue a policy which denies racial equality and seeks to bring about the separation of the racial groups for the sole purpose of ruthless exploitation. This policy has been applied by all methods of action at the disposal of the racist regime, and in particular, by the adoption of an extensive network of laws concerning every aspect of human activity. It is a person's racial classification and not his individual merits or qualifications which determines what rights he may exercise. Thus, racial oppression and exploitation became an intrinsic part of the social order of the Namibian society. In order to consolidate further from where the Germans left, racial differences became the basis for economic exploitation and social organisation.

To justify this racially based class exploitation, the regime developed an elaborate system of African differentiation into "ethnic" groups and confined to reserves or "homelands". Relegated to the lower levels of humanity, the sole purpose

in the life of the African population was to serve the interests of South Africa, white settlers, and more importantly, international capital.

6.1 The emergence of the white settler population and its collusion with international capital: An Overview

By the end of the First World War, the emergence of mining multinational companies accelerated international trade across international boundaries. The entry of multinational mining companies into Namibia crippled the old practice of monopoly trade enjoyed by Germany. Although their entry did not fundamentally change the pattern of natural resource exploitation, they broke out-of-date moulds such as physical control of the territory as a pre-condition for resource exploitation. This development facilitated a transformation from direct imperial rule as a pre-condition to exploitation to neo-colonialism. From the early 1960s, physical occupation of the colonies in Africa became no longer necessary (save in few instances such as Namibia), and the physical retreat from Africa of the European colonising countries became almost complete.

In countries such as Namibia, Zimbabwe, Angola, and Mozambique, the task for decolonisation became much harder (and it is still the case in Namibia) due to the fact that there is a large number of settler population. In addition, Namibia is distinguishable from all other former German colonial countries such as Tanzania, Togo and Cameroon by the presence of a relatively large class of white settlers (a

white national bourgeoisie). The dominance of this class is based upon privileged access to and exploitation of resources of land and African labour. Over the long run, the interests of mining multinational companies became roughly compatible with the interests of the white settlers.

The white settler class is deeply entrenched, and holds a substantial share of private investments in mining and other sectors of the Namibian economy alongside international capital. Moreover, since the mandate period, from 1925, the Namibian white settlers have enjoyed access to the apparatus of the South African state, as well as autonomous administration in Namibia. Control of the colonial administration has been utilised, in association with international capital, to encourage the growth of a white economy based on an infrastructure from surplus extracted from African labour. The institutionalisation of white economic privilege has produced capitalist relations of production.

Since imperialism maintained its interests in Namibia through the white settler community, the privileges granted to the white settlers ensured their support for imperialism. In this way, imperialism was guaranteed access to the territory's natural resources while the long-term exploitation of the African population was secured. In addition, European settlement was encouraged by international capital and South Africa since it provided them with firmer control over the territory and greater security for their assets. The discovery of considerable mineral wealth made

necessary the availability of a large labour force to develop these resources. There thus developed a form of master and servant relationship in which the white settlers and international capital control all the levers of political and economic command, while Africans supply the basic labour force needed in the mines. Indeed, as will be discussed in Chapter II, it is precisely for this reason that Africans cannot be granted prospecting or mining licences. The lasting inequality to which this gave rise is at the root of the present situation in Namibia.

The arrival of white settlers in large numbers from South Africa had a drastic impact on the African population. The settlers took the most fertile land and pushed the Africans on to the worst land. Therefore, the change of administration from German to the South African regime made the plight of the African population even worse. The situation arose whereby the settlers blocked access to those positions of nominal power which normally went to a class of indigenous population in other non-white settler ex-colonies of Africa. The territory was demarcated into two main parts, one part reserved for Africans, and the other part reserved for white settlers.

The "Police Zone" which may be referred to as the "European area", embraces all major infrastructural and industrial installations. The discrepancy is also attributable to the differential access available to whites and blacks to resources, not only of land, but of technology, management skills, credit, and marketing facilities. In this way, it

ensured Namibia's continued economic dependence on the international capitalist economic system.

In this context, mineral exploitation in Namibia may be described as a joint-venture between international capital and the racist South African illegal regime. The reason for the association is that neither party has at its disposal all the elements necessary in order to succeed on its own in the exploitation of the territory's mineral resources. While the South African regime purports to own Namibian mineral resources, it lacks the means to explore for and successfully develop them (e.g., capital, experienced management, trained operational personnel, and access to the international world market). The capital and the expertise required for this lie largely in the hands of mining multinational companies based in the Western nations.

The legal creation of mineral rights has been a prerequisite for the exploitation of the territory's mineral resources by the mining companies. Without South Africa's consent, these companies lack access to the exploitation of the mineral resources. South Africa provides mining legislation - rules governing mining rights. The legislation determines how mining rights are held, and the extent to which companies may obtain mining rights. A relationship of mutual dependence is thus a vital economic fact. This fact is clearly reflected in the mining concessions provided for under the 1968 Minerals Ordinance discussed in subsequent chapters.

The relationship between mining companies and South Africa benefits both parties, which in turn encourages South Africa to maintain its belligerent hold on Namibia. Despite United Nations resolutions and Decree no.I calling upon foreign governments and their companies to avoid investment in illegally occupied Namibia, foreign investment especially in the mining sector, has considerably increased since the termination of the mandate. The incentive of high rates of return on capital investment and the freedom to repatriate profits have proved stronger than the right of the Namibian people to independence.

It is interesting to note that mining companies seem to be content with the current colonial situation. As long as they benefit from apartheid, colonial oppression and exploitation, they have not only chosen to turn a blind eye to the plight of the indigenous population, but they have actively supported the current situation. This is clearly reflected in the 1982 Chamber of Miners Report which stated that: "The prospects of an internationally supervised independence election appear to many to be no stronger now than they were two or three years ago ... there is a school of thought <u>especially in the business community, that would prefer the present uncertainty to continue, rather than face the certainty that would follow a universal suffrage election</u>. ... In most cases, independence has been followed by a running down of the economy, the erosion and sometimes the disappearance of personal assets and private enterprise values, and generally by a process in which business

interests have come off second best".[42] However, there may be another school of thought which is either indifferent or which would like to see an end to the present uncertainty mainly for personal interest.

Therefore, it is clear that the economic interests of foreign mining companies create a major obstacle to Namibia's independence. Their interests seem to dictate that the present situation has to be maintained in order to prolong the period of exploitation.

To South Africa, maintaining economic ties with the multinational companies is regarded to be highly satisfactory. By establishing a high degree of interdependence with international capital, the regime strengthens the material base of its economy, and minimises the possibility of commercial sanctions. It also consolidates and strengthens political ties with the Western capitalist countries, and lessens the effect of its international isolation.

6.2 The granting of mining rights (concessions)

We have already discussed above that the administration of Namibia was transferred to South Africa in 1919 under the Covenant of the League of Nations and the Treaty of Peace. The transfer of the administration also meant that the mining

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42 see Chamber of Mines of SWA/Namibia Report, (1982) p.5, emphasis added

rights held under the German period had to be fundamentally transformed. A Concessions Commission appointed in 1919 was entrusted to inquire into the concessionary rights acquired from the German Government by seven mining companies namely: (1) the German Colonial Company for South West Africa, (2) the South West Africa Company Ltd, (3) the Otavi-Minen-und Eisenbahngesellschaft (4) the Kaoko-Land-und Minengellschaft (5) the South African Territories Ltd (6) the Hanseatische-Minen-Gesellschaft, and (7) the Anglo Colonial Territories. Most of the companies' mining concessions were confiscated, the South African Government then proceeded to make its own grants of mining rights.

This section examines the manner in which mining legislation has promoted the linkage between the South African illegal regime and multinational mining companies. The regulations which govern the operations of mining transnational corporations are those which are discussed in Chapter II. Through the system of awarding mineral rights in the form of concessions, foreign mining companies have acquired, over the years, major interests in the exploitation of Namibia's mineral resources. In this way, the South African illegal regime has transferred key mining rights giving economic control in the mining sector to foreign companies. Mining rights are now granted in terms of the general regulatory provisions of the 1968 Minerals Ordinance.

The legislation contains provisions which give foreign mining companies exclusive long-term mining rights in return for income taxes. Apart from the grant of mining rights, the

companies exercise rights of control over production and distribution of Namibian minerals. Therefore, the main features of mining concessions comprise the exclusive management of operations by the companies; control over the volume of mineral production, expansion and development; control over marketing; and control over distribution and processing.

By 1971, about 120 mining companies were involved in prospecting for Namibian minerals.[43] Until 1969, only 36 temporary prospecting rights and mining concessions had been granted. By 1974, the number reached a peak of 569, and by 1975, the concessions covered almost a third of the Namibian territory. What follows is a detailed discussion of some mining companies which have acquired mineral rights in the territory.

6.2.1 CDM Ltd and the Halbschied Agreement

Before we discuss diamond concessions in detail, it is important to note that sources used in the following two sections are mainly derived from text books and newspapers. The main reason is that there is little detailed official information. The only available detailed official information relates to the manner in which diamond companies are required to mine and market their minerals. This is

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[43] see The Department of State Airgram, E2 SAFR-A-174 from: American Embassy Pretoria, Subject: Namibia: The State of the Economy in mid-1971. Ref.Pretoria A.54, A46 and A47, p.6

discussed in detail in Chapter III. Furthermore, it must also be noted that actual copies of the concession agreements are not available to the public although some of their terms have been revealed through official sources such as commission reports.

De Beers had tried on several occasions, without success, to gain control of the Namibian diamonds during the German period. The company sought the exclusive right to sell the Namibian diamonds in the early days of their discovery.[44] When this scheme proved unsuccessful, it sought to buy as many shares in the German Colonial Company for South West Africa as possible but again without success. The Germans were determined to keep De Beers out of Namibian diamonds. In 1909, the German Secretary for the Colonies, Dernburg, reported that "Quite recently, large numbers of shares in the Deutsche Kolonial Gesellschaft f"ur S"udwest Afrika have been bought up by English interests. Steps are being taken, after discussion with the Chairman of the company to see that its control does not pass into foreign hands".[45] This reference was directed at De Beers which had acquired 15 per cent of the German company's shares and was seeking to acquire more.

De Beers' dream came true when South Africa assumed the administration of the territory. On 31 October 1919, an agreement was concluded at the Hague by H.C.Hull, South

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[44] see The Times - London, 1909, 6 April, p.5, col.f

[45] op.cit., I.Goldblatt, History of South West Africa from the beginning of the nineteenth century, p.179

Africa's ex-minister for Finance, with all the nine principal German companies which owned the diamond fields in Namibia. Under the agreement, the mining properties and undertakings of the companies were transferred to a new company "The Consolidated Diamond Mines of South West Africa Ltd" (CDM) with a share capital of £4,500,000. The major part of the capital was held by British and allied subjects, who controlled and managed the company.

The effect of this agreement was that all the chief German diamond interests were acquired and transferred to the South African company which owned more than 90 per cent of the diamond output in Namibia. This meant that for the first time in the history of diamond mining, practically all the known diamond producing areas of the world became held and controlled by British and Allied subjects. De Beers' dreams had come true. The price paid for the German interest was £3 million, and the supporters of the new company were the Anglo-American Corporation of South Africa and the financial groups connected with the Corporation such as Messrs J.P.Morgan and Company, the American Financiers.[46]

The South African Government approved the deal on the 3rd of November, 1919, with the exclusion of the German Colonial Company for South West Africa whose mining rights were

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[46] see The Times - London, 1919, 4 November, p.4., col.1, and I.Goldblatt, History of South West Africa, op.cit., p.238

confiscated by the Government.[47] CDM was finally registered as a limited company on the 9th of February 1920. It is interesting to note that Mr H.C.Hull, the ex-finance minister in the South African Government, who negotiated the deal became the company's first chairman.[48] After the takeover of the German diamond companies, CDM proceeded to negotiate with the South African Government for diamond mining concessions. Given the fact that Mr H.C.Hull was the chairman of the company, it was relatively easy to obtain a diamond mining concession from the South African Government. The company obtained mining rights in Diamond Area No.I (the then German Sperrgebeit area discussed in Chapter II) initially for a period of fifty years[49] to 1990.[50] The mining right was later extended in 1967 to the year 2010.[51]

In 1923, CDM consolidated the mining rights with the then Administrator of South West Africa. The company was granted the sole right to explore, mine or work for claims over the area referred to above. It was also recognised as the successor in title to the Deutsche Diamenten Gesellschaft

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[47] see I.Goldblatt, History of South West Africa, p.238

[48] see The Times - London, 1920, 26th February, p.19, col.d

[49] The mining right was later extended in 1967 to the year 2010.

[50] op.cit., Goldblatt, History of South West Africa, p.240

[51] see Windhoek Observer, - Namibia, 28 June, 1985

(DDG), a German subsidiary company of the (DKG). Under the 1910 agreement between the (DKG) and the German Government, the company was granted mining rights over the Sperrgebeit until 31 March 1911. Thereafter, the mining right became vested in the German Government. Agreement was reached between the German administration and the DDG on the formation of a company, the Halbscheid Company, which would work the diamond area. It was also agreed that the proceeds from this area were to be shared equally between the DDG and the German Government. In the Hallscheid Agreement referred to above, the rights of the DDG in the Halbscheid Company (the company was never formed) were transferred and became vested in CDM.

Notwithstanding the fact that mineral rights over the Sperrgebeit became vested in the administration, due to CDM's undue influence, these rights were "leased" to the company. It subsequently acquired the mining rights over the remainder of the Sperrgebeit (Diamond Area No.2). The rights are held under a permit granted in 1954,[52] and the area comprises more than 3,500,000 hectares or 36,000 square kilometres.[53] It is interesting to note that most of the mining rights which the company acquired under the 1954 Minerals Ordinance have not been altered notwithstanding the fact that the ordinance has been repealed.

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52 see Windhoek Advertiser - Namibia, 28 June. 1985

53 see Windhoek Observer - Namibia, 6 June, col.a

6.2.2 Offshore Diamond Concessions

In April 1963, the then South West Africa Administration granted a concession to a seven company consortium of financial interests to mine for diamonds from the sea. The members of the consortium were: Federale Mynbou, Sanlam, Spes Bona Mynboumaatskappy, Bonuskor, Santam, Federale Volksbeleggins, and Duinveld Beleggings.[54] This move resulted into a situation whereby the whole of the Namibian coastline was given out to mine for sea diamonds.

Other concessions are held by the Marine Diamond Corporation, now 100 per cent owned by De Beers; Southern Diamond Corporation; Diamond Mining and Utility Company, and Atlantiese Dimant Korporasie. The Marine Diamond Corporation, before it was acquired by De Beers, used to be an operating company owned jointly by Collins Organisation (50 per cent of the share capital),[55] General Mining Corporation (25 per cent), and Anglo-Transvaal Investment (25 per cent).[56] The Collins Organisation's 50 per cent share was held by a company called Sea Diamonds. The three companies also jointly own a diamond operating company called

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[54] see The Times - London 1962, 28 April, p.13, col.d

[55] The Collins Organisation is an American concern specialising in the construction and laying of under-water pipelines

[56] in 1963, the capital of the Marine Diamond Corporation was £3 million.

Southern Diamond Corporation.[57] Before the takeover, De Beers was closely associated with the Marine Diamond Corporation, in 1963, it lent £1 million to the company in order to increase its share capital. In addition, it was also intended to increase diamond production from the sea bed off the Namibian coast.[58] Other De Beers companies in Namibia are: CDM Prospecting Ltd; CDM Properties Ltd; De Beers Services Ltd; and the South West Finance Corporation Ltd.[59]

On 28 October 1963, the then Secretary for Namibia announced that the Marine Diamond Corporation was granted an extension to its diamond concession, to operate to the limits of the territorial waters, six miles from shore or to the end of the continental shelf, whichever is greater.[60]

6.2.3 Rossing Uranium Ltd

Unlike CDM, there is no officially available information concerning mining concession agreements between South Africa and foreign mining companies. The difficulty is also compounded by the fact that there is no standard form of concession agreement in Namibia. Each mining lease is

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57 see The Times - London, 1963, 21 January, p.14, col.b

58 see The Times - London, 1963, 4 March, p.16, col.f

59 see De Beers Consolidated Mines Ltd Annual Report, (1982) p.44

60 see The Times - London, 1963, 29 October, p.17, col.d

individually determined between the South African regime and the mining companies. Due to the political situation and the legal uncertainty of the concessions, especially after independence, details of such agreements are normally kept secret. Therefore, this section does not provide a complete picture of the mining concessions held by RTZ through its subsidiary and operating company, Rossing Uranium Ltd.

The present uranium deposit was discovered more than 50 years ago, but the low grade ore made exploitation uneconomic until 1966 when RTZ was drawn into the scheme. The first significant study began in 1956 when Dr D.A.M.Smith located a radioactive anomaly. The Anglo American Prospecting company then investigated the area by trenching, diamond drilling and underground excavation.[61] Between September 1966 and March 1973, RTZ joined the Namibian Uranium Prospecting race and finally decided to undertake commercial exploitation by using the extraction methods developed at its Palabora copper mine in South Africa. It easily obtained, through its Rossing subsidiary company, an exclusive mining right from the South African Government to mine Namibian uranium at Rossing. It is likely that RTZ initially obtained a 20 year mining concession over Rossing.

The 20 year mining right assumption is based on Rossing Uranium Ltd's own publication - a monthly magazine entitled "Rossing". According to one article entitled "Rossing

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61 see Rossing, (1979) June, p.13

Uranium: geology and mining operations",[62] it is stated that: "The ore reserves of the Rossing deposit were developed from data provided by the surface diamond drilling programme undertaken by Rio Tinto in the period 1967 to 1971. Using computer techniques a series of long-term mining plans was developed from the ore reserve data until an optimum 20 year plan was obtained. This calls for an open-pit mining operation ..."[63] This seems to suggest that initially, the mine was believed to have a life span of 20 years after which the ore reserves would become exhausted. Therefore, it is reasonable to assume that RTZ's subsidiary company, Rossing Uranium Ltd, was granted a 20 year mining concession. It is possible that the mining rights might have been extended because Rossing's general manager, Mr Gordon Freeman, revealed in 1983 that based on 5,000 tons of uranium oxide production a year, Rossing uranium ore reserves could last for 23 years. It was also revealed that deeper uranium deposits had been found in the vicinity of Rossing (presumably within the area which covers the current mining rights) which could considerably prolong the mine's estimated life.[64]

RTZ finally decided to form a subsidiary company (Rossing Uranium Ltd) in 1968 to serve as an operating company to exploit Namibian uranium. The company has its registered

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62 the article appeared in June 1979 publication

63 op.cit. Rossing, p.14, emphasis added

64 see Rand Daily Mail - South Africa, 27 October 1983

office in Namibia where it was incorporated. In addition, it was reported in 1983 that Rossing was considering extending its activities to gold, copper and tungsten on the Namibian coast.[65]

6.2.4 Tsumeb Corporation Ltd

Concession rights which are currently held by Tsumeb Corporation stem from the old German company, the Otavi-Minen-und Eisenbahngesellschaft (OME).[66] The rights were in turn acquired from an English company, South West Africa Company, in 1899. OME was granted the right to prospect for and mine precious stones and base minerals, but most of its operations became copper production. When the administration of Namibia changed from Germany to South Africa, OME was granted the sole mining rights for one year within 1000 square miles of the present Tsumeb mine. This period has been extended by successive proclamations until the Second World War when the company's rights became vested in the Custodian of Enemy Property. These rights were later bought by a consortium of American and British companies led by American Metal Climax and Newmont Mining on 6th January, 1947, for £1,010,000 pounds.

Tsumeb Corporation Ltd was incorporated in Namibia as an operating company on the 4th of January 1947. It acquired,

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65 ibid.

66 op.cit., I.Goldblatt, History of South West Africa, p.239

from the South African Custodian of Enemy Property, mining rights which were previously held by OME. Today, the company produces copper, zinc, lead, cadmium and silver. It also holds a mining concession of 1,788 hectares and 59,850 acres of non-mining interests in Namibia. Up until 1982, major shareholders in Tsumeb were still Newmont Mining Corporation and Amax. In 1982, Amax sold all its stake to Anglo-American Corporation and its complex of companies. It took control through Gold Fields of South Africa (GFSA) which acquired 42 per cent of the share capital in Tsumeb.[67] The transfer of Amax's equity interest to Gold Fields means that a South African based company now effectively controls Tsumeb, and consequently, ties the Namibian mining industry even more closely to South Africa's economic interest. Apart from the information provided above, very little is known about the terms of the mining concession and its duration.

6.2.5 The South West Africa Company Ltd

On the 3rd of August 1892, the German authorities granted a mining concession (popularly known as the Damaraland Concession) to Dr Scharlach and C.Wickmann. The rights were transferred, with the consent of the German authorities, on the 12th of September 1892 to the South West Africa Company. It is one of the oldest companies still operating in Namibia today. Initially, its major shareholders were British. It was incorporated and controlled from London since 1892.

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[67] op.cit., Leake S.Hangala, Structure of Namibian Mineral Industry, p.57

Among the early shareholders was Cecil Rhodes who played a major part in the success of the company. The initial concession area covered about 22,000 square miles. In 1896, it bought from the German Kolonial Company (Deutsche Koloniale Gesellschaft) a large area of mining concession covering an area of 37,000 square miles. By the same agreement, it was exempt from paying mineral tax until 12th September 1912.[68]

After the change of administration in 1919, it was granted, for a three year period, the sole right to prospect for and extract precious stones and base minerals in the Damaraland Concession area, granted to it by the German administration. The concession period has been extended by the successive proclamations, by virtue of which the company is still operating in Namibia today. Significant changes took place in 1976 when the company became a wholly owned subsidiary of Kiln Products Ltd, which is in turn owned by Goldfields of South Africa (GFSA). The change enabled its headquarters to move from London to Johannesburg in South Africa.[69]

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[68] op.cit., I.Goldblatt, History of South West Africa, p.116

[69] see C.M.Ushewokunze, (1981), Draft Report on Legal Aspects of Namibia's Mining Industry, UNIN - Revised June, p.93

CHAPTER II - COLONIALISM, MINERAL EXPLOITATION AND MINING LEGISLATION IN NAMIBIA

1 COLONIALISM AND NATURAL RESOURCES

The colonisation of Namibia by Germany may be regarded as the most important landmark in the exploitation of Namibia's mineral resources. During the initial stage of colonisation, the policy of the German Crown was to leave responsibility for the construction of institutional life in the hands of its colonists.[1] The German Crown learnt from the British experience whereby great trading companies, chartered by the Crown, served as the institutional model for colonisation.[2] It was soon realised that chartered companies played an important role in extending German commercial strength. As a result of the use of commercial forms of organisation, the German Crown played a minor role in the activities of the chartered companies. At the same time, colonisation by the commercial organisations was expected to yield tangible profits to investors.

The role of the companies during the German colonial period legitimised the exploitation of the indigenous inhabitants, and the harnessing of private self-interest in the pursuit of German national welfare. Personal profit and German public

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[1] See J.H. Esterhuyse, (1968), South West Africa 1880-1894: The Establishment of German Authority in South West Africa, C. Struik (pty) Ltd, Cape Town, p.88.

[2] ibid.

good were capable of being combined. Companies which operated in Namibia attracted heavy investment not only from merchants but from the nobility and gentry as well.[3] The welfare of the trading companies operating in Namibia became a concern that touched many levels of German society. Commerce became an affair of state. Indeed, it was the strength of the German state and its willingness to back mercantile operations that made long-term investment in joint stock companies secure. As time progressed, the German state became better organised to support the structure of commerce in Namibia.

The companies conformed to the pattern of a private group licenced to promote the common welfare of Germany. They were given power to purchase land and to make on that land any reasonable laws not contrary to the laws of Germany. They were licensed as self-governing agents of the German Crown. As more and more merchants, adventurers, and men of wealth became interested in exploiting Namibia's natural resources, they naturally turned to the familiar institutions (chartered

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[3] It is interesting to note that even Emperor William had large investments in Namibia. He even bought two farms for £4,800. See the Times, London, 1912, 3rd May, p.5, col.b. The Emperor's interests in Namibia were so extensive that he even attended a Lecture given by Herr Dernburg, the Colonial Secretary, on Namibia (German South West Africa as it was then known). The Lecture was delivered in the Chamber of Parliament (Reichstag) in Germany. Among those present were: the Empress, Prince Henry of Prussia, Princess Victoria, Duke Adolf Frederick of Mecklenburg - as Chairman, a large number of Deputies, naval and military officers, high state officials, and members of the German Colonial Association. See The Times - London, 1909, 22 January, p.5, col.d.

companies) that proved to be effective instruments in colonial commercial activities.

During the period of company rule, the mineral estate was part of the surface estate and passed with it until severed and treated separately. This principle was acceptable when mining was still a small-scale initiative, starting from outcrops and restricted to small depths. It soon became clear that the system has drawbacks. The parcelling of estates hindered prospecting and mining. Furthermore, the opposition of even one landlord was likely to jeopardise an entire mining concern. Landowner's privileges, especially those of the colonial company, prevented and impeded mineral development by interested parties. Moreover, the system resulted in speculation and tying-up of large areas of land. When the German Crown assumed direct colonial administrative responsibility, mineral rights were separated from the surface rights and became vested in the Crown. The result was that surface right owners lost their right to the minerals existing on or beneath their land. However, the fact that mineral rights became vested in the Crown did not necessarily mean that their exploitation became exclusively state undertaking. The colonial administration allowed private interests to take part in their exploitation. In order to encourage mineral development, three methods of granting exploitation rights were adopted, namely, grant to the discoverer, grant to the applicant at the Crown's discretion, and grant by special contract.

The system promoted the search for mineralised outcrops by the reward it offered to fortunate prospectors. It also encouraged the excavation of many small mines. The method of grant at the Crown's discretion became the most widely used system. The Crown, acting in its capacity as owner of mineral rights, had legal power to choose the holders of mining titles. The system enabled the colonial State to pursue a dynamic mineral policy by choosing from among the applicants whom it considered to be the most competent by reason of technical skill and financial resources. In order to achieve its mineral development objectives, it became necessary for the State to promulgate mining legislation and regulations to establish required conditions for making applications and for the procedure to be followed. This is discussed in detail below.

2 TERMINOLOGY

The phrase 'mineral rights' means the same thing as 'mining rights'. In its most general sense, the phrase means rights pertaining to mines and minerals. It is important to note that the expression has come to be a term of art. It may mean the sole ownership of the minerals in the whole territory by the State whether or not such minerals are located in public land; or the expression may refer to the lesser and abstract right to go on someone else's land to prospect for minerals and, if minerals are discovered, to mine them and take them away without ever having any ownership in the land itself.

Under English common law, the owner of the land owns it downwards to the centre of the earth, including everything contained in the soil below the surface. The landowner accordingly owns the minerals in the ground and he may consequently mine and dispose of them (although this may depend on the terms of the title deeds since mineral rights are capable of being owned separate from the land), save to the extent to which his legal rights have been curtailed by statute, as is the case in South Africa.[4] It is clear from the above discussion that both the dictionary and scientific meaning of the term 'mineral rights' are inadequate for the purposes of this study. It is important to note that the word is used in the mining legislation with a legal significance in relation both to the State and the miner. The legal conception or definition of the word is one which in the cases of conflict has to prevail over the purely scientific or dictionary meaning.

2.1 Mineral

The word is susceptible to expansion or limitation in meaning according to the intention with which it is used. The meaning ranges from the general one of inorganic substances found in the country rock or as deposits in or substances forming part of the Earth's crust, usually extracted by mining or quarrying, to the more particular meaning of the

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[4] In South Africa, all precious stones, precious metals and source materials are vested in the State. See generally the Mining Rights Act 20 of 1967, the Precious Stones Act 73 of 1964 and the Atomic Energy Act, 1967.

processed and refined products of that extraction in the shape of elements or compounds or classified species of inorganic substances belonging to the mineral Kingdom. Although the statute may provide a definition of the word 'mineral', it is important to note that this does not mean that only those substances which fall within the definition are minerals; it means that, for the purposes of the administration or the law, minerals are deemed to be the substances so defined.

Section 1 (XXIII) of the Mines, Works and Minerals Ordinance 20 of 1968 states that: "'mineral' means any substance, whether in solid, liquid or gaseous form occurring naturally in or on the earth or bed of the sea and having been formed by or subjected to a geological process, but does not include water, not being water taken from the earth or sea for the extraction therefrom of a mineral: provided that subject to the provisions of section 16(2), the term 'mineral' shall not apply to soil, sand, clay, gravel or stone (other than limestone or marble) if these substances are bona fide required for - (a) agriculture; (b) building; (c) fencing; (d) road making; (e) the manufacture of brick and tiles; (f) the construction of sports or air fields; (g) the construction of bridges, dams, reservoirs, weirs, canals, or other irrigation works; (h) railway construction; (i) any other purpose so declared by the Minister by notice in the Gazette".

It is clear from the statutory definition that the meaning of the phrase 'mineral' has been narrowed down by the exceptions

listed in the statute. This enables individuals to use the substances not classified as minerals without having to obtain permission under the Ordinance. However, the meaning is still wide enough since even the substances excluded from the definition may, under certain circumstances, still be regarded as minerals. Section 16(2) of the Ordinance empowers the Minister to declare the substances excluded as minerals if he is satisfied that they are being mined "for a purpose of disposal to another party for profit". Furthermore, the question of whether a particular substance is or is not a mineral is a matter for the State to decide in that it is legally entitled to declare that a particular substance is a mineral for the purposes of the mining laws. By making specific exception to the definition of 'mineral', the general intent of the mining legislation seems to include minerals which are still unknown or which are presently considered to have no intrinsic value but which, given the development in science and technology, would become valuable in future.

2.2 Mine

It is important that mining legislation should clearly define the word 'mine' since the extraction of minerals depend on the development of a mine. Furthermore, clear statutory definition of the word has legal significance for the general public because such areas are normally protected places, especially in the case of diamond mines which it is an offence to visit without official permission.

Section 1(XXII) of the Ordinance defines the word 'mine' when used as a noun to mean "any excavation in the earth, whether abandoned or being worked, made for the purpose of searching for or winning any mineral, and any place where any mineral deposit is being worked in any quarry ... and when used as a verb, means any operations with the object of winning minerals from the earth or from water in or under the earth or from the sea or the seabed, and shall include all excavation work whether by underground or open working or otherwise, and any boring and other operations necessary for, or incidental to such winning, and shall include the collecting of sea bird guano".

3 MINERAL DEVELOPMENT AND LEGISLATION UNDER GERMAN RULE

The development of mineral resources brings about the establishment of norms of conduct especially in the search, production, and disposal of minerals. During the German Colonial period, the colonial state developed a legal system intended to regulate the exploitation of Namibia's mineral industry. The legal framework permitted the undisturbed pursuit of various mining activities and imposed restrictions in the manner in which these activities were to be carried out.

German policy was based on encouraging white immigration of German origin which called for intensive economic development by the colonial state. The active role of the colonial state was reflected in the establishment of an elaborate legal framework. By enacting legislation and imposing regulations,

the colonial administration was vested with powers to control and regulate every aspect of economic activity especially in the mining sector. But the role of the colonial state in economic development was essentially regulatory in character as legislation was oriented mainly towards creating the legal framework for a private enterprise economy.

3.1 1888 Imperial Mining Decree

The first mining legislation in Namibia took the form of a 'Claim' system. Under this formula, any legally qualified person had the right to hold, work or dispose of minerals within a specific area in which he discovers minerals. The colonial State had discretion to impose certain general restrictions. The first mining legislation and regulation were introduced as a result of gold discovery in 1887.[5] In order to regulate gold mining activities, a two point plan was formulated by the German colonial State. First, steps were to be taken with a view to protecting the gold-fields, and secondly; steps were to be taken to establish necessary administrative machinery on the gold-fields.[6] The policy resulted in the enactment of the "Imperial Ordinance Concerning Mining Matters and the Extraction of Gold and

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[5] op.cit., J.H.Esterhuyse, South West Africa, 1880-1884, p.25

[6] ibid., p.127

Precious Stones in the South West Africa Protectorate" dated 25th March 1888.[7]

The Ordinance consisted of forty-four paragraphs.[8] By virtue of the first paragraph, the Deutsche Colonial Gesellschaft fur Sudwest Africa, a company formed to exploit Namibian minerals, was placed under the control of the German Government. Section 1 provided as follows: "For any minerals valuable on account of their contents of metals, sulphur, alum, vitriol and saltpetre; also for precious stones, graphite and bitumen in solid and liquid form, the Mining Rights Prerogative within the South West Africa Protectorate appertains to the Deutsche Colonial Gesellschaft fur Sudwest-Africa under the supervision of the Empire". The German Commissioner in the territory was charged with the administration and control of the mining industry. The company was required to establish a mining office and placed under the supervision of the German Imperial Commissioner.[9] The main function of the mining office was to keep a claims register and the collection of claim monies from the prospectors. It was also charged with the function of investigating conflicting claims and ownership rights, and to supervise the working of the mines. The Imperial Ordinance imposed a fee of 10 marks for the registration of every claim

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7 ibid., p.129. The precise citation in German read: "Verordnung Bergwesen und die Gewinnung von Gold und Edelsteinen im S"udwestafrikanschen Schutzgebiet".

8 ibid.

9 ibid.

and 20 marks for the transfer of a mining claim to another name.[10]

The first mining office of the Deutsche Colonial Gesellschaft f"ur S"udwest Afrika was opened on 31st July 1888.[11] In accordance with the Imperial ordinance, the first mining area was proclaimed. A total of fifty three mining claim licences were issued to claim holders within a period of three months. A number of mining companies and individuals began to arrive in the territory with a view to making a fortune from the newly discovered gold. The expectations of the companies soon proved to be illusory. The exploitation of gold became an unsuccessful business venture due to its low quantity.[12] As a result, stockholders did not receive a favourable return on their investment. It became extremely difficult after initial enthusiasm had waned for the companies to raise enough capital to keep them afloat. Notwithstanding this state of affairs, the 1888 Imperial Ordinance provided a framework for subsequent development of mining legislation in Namibia.

3.2 The 1905 Imperial Mining Decree

After the experience with gold, the search for mineral resources was extended to other minerals such as diamonds,

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10 ibid., p.130

11 ibid., p.133

12 ibid.

copper and iron. Because of the financial difficulties of the colonial administration, especially after the unsuccessful gold rush, it became necessary to attract mining companies and individuals to search for minerals. As an incentive to attract prospective investors, a new legal framework regulating mining was enacted. In the formulation of a suitable legal framework, the colonial authorities worked hand in hand with interested parties, especially mining companies which already controlled large areas of mining concessions in the territory.

On 8 August 1905, the German colonial administration proclaimed the Imperial Mining Decree to regulate mining activities. This decree repealed the 1888 ordinance. Under its terms, general freedom of prospecting within the territory was established. This freedom was specifically extended in respect of the areas held by the Concession companies. Anyone was entitled to explore and to extract "precious" and "common" minerals subject to the provisions of the ordinance. However, blacks and "other coloured people" were not permitted to extract any mineral without obtaining the special consent of the colonial Governor. With few specified exceptions such as land required for public roads, the pegging of mining claims could take place on any land.

Designated minerals were excluded from the landowner's property and became the property of the State. In contrast to section 1 of the 1888 Imperial Ordinance, section 1 of the 1905 Ordinance attempted a lengthy definition of minerals. It stated that "The minerals hereinafter named are excluded

from the right of disposal of the owner of the land, and shall not be searched for or won save in accordance with the provisions of this Ordinance: A. Precious Minerals (1) precious metals (gold, silver and platinum). (2) Precious stones (diamonds, rubies, emeralds and sapphires). B. Base Minerals (1) All metals not mentioned before, in their native state and as ores. (2) Mica and semi-precious stones, as well as asbestos and fluor spare. (3) Coals, salts, and valuable earths, namely:- (a) Coal, brown and graphite. (b) Bitumen in solid, liquid or gaseous form, especially rock oil and asphalt. (c) Rocksalt with the salts occurring upon the same deposit and salt springs. (d) Earths, which are valuable owning to their sulphur contents or for the production of alum, vitriol and saltpetre. (e) Phosphates (organic and inorganic) and guano. the recovery of cooking salt out of the so-called salt-pans does not fall under this ordinance".

However, private landowners retained full rights over the land. Compensation was provided to landowners for land usage by mine owners upon the conversion from prospecting to mining. Once compensation was paid, mine owners enjoyed the exclusive right to search for and extract minerals from such land. There was provision for the payment of prospecting and mining fees to the colonial mining authority together with mineral extraction tax.

In contrast with the first ordinance of 1888, the 1905 decree took the form of a lease system (sometimes referred to as the

Concession system).[13] The ordinance vested title to all Namibian minerals in the Imperial government. The miners derived their rights to work the minerals by some form of tenure granted by the colonial authority. In this context, the tenure which the miners exercised was equivalent to a property right. It consisted of a bundle of rights and obligations, the composition of which varied greatly depending on where such rights were being exercised. In the case of privately owned land, compensation was required to be paid to the private landowners before mining rights could be exercised.

3.3 Regulations and policy relating to Diamonds

The discovery of diamonds in Namibia, in September 1908, transformed Namibia into Germany's most important colony. Diamonds were in fact discovered by an African employed on the railway, running from the harbour of Luderitz to the interior.[14] Subsequent discoveries followed rapidly until a long stretch of shore line was proved to be rich in diamonds. Following its discovery, administrative as well as legislative steps were taken to protect the industry. The administrative regulations which were subsequently introduced contained four main objectives. First, half the net profit of the diamonds were to be retained by the administration;

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[13] for a detailed discussion on mining systems, see Charles J.Alford, (1906), Mining Law of the British Empire Charles Griffin and Company Ltd - London, pp.1-3

[14] The Times - London, 1912, 24 May, p.22, col.a

secondly, measures were to be taken to secure an adequate market for the diamonds; thirdly, suitable conditions were to be established for the working of the mines; and fourthly, the exploitation of the diamonds was to be mainly reserved for German capital, and to provide increased work for the German diamond-cutting industry.[15]

As we have explained above, Germany had full control of trade in Namibia. The colonial administration kept a watchful eye on the development of the territory's commerce, limiting participation to merchants of German origin. Based on the philosophy that Namibia was a natural source of specific raw materials that could not be produced in sufficient quantity in Germany, the official policy was to ship all the raw materials to Germany. Although the 1905 ordinance provided that any legally qualified person was entitled to prospect for any mineral, severe restrictions were imposed on the marketing of diamonds by individual producers.

In 1909, a number of administrative regulations were published in the North-German Gazette regarding the regulation of the diamond industry.[16] All diamond winners were required to hand in their diamonds to a specified Government authority. Upon the settlement of their value, they were entitled to receive cash payment in accordance with

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15 ibid., 1909, 23 January, p.8, col.a

16 these measures were published by the Colonial Office, see The Times - London, 1909, 29 January, p.6, col.b

the valuation. Power was reserved to the Colonial authority to restrict the diamond output. This measure was not meant to protect over-exploitation of the territory's diamonds, but was designed to prevent market depreciation.

Further administrative measures were taken in Germany designed to protect the diamond industry. A limited liability company with capital of £100,000 was formed under the auspices of prominent German banking houses.[17] They were instructed to act as representatives of all interested groups in the colony. The purpose of the association was to combine all the mining interests on the one side over against "fiscal and colonial" interests on the other. The company became known as the Diamond State Co. (Diamanten Regie Gesellschaft). The colonial authority acquired majority shares in the company with an option to acquire all minority shares if it became necessary to do so.[18] All the diamonds produced in the territory had to be delivered to the company for sale up to maximum quantities. The colonial authority reserved the right to fix the price of these diamonds if it became necessary. The main objective was to maintain the price of the diamond industry on the world market at the desired level.

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[17] I Goldblatt, History of South West Africa from the beginning of the nineteenth century, (Juta and Company Ltd - Cape Town 1971) p.178

[18] see The Times - London, 1913, 8 December, p.22, col.d

In 1914, the company was reorganised. It came to be administered by a board of eight persons, of whom four represented the producers, with a Government Commissioner having a casting vote. Its shares were divided equally between the colonial Treasury and the producers.[19] It is stated by Ruth that "South West Africa now entered an era of profit more gratifying to German than that in any other of her colonies ... The report of the British Consul for 1913 revealed South West Africa in a thriving economic condition. Colonies, it seemed to Germany at last, could be made to justify themselves."[20]

Before the Germans could develop a comprehensive mining law and exploit other minerals in large quantities, the First World War broke out. Mining activities came to a halt during the 1914 to 1918 war. After the war, Germany lost the territory of Namibia. It was stated that the loss of Namibia was "a bitter blow" to Germany because the territory was regarded to be "by far the most important German possession overseas. ... In 1912 the imports were valued at £1,625,000 and the exports were valued at £1,953,000 ... The discovery of diamonds in the Luderitz Bay district in July, 1908, caused a rush of diamond seekers. Within a year the output was valued at £1,000,000".[21] According to Ruth, apart from the economic importance of the territory, it was "Germany's

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[19] ibid., 1919, 3rd March, p.15, col.e

[20] See Ruth First, (1975), South West Africa, Peter Smith Publishers, p.88.

[21] see The Times - London, 1915, July 10, p.5, col.c

second largest colony, and the only one suited to White settlement."[22] However, it is important to note that notwithstanding Germany's loss, the regulatory mining framework which developed survived post German colonial period, subject only to minor modifications.

4 MINERAL POLICY AND LEGISLATION UNDER SOUTH AFRICAN RULE

Before we discuss in detail the current mining legislation and policy prevailing in the territory, a number of factors have to be mentioned. It should be remembered that South Africa acquired the territory of Namibia at the time when minerals were being exploited in large quantities. In terms of raw materials, the Namibian minerals acquired much importance in developing and expanding industries of the Western countries. They became part of their programme for economic reconstruction and development after the war which had brought mining in the territory to a halt. It was the period in which the expansion of international capital began to gather momentum, it was also a period in which international mining companies began to emerge. Unlike Germany, South Africa was financially weak and technologically backward, which meant that she relied heavily on international finance and multinational mining companies to exploit the Namibian minerals.

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[22]Op. cit. Ruth Fist, (1975), South West Africa, p. 72. Professor R.H. Green is of the view that in terms of economic importance, Namibia was in the second category.

The history of capitalism and imperialism has taken many forms over the years. There have been changes in the ways in which private property and property rights have been acquired. The change, especially in mineral rights, has increasingly taken into account a number of social, political, and economic pressures which have acted as constraints upon traditional forms of ownership. The emergence of multinational mining companies in Namibia, radically changed the pattern of international trade in the mining industry. To provide a legal framework for the activities of the mining companies, the South African racist regime has enacted mining legislation whose main purpose is to encourage excessive exploitation of the territory's minerals. The creation of mineral rights has been a prerequisite for the exploitation of the territory's mineral resources.

By and large, mining multinational companies own and control the technology and the capital required to find and exploit the minerals. Hence, it was inevitable that an alliance had to be formed between the South African regime and the mining companies for the purpose of exploiting the mineral resources of the territory. This in turn has helped to integrate Namibia's economy with that of the racist South African regime and of some Western states. The recognition that Namibia's independence is not far in the future, has prompted the mining companies to conclude that maximum profits should be extracted as quickly as possible while the colonial situation still prevails. At the same time, they have

exploited the weaknesses of the mining legislation to their advantage.

4.1 The Mandate Period

As already mentioned above, the South African regime's main objective was to provide a basically regulatory framework within which private mining operations could be conducted. During the early days of the mandate, the South African administration relied on the same general principles embodied in the German laws. The process by which South Africa assumed "rights" over the Namibian minerals in succession to the German administration has been discussed in details in the preceding chapter. However, it is important to note that the succession is only relevant in so far as it provided the context for the mining laws successively enacted since South Africa assumed the task of administering the territory in 1919.

Under the provisions of the Treaty of Peace and South West Africa Mandate Act of 1919, the Governor-General was empowered to legislate by proclamation and the Union Parliament by Act. The Governor-General had discretion to delegate the power to issue proclamations to the Administrator (the then head of the administration in Namibia appointed by the South African Government), as long as the proclamation or ordinance was not in conflict with any proclamation of the Governor-General or Union Act. In practice, the device provided no significant diminution of South African control by law, which meant that the South

African Government had full power to make effective her obligations under the mandate.

Before the South West Africa Mandate Act of 1919, Namibia was under martial law, until the formal transfer of administrative powers via the League of Nations. The only significant administrative action during the martial law period was that the South African Governor-General made diamond taxation and royalties which were previously paid to the German Colonial authority payable to the South African administration in Namibia.

After 1919, a number of changes took place starting with the introduction of Roman Dutch law on 1st January 1920, by the Administration of Justice Proclamation, 1919. A certain number of South African Acts were given direct application to the territory. Others were applied by specific proclamations of the Governor-General or the Administrator. The rest of the law was provided by proclamations; ordinances of the Legislative Assembly; fragments of German law especially that of mining, preserved by proclamations of the Administrator; and such provisions of German law which covered matters not touched on in the rest of the law.

In 1919, the South African Government appointed a commission known as the Concessions Commission, to inquire into the concessionary rights acquired by the mining companies during the German administration. On the basis of the Commissions' report, the South African Government issued a proclamation known as Concession Modification and Mining Law Amendment

Act, no.59 of 1920. The legal consequence of the proclamation was that mining concessions held by a number of companies during the German period were abrogated without compensation, and without the dispossessed holders being entitled to make any appeal.[23] The main argument of the South African Government was that it acted under its ordinary right, and it was in the "public interest" to pass legislation expropriating private property without paying any compensation.

The policy of the South African Government was to open the whole country and maintain a system of unrestricted prospecting in order to promote economic development. The Administrator's report of 1920 emphasised the "opening of the country to prospecting ... followed by the application of the amended mining law, and completed by the completion of this law without modification or restriction to the whole country may be regarded very justly as inaugurating a new epoch ..." This meant that no significant changes were effected in so far as mining law was concerned. The Imperial Mining Decree of 1905 continued to operate. In December of 1919, Proclamation no.24, of 1919 amended certain provisions of the Imperial Mining Decree. In accordance with the Administrator's report, freedom of prospecting provided for under the 1905 Decree was extended throughout Namibia. Mineral rights in respect of both state and private land were

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[23] op.cit., I.Goldblatt, History of South West Africa, p.140. See also The Times - London, 1930, 10 September, p.12, col.c.

vested in the Administration. The Administrator was placed in charge of administering the application of the proclamation. Magistrates in each district within the "Police Zone" (the area excludes Bantustans situated in the Northern part of the country) were empowered, initially, to grant prospecting rights.

In 1925, South Africa decided to confer some form of autonomy to the territory of Namibia. The South West Africa Constitution Act of 1925 was passed for this purpose. The administration of the territory was entrusted to an Executive Committee, consisting of the Administrator, appointed by the Governor-General, and four members elected by each Assembly for its duration. The entire members of the Executive Committee and the Legislative Assembly consisted of whites only. The Legislative Assembly composed of six members appointed by the Administrator with the Governor-General's assent and twelve elected members. The election of these members was restricted to whites only. It was necessary to have the consent of the Governor-General before legislation was passed on certain vital issues, including native affairs and taxation; mines and precious stones; tariffs, customs and excise duties; and control of the public services as well as the constitution and jurisdiction of courts of justice. All matters relating to "minerals, mining, mineral oils or precious stones" including fees, royalties and taxes payable to the Administration remained in the exclusive jurisdiction of the Administrator directly responsible for the running of the Mining Authority.

The Imperial Mining Ordinance of 1905 was repealed and replaced by the Mining Consolidation and Amendment Proclamation 4 of 1940. Section 1 of the Proclamation provided as follows: "The right of mining for and disposing of precious and base minerals in the Territory including the territorial waters thereof and the sea bottom within such territorial waters, is vested in the Administration and no precious or base mineral shall be searched for or won save in accordance with the provisions of this Proclamation". In addition, the South West Africa Constitution Act of 1925 was amended by the South West Africa Constitution (Amendment) Act no.23 of 1949 in order to provide for the establishment of a Mines Division for Namibia. In theory, the Mines Division was placed under the control of the Legislative Assembly but in practice, real control remained in the hands of the Administrator operating through the Executive Committee. The mining industry continued to operate through this existing administrative and legislative framework until they were superseded by the first systematic mining Ordinance of 1954.

The provisions of section 1 of the earlier Proclamation were re-enacted in the same terms but with an extended definition of 'mineral' to include all mineral substances that can be obtained from the earth by mining, digging, drilling, dredging, quarrying or other operations. Under the terms of the Mines, Works and Minerals Ordinance 26 of 1954, the powers and functions of the Mines Division were established and came to be clearly defined. It provided that: "There shall be a department known as the Mines Division which shall be subject to the direction of the Administrator for the

Territory... The function of the Mines Division shall be the control of the mining industry, and the exercise of all rights, powers and jurisdiction vested in the Administrator in regard to minerals, mines and works in the Territory". The Ordinance made a distinction between the rights of the mine owner and those of the land owner. It remained in force until after the termination of the mandate by the United Nations when it was repealed by another ordinance which contains the most comprehensive and systematic mining law in the territory.

4.2 Post Mandate Period and the Mines, Works and Minerals Ordinance 20 of 1968

Since the termination of the mandate, there has been a revolution in the conduct of mining operations. Methods of mining techniques have been transformed; the volume of mineral production and export have increased vastly; and a new range of minerals have been added to the list. A whole range of new contract structures (e.g., interlocking ownership in uranium) and financing techniques has evolved, and the receipt, storage and transmission of information have been completely changed by new technology. If it be right that mining law is rooted in the customs and practices of those who are directly involved in the mining industry, we could reasonably expect to find a parallel transformation in the mining law and policy introduced by the South African racist regime.

We could expect a reappraisal of fundamental concepts, a wholesale jettisoning of twentieth century statutes enacted by the German colonial administration. It is a matter for some astonishment that this has not occurred in any fundamental way. Although there has been new legislation, most of it has been institutional in character. The principal mining law statues have remained substantially in the form in which they were enacted by the German colonial administration (especially the 1905 Imperial Mining Decree) up to the 1968 ordinance. What follows is a discussion on the main provisions of the Mines, Works and Minerals Ordinance 20 of 1968.

In 1968 (i.e. two years after the termination of the mandate by the United Nations), the South African colonial administration passed the most comprehensive and detailed legislation designed to regulate the mining industry in open defiance of the United Nations resolutions. The Mines, Works and Minerals Ordinance no.20 of 1968 was enacted. It repealed the Mines, Works and Minerals Ordinance no.26 of 1954. it redefines the powers of the Mines Division, and provided for the administration of the mines via the then Secretary of the territory. The Secretary was empowered to supervise and control the mining industry and exercise all rights, powers and jurisdiction vested in the then South West Africa Administration.

Before going into detail, it should be pointed out that there have been a number of administrative changes. However, it should be stressed that these changes have not affected the

substantive provisions of the ordinance. It is for this reason that the changes will only be discussed briefly after we have discussed the main provisions of the ordinance. Before cosmetic changes were introduced in 1980, the right to apply for prospecting licences and mining grants was limited to whites of 18 years or more; companies registered under the Companies Ordinance no.19 of 1928; and foreign companies complying with the provisions of the ordinance. As a result of the apartheid laws, whites, coloureds and blacks were given a legal definition.

A 'Coloured person' was defined as a person who is not white or black, and who is generally accepted as a coloured person, but not including a person who although a coloured person by descent, is "generally accepted as a native".[24] A 'native' was defined as a person who is a member of an aboriginal race or tribe of Africa or who is "generally accepted" as such.[25] Finally, a 'White person' was defined as a person who in appearance obviously is, or who is "generally accepted" as a white person, but not including anyone who although in appearance obviously white is "generally accepted" as a coloured person.[26]

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24 Section 1(VII) of 1968 Ordinance

25 Section 1(XXVI)

26 Section 1(XIVI)

4.2.1 Ownership and Control of Minerals

Like the 1905 Imperial Mining Decree, repealed by the 1954 ordinance, ownership of all mineral resources is vested in the state without qualification. It is provided by S.2(1) that: "... the right to prospecting and mining for and disposing of precious and base minerals in the Territory, including its territorial waters and continental shelf is vested in the Administration". Before the 1980 cosmetic reforms,[27] mineral rights in the "homelands" or reserves were vested in the South African Bantu Trust (constituted under S.4 of the South African Bantu Trust and Land Act, no.18 of 1936).[28] The formula of state ownership enables the South African Government to grant mining rights over private land and saves mining-right holders from spending large sums either on land purchases or on compensation which would otherwise be necessary.

The South African Government, by adopting the formula of mineral ownership, has enabled itself to have complete power over the Namibian resources whether mined by the South African companies or by foreign multinational mining companies. It is apparent, therefore, that parcelling (leasing) out of land by the South African regime creates no rights whatsoever to minerals therein. Where the lease of land is coupled with the grant of a mining right or rights conferring on the grantee the rights to win minerals, it is

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27 These are discussed in detail below.

28 Section 2(2)

in virtue of such grant, and not the lease of land that the right to win minerals arises. In practice, the two interests are usually conferred by two different administrative organs pursuant to entirely different statutes (i.e., one conferred under the land ordinance, and the other conferred under the mining ordinance). This means that it is possible to lease land for other purposes (e.g., agriculture) to one person at the same time as it is the subject of a mining right to another.

In practice, most mining right holders obtain both surface and mining rights, especially when they have to take out a mining licence. South Africa as "owner" of the minerals under S.2 of the ordinance, has the exclusive right to decide who can and should work the minerals.

4.2.2 Categories of Mining Rights Created

We have already intimated above that the working of minerals requires large amounts of capital which South Africa alone does not possess. In promoting the exploitation of Namibia's minerals to the maximum desirable extent, the regime has brought about a system in which the exploitation of mineral resources by foreign mining companies characteristically takes place under a system of licences. Two categories of mining rights have been granted under the Ordinance. The lowest form of the right is the prospecting licence, and the highest form is the mining licence. The holder of a mining licence, for example, may prospect within the area to which the licence relates as though he were the holder of a prospecting licence. The gradation of rights represents progressive stages from searching through mining a

mineral deposit. In each of these stages, the length of time and the amount of money required in terms of mining expenses increase with respect to that required for the preceding stage of mining development. Each licence constitutes a kind of constitution on which the holder of the mining rights bases his work, in the sense that the rights and obligations of the mining-right holders are contained in the document issued to the miner.

A Prospecting Rights

Under section 20(1) of the Ordinance, the Mining Commissioner is empowered to issue a prospecting licence to any applicant who qualifies under the provisions of the Ordinance. Those who qualify include "(a) a person of eighteen years or older; (b) a company registered under the provisions of the Companies Ordinance, 1928 (Ordinance 19 of 1928) or (c) a foreign company which has complied with the requirements of the Companies Ordinance, 1928".[29] A woman who is "married in community of property" does not qualify for a prospecting licence, "unless her husband has given his written consent".[30] There are two alternative methods by which a licensed prospector may obtain the exclusive right to prospect or mine in defined areas.

One alternative is that he may peg one or more claims as required under section 22(1) and have them registered by the Mining Commissioner in the claims

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29 Section 21(1)

30 ibid

register.[31] On compliance with certain requirements under section 46, the prospector may have his claim or claims converted into a mining area under a deed of conversion which is registered in the mining area register kept by the Registrar of Mining Titles. By this procedure, the holder of a claim and the owner of a mining area obtains the exclusive right to prospect and mine for minerals specified in the deed of conversion.

Alternatively, the holder of a prospecting licence may obtain from the Minister of Mines the grant of the exclusive right to prospect in any defined area. Such grant is embodied in a deed of grant called a prospecting grant. There is a requirement to register the rights in a prospecting grant register kept by the Registrar of Mining Titles situated within the Mining Titles Office.[32] The Minister is also empowered to grant to the prospecting licence holder any particular mineral or minerals for a given period.[33] In addition, he is empowered to add any list of minerals to the prospecting licence holder,[34] and once the rights are granted to the holder, he cannot cede, lease, or transfer them without the consent of the Minister of Mines.[35]

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31 Section 29

32 Section 60

33 Section 60(1) (b)

34 Section 60(1) (c)

35 Section 57, this function is now exercised by the Administrator-General

A person wishing to obtain prospecting rights over any area not closed to prospecting can apply for any number of prospecting licences. Every applicant for a mining right has to show that he is financially sound and technically capable. He has to specify the names of the minerals he intends to prospect and give a detailed description of the area over which a licence is sought. There is no limitation as to the size of the area which one can be granted. This is mainly due to the fact that the industry is dominated by the multinational mining companies. It is characterised by a monopoly of large areas being held by big mining companies, and a number of minerals are divided among the major companies (e.g., the diamond industry is dominated by De Beers, and the uranium industry by Rio Tinto Zinc (RTZ)).

It must also be borne in mind that every applicant for a prospecting licence has to prove that he has financial resources and technical staff available to carry out the proposed programme of operating effectively. This practical requirement effectively limits the chances of an individual who wants to apply for a prospecting licence. Furthermore, the technology for prospecting is mainly available to large mining companies, and it is becoming more sophisticated all the time especially when prospecting activities are carried out offshore. All these developments favour large mining companies which possess proven technology.[36]

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[36] Two companies were formed in the 1960s specifically (Footnote Continued)

A prospecting licence entitles the holder to enter freely upon the land specified in his licence to search for minerals. Usually, the activities of the prospector involve the mapping of geological formations, mineralisations, and structural conditions of the prospecting area. The mapping may be generalised or may be detailed. In most cases, surface geological mapping is usually accompanied by the use of topographic aerial maps. Finally, laboratory samples are made of the various samples collected in the field. Should the holder of a prospecting licence discover mineral occurrences, he would then be ready to obtain the second stage of the mining rights.

B Exclusive Mining Rights

The ordinance states that no mining is to be carried out on any land until the land is pegged off, and registered as a claim in accordance with s.60. In the case of private land, there is to be no mining until the mining right holder concludes a written agreement with the landowner on compensation terms, and has obtained a permit from the mining Commissioner authorising mining.[37]

The last category of the mining rights created under the new legal regime is the mining licence. Under s.61 of the ordinance, the holder of a prospecting licence may

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(Footnote Continued)
to recover diamonds from the sea along the Namibian coast using modern technology. These are: Marine Diamond Corporation and Southern Diamond Corporation. See The Times - London, 1963, 21 January, p.14, col.b

[37] Section 28

obtain a mining licence, in respect of a workable mineral deposit covered by the grant. Like the prospecting licence, the mining licence is exclusive. It grants to the holder the right to mine, i.e., a right to carry out the whole coordinated operation to obtain industrial utilisation of a deposit from the extraction of the minerals to the processing and disposal of the mineral or minerals.

The right to mine is embodied in a deed of grant, known as a mining grant. There is a requirement that the grant should be registered in the grants register of the Mining Titles Office. The holder of the mining grant enjoys his rights until the mineral or minerals involved have become exhausted, or for the period prescribed in the grant. Before actual mining can take place, there is a requirement to convert a claim into a mining area. This is usually done by a deed of conversion. The deed gives to the owner of the mining area an exclusive right to mine and dispose of all minerals specified in the deed. Once a claim has been converted into a mining area, the owner is obliged to begin regular mining operations within two years from the date of the deed of conversion.

The claim holder is required to survey, demarcate and prepare a diagram of the mining area. He is also required to give notice of the conversion. Any objections to it are dealt with by the Mining Commissioner, who must register the conversion in accordance with the law relating to the registration of

mining titles in the Mining Titles Office.[38] Those claim holders whose mining rights are situated on private land are required to compensate private land owners for the mining operations carried out on such land. Any dispute between a land owner and a mining owner over their respective rights is referred to a Board of Adjudication by the mining Commissioner.[39]

It usually happens that mining rights are obtained on farming land which makes it difficult to carry out both operations simultaneously. S.70 of the Ordinance provides for the compulsory purchase of such land on the direction of the Minister of Mines. Mining rights lapse if the exclusive right to mine is terminated by the administration. It is important to note that cases of termination vary. However, it must be noted that there are two main ways under which mining concessions may be terminated. First, the concessionaire may be empowered to terminate the concession under the power of abandonment or surrender reserved under the terms of the concession or under s.55 of the Mines, Works, and Minerals Ordinance of 1968. Second, the State has a right to terminate a mining concession in case of fundamental breach. In this section, however, we shall restrict our discussion to the right of the State to terminate mining concessions. Under s.47(6) of the

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38 The Mining Titles Office was established by the Mining Titles Registration Proclamation R90 of 1969

39 Section 68

Ordinance, the State is empowered to terminate a mining concession if the concessionaire fails to pay a rental within three months from the date of receipt of a written notice from the Mining Commissioner specifying such failure. The Mining Commissioner is empowered to declare the concession forfeited, "and may in addition institute civil proceedings against the defaulter for the recovery of the amounts so accrued and the cost of such publication."[40]

Furthermore, s.56(1) confers wide powers to the State to terminate mining concessions. It is important to note that the section does not provide grounds for termination. It provides that forfeiture "of any mining area shall be by notice in the Gazette under the hand of the mining commissioner and such notice shall give the reason for such forfeiture." It is submitted that apart from the provisions of the statute, the State has a right to terminate a mining concession under the general principle of law in case of fundamental breach of obligations. In case of fundamental breach, the State may regard the concession as repudiated. This is the legal position under the general principle of law notwithstanding the absence of any express provision in the mining concessions or agreement.

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[40] S.47(7). S.30(2)(c) applies in respect of prospecting rights.

4.2.3 The legal nature of the mining rights created

It is important to have a clear understanding of the character of a mining right conferred by the mining licence in order to appreciate the degree of control exercised by the South African racist regime over mining rights in Namibia. We have already observed above that a mining licence gives to its holder an exclusive right to exploit, process, and utilise the minerals within the boundaries of his licence. This is only limited by the condition that the holder observe and fulfil all obligations demanded by the South African regime through the mining legislation. It is apparent from practice and legislation that the grant of exclusive mining rights includes possession of two separate interests, (a) the surface covered by the licence, and (b) the minerals within the bounds of the licence.

The possessory interests in a mining licence are of a special character, and differ from the interests created under the general domain of land law. As between the mining-right holder and all persons other than the South African regime, the mining-right holder is treated as possessing all the attributes of a fee title, so long as the requirements of the ordinance are satisfied. The land enclosed within a mining grant area is usually treated differently from other public land. Third parties cannot trespass. This does not, however, limit the regulatory functions exercised by Government officers[41] or by the owner

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[41] Section 85

of the surface land, when mining operations are taking place on his land. The mining licence holder is given the right of access to mining lands and to sever minerals specified in the licence, and the power by severance to acquire title to the minerals and dispose of them.

Mining rights are granted by the South African Government upon compliance with certain conditions. The Ordinance regulates the terms of the licence. It is also important to note that the terms under which the mining licence is held and their interpretation are fixed by the Ordinance. With respect to the land covered by the mining grant, the holder only enjoys the use of the surface of his ground for the purposes subsidiary to the main object of his tenure which is the extraction of minerals. Title to the land is split in that the legal title to both minerals and the land (if it is publicly owned) is retained by the South African regime as owner while the use of land and title after the severance of minerals passes to the holder of the mining licence. Since these rights depend on the mining legislation, their exercise can be restrained or new obligations imposed on them notwithstanding the provisions or the rules in existence when the mining right was granted. The implication of this state of affairs is that the South African regime can enact mining laws which create new rights and obligations.

It is important to note that there is an important difference between the grant of exclusive prospecting and mining rights under the 1968 Ordinance and common law mineral rights. Under Common law, the holder of mineral rights may exercise his right to prospect or mine at any time in the future whereas the rights of the holder of a prospecting and

mining grant are limited by the duration of the grant. While the holder of mineral rights under common law may have a legitimate complaint against an extension of the use of the surface which may detrimentally affect prospecting or mining at an indefinite time in future, the holder of a prospecting or mining grant has no ground for complaint unless the extension may prejudice such prospecting or mining operations as may still be carried out during the continuance of his rights.

Some of the principles which are applicable under common law have been endorsed by the courts. These include (1) In case of irreconcilable conflict the use of the surface rights must be subordinated to mineral exploitation and mining;[42] (2) A holder of mineral rights is entitled to mine wherever and whenever he chooses.[43] The owner of the surface may not dictate where and how the right to prospect or mine is to be exercised by facing the mineral rights holder with a fait accompli of changed conditions on the surface. (3) No user of the surface is defensible which has the effect of taking away the right to prospect and mine; for otherwise the right to prospect or mine ceases to have any content and amounts to breach of undisturbed possession.[44] The consequence of these principles is that the surface owner's rights may be rendered less valuable.

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42 see Hudson v. Mann and Another, 1950 (4) SA 485 at 488 E-F

43 see Douglas Colliery Ltd v. Bothma and Another, 1947 (3) SA 602 at 616

44 ibid., p.610

However, the common law principles referred to above which are applicable in South Africa (subject to statutory limitation) have no application in Namibia because all mining rights are governed by statute and mineral rights in the ground are vested in the State. This fact was clearly stressed in Aussenkjer Diamante (pty) Ltd v. Namex (pty) Ltd.[45]

Finally, in contrast with the mining legislation in a number of mineral producing countries (especially in the developing countries) the mining legislation in Namibia does not provide for joint-venture agreements between the South African Government and private mining companies. This was clearly stated in a brochure issued in 1978 by the First National Development Corporation of South West Africa Ltd. It was stated that: "Unlike the situation in most mineral-rich countries, South West Africa/Namibia has mining laws designed to encourage companies to find and exploit resources and they do not discriminate against foreign-owned firms... There is no compulsory participation by the state or by local interests in mining ventures, no obligation to plough back profits or recruit local managerial personnel, no pressure to process minerals in the country and no restriction on output volumes".

The practice of the colonial administration is that if a foreign mining company, i.e. a mining company which is not composed of South Africans or Namibians, seeks to obtain mining rights in the territory, it is only required to offer

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[45] 1983 (1) SA AD p.263

a minimum share of 25 per cent to local companies. According to the United Nations Centre on Transnational Corporations, "measures aimed at encouraging investors in the mining sector were introduced in 1974. Previously the government could require up to 50 per cent 'local participation' in any mining or prospecting venture, on payment of half share in the value of assets, and a 10 per cent premium, if justified, on valuation. In theory this might have meant a company was compelled to sell off half the equity in the venture in the event of an exploration programme proving successful. This requirement was reduced to 25 per cent, leaving the promoter control over the venture; 'local participation' is only required when the mining stage is reached and an operating company needs to be registered."[46]

Even if this arrangement could benefit "local" interests, it does not do so in practice because most of these companies are owned by South Africans notwithstanding the fact that they are incorporated in Namibia. Even those which are incorporated in South Africa are regarded as local companies under the Companies Ordinance no.19 of 1928 as amended from time to time. Another disadvantage to the Namibian population is that there is a lack of a separate Namibian identity in terms of the genuinely autonomous administrative and financial institutions.

The only instance in which a private mining company or an individual can lose mining rights is through expropriation of

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[46]See United Nations Centre on Transnational Corporations, (1981), "Role of Transnational Corporations in Namibia", First Draft Report, United Nations, New York, p. 2-17.

the rights in the "public interest" and for public purposes.[47] It is not clear from this provision whether after expropriation the state undertakes mining activities, or mining rights are transferred to other private mining companies.

4.3 Mining Legislation and policy applicable to specific minerals

In addition to the general statutory provisions of the 1968 ordinance, as amended from time to time, there are special legal norms regulating diamond and uranium mining.
In the case of diamonds, the need for special additional legislation stems from the fact that the minerals are obtained from the deposits as finished products (given the fact that 98 per cent are gem diamonds). Special legislation is also required to maintain and strengthen the marketing monopoly enjoyed by De Beers' Central Selling Organisation.

In the case of uranium, the industry is of great strategic importance to the South African racist regime partly because of the international embargo on oil sales to South Africa, and because of the military uses of uranium. In most uranium producing countries of the world, there is usually special legislation regulating the mining, disposal and its uses.

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[47] Section 86 of the Executive Powers (Mines) Transfer Proclamation, 1978

4.3.1 Diamonds

The most important legislation relating specifically to the diamond industry is the Diamond Industry Protection Proclamation no.17 of 1939.[48] It provides for the "regulation, control, development and protection of the diamond industry of South West Africa". These functions are carried out by the Diamond Board, set up by the Diamond Board Establishment Proclamation no.4 of 1921. It vested in the then South West Africa Administration powers formerly exercised by the "Diamanten Regie" discussed above. The Board was established as a corporate body with perpetual succession, consisting of the Administrator-General[49] and diamond producers in the ratio of either 1:2 out of 3, or 2:3.

It is entrusted with the supervision of all agreements relating to the production, quotas and sales, valuation and delivery of diamonds from producers to purchaser.[50] Every diamond producer in the territory is required to deliver all diamond production to the Board if required, and no other person other than the Diamond Board is permitted to export diamonds from Namibia. The Board has discretion whether or not to export diamonds. The legal implication is that only the authorities have the right to dispose of all the diamonds

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48 It has been amended by Proclamation R88 of 1969

49 Before the Administrator-General it was the Administrator

50 Section 3

found and won in Namibia. Any other form of sale by an individual or company is void and of no legal effect.

In addition, magistrates and post commanders are empowered to intercept and open postal parcels if they reasonably believe that they contain diamonds which are being dispatched from the territory without the authority of the Diamond Board.[51] Any person who picks up diamonds in any place outside the prohibited areas (sperrgebiet) has a legal duty to hand them over to the magistrate. Diamond detectives and police officers are empowered to search any claimholders' property under a warrant issued by a magistrate or authority given by the head of the Diamond Detective Department. Employers are empowered to search their Black and Coloured employees.[52]

The proclamation further delineates the areas of the prohibited diamond areas into two zones, namely, Diamond Area no.1 and Diamond Area no.2. No person is permitted to enter these areas without a permit issued by the Diamond Board or under the authority of the Administrator-General.[53] Africans and Coloureds are prohibited to enter the areas unless they are employed by a claimholder, and are not allowed to leave the area unless they are accompanied by a European. Any African or Coloured person who is found in these areas without a permit is liable to arrest.[54]

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51 Section 15

52 Section 17

53 Section 22

54 Section 25

Severe penalties are prescribed for any person who contravenes the restrictions discussed above. Any person who is found in possession, attempting to buy, receive, sell , export, or dispose of diamonds is liable to maximum prison sentence of 15 years and a fine of 4000 South African rands.[55] These penalties also apply to claimholders who contravene the provisions of their licence, and to servants who attempt to steal the diamonds.[56]

4.3.2 Uranium

Uranium occupies a central position in all countries of the world which produce the mineral. This is due to the fact that it has capacity to generate fuel for nuclear energy stations (mostly located in developed countries), and its ability to produce nuclear weapons of mass destruction. In short, it influences the balance of power in East-West relations. In all countries of the world, it is regarded as a strategic mineral. It is for these reasons that the South African regime has enacted legislation designed to regulate the production, possession, and disposal of the Namibian uranium.

Control is exercised under the Atomic Energy Act, 1967. This is a South African Act enacted by the South African

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55 Section 28

56 e.g., in S v. Kapweja, 1975 (2) SA AD p.541, it was held that theft, concealment or retention of employer's diamonds in contravention of section 30(1) of Proclamation 17 of 1939 could lead to imprisonment, as opposed to a fine provided for under the section if the accused is the first offender, when "the amount of the fine would be entirely beyond the means of the accused".

Parliament and it directly applies to Namibia. Its administration in Namibia lies with the South African officials and institutions. It provides the South African Government with complete control of uranium production, possession, and disposal. The right to produce nuclear or atomic energy is vested in the state. It also provides for the control of processing, enrichment, reprocessing, possession and disposal of source material.[57] Prospecting and mining licences for the Namibian uranium are issued under the provisions of the Mines, Works and Minerals Ordinance no.20 of 1968.[58] The right to mine other minerals also includes the right to mine for and dispose of source materials.[59] The legal implication of the provision is that if a claimholder of other minerals discovers that they also contain source materials, he does not have to apply for a fresh source material licence.

The supervisory powers are exercised by the Atomic Energy Board established under the earlier Act, Atomic Energy Act, 1948. Various interest groups are represented in the Board, e.g., Uranium producers, commerce, industry, scientific research, secretaries for Mines and Foreign Affairs, and three other persons appointed by the South African Government.[60] The Act does not contain a specific provision for Namibian representation. The Board has extensive powers.

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57 Section 2

58 Section 5(c)

59 Sections 5 (3)

60 Sections 8, 11 and 12

It is empowered to prospect; mine; enrich; reprocess; produce; export; acquire; dispose; produce nuclear or atomic energy; finance nuclear research and training; and to conclude production quotas with producers for the fulfilment of existing uranium contracts.[61] It has power to control the grant or acquisition of patents relating to nuclear or atomic energy.[62]

As for the mining activities in Namibia, there is a requirement to inform the Board in writing of any permission granted to claimholders to prospect and mine source material or the recovery of such material from tailings.[63] The South African Government can withdraw prospecting and mining licences from claimholders if the security of the State is likely to be endangered. All the functions of the Minister of Mines in Namibia are vested and exercisable by the Administrator-General.[64]

All information relating to the existence of source material is to be reported to the South African authority. The Act contains provisions which require strict secrecy relating to the release of information concerning uranium. Apart from the political implications, this is the main reason why detailed information relating to the Rossing mine and other uranium prospecting activities in Namibia cannot be

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61 Section 13

62 Section 21-24

63 Section 5 (9) (b)

64 This has been made possible by the Executive Powers Transfer (General provision) Proclamation, 1977, and the Transfer of Administration of the Mines to the Administrator-General Proclamation, 1978

made available by the companies concerned. The secrecy provision was only extended to Namibia after the South African Government decided to exploit uranium in the territory. It is of particular interest to note that the 1967 Act provided for an immediate application of its provisions to Namibia, while the 1948 Act did not.

The Act provides that without the consent of the competent authorities: "no information may be published or disclosed on the locality, extent, and source material content of ore reserves, on the importance of the production or the price and conditions of acquisition of such material, in or outside South Africa; no person may disclose information on activities or transactions carried out in the past connected with source material; no information may be communicated which is connected with any investigation or negotiations with a view to acquiring a site licence or with any licensed site under the Nuclear Installations (Licensing and Security) Act, 1963".[65] The competent authorities (the Atomic Energy Board and the Minister of Mines) may furthermore direct that in any proceedings, evidence in connection with transactions in any company producing source material be given in camera. It is clear that the word 'person' as used in the statute refers to a natural person as well as a legal person, i.e., companies.

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[65] Section 30 as amended by the Atomic Energy (Amendment) Act no.46 of 1978

4.4 Administrative changes relating to the regulation of the mining industry

It is important to note that a number of administrative changes have taken place, some of which relate to the regulation of the mining industry. Although these changes do not alter the substantive nature of the mining legislation in the territory, it is felt necessary to discuss them briefly. The main reason is that some of the institutions which have been established may be retained by the future independent government in Namibia.

In August 1977, the South African Government appointed the so-called Administrator-General to head the South African illegal administration in Namibia. He took over the functions which were formerly exercised by the South West Africa Administrator, another South African official who headed the colonial administration in Namibia since the mandate period in 1919. The changes also resulted in the Administrator-General assuming a number of functions previously exercised by the South African ministries. In 1969, the South West Africa Affairs Act no.25 of 1969 transferred, among others, mining and all matters relating to minerals to the South African Department of Mines in Pretoria.[66] As a result, territorial autonomy was sharply restricted. This change virtually reduced Namibia into the

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[66] This was implemented by Proclamation no.R89 of 1969

status of a fifth province of South Africa. After the appointment of the Administrator-General, he assumed responsibility for the day-to-day conduct of the administration in the territory. Being a representative of the South African Government, he has power to issue proclamations which have the effect of law.

In the case of the mining industry, the Executive Power (Mines) Transfer Proclamation, 1978, transferred the administration of mines from the South African Minister of Mines to the Administrator-General. In addition, the Mineral Rights Proclamation of 1978 provides that the "rights of prospecting and mining for and disposing of precious and base minerals in the territory, including its territorial waters and continental shelf is vested in the Administrator-General". The vesting of mineral rights in the "homelands" in the South African Bantu Trust contained under s.2(2) of the 1968 ordinance is repealed. Now the legal position is that all mineral rights (except those falling under the Atomic Energy Act, 1967 discussed above) over the whole country are vested in the Administrator-General. Amongst the departments so transferred was the Namibian section of Department of Mines, which means in theory, control over all mining matters has been assumed by the Administrator-General.

In practice, no significant changes in the context of mining legislation in existence had been made. The only notable change is that, rules and regulations issued by the South African Government officials no longer apply automatically in

Namibia. The Administrator-General has discretion to delegate responsibility to the South African officials and their representatives in Namibia. He has power to consent to the application of South African regulations which he deems to be in the "interests" of Namibia. The powers of the Administrator-General were briefly interrupted in 1983 when the South African Government assumed direct responsibility over all mining rights. This was after the collapse of the so-called internal government in Namibia. The functions of the Administrator-General were restored towards the end of 1985.

Apart from the Administrator-General, there are a number of other officers who fall within the Mines Division discussed above. We have already stated that the main function of the Mines Division is to supervise and control the mining industry in the territory. It exercises all rights, powers, and jurisdiction vested in the Namibian colonial administration and its officers regarding minerals and mines works. It is divided into three sections, namely, Mining Titles Office; Mines Inspectorate; and the Geological Survey Branch. Apart from the Administrator-General who has overall control, the Mines Division is headed by the Mining Commissioner. He is responsible for receiving, considering and granting mining rights.[67] He is required to maintain a registry of claims and mining titles in which pegging of claims, forfeiture, cancellation, abandonment and transfer of

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[67] i.e., prospecting and mining licences

mining rights are recorded. Finally, he is required to issue permits for the disposal of minerals.

Below the Mining Commissioner, each of the three sections of the Mines Division is headed by a senior officer. The Mines Inspectorate is headed by the Chief Inspector of Mines appointed by the Administrator-General. The sections' main function is to supervise safety standards in the mines including mining machinery and explosives. He has power to hold an inquiry into causes of a mine accident and contraventions of the mining ordinance relating to general safety standards. The Geological Survey Branch is headed by the Surveyor-General. The main function of the branch is to survey and register mining areas.[68] The survey must comply with the requirements of the Land survey Ordinance, 1963. Finally, the Mining Titles Office is headed by the Registrar of Mining Titles. Its function is to preserve all mining titles lodged with the office by the Mining Commissioner.

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[68] Section 74 of the Mines, Works and Minerals Ordinance 20 of 1968

CHAPTER III - MARKETING ARRANGEMENTS

1 INTRODUCTION

As will be shown below, the colonial administration in Namibia exercises very little control over the marketing of Namibia's minerals. The mineral trade and pricing policy are firmly controlled by foreign owned multinational companies which manipulate Namibian mineral prices to their advantage. Therefore, the main objective of this chapter is to show that the present relationship between the mining companies and the Namibian colonial administration has led to the enrichment of the mining companies. This relationship, which is partly facilitated by the colonial mining legislation, has greatly contributed to Namibia's process of underdevelopment.

It is a characteristic feature of the mining companies that they need an adequate and reliable flow of mineral resources in order to make a profit. We have already discussed in the preceding chapter that mining laws and regulations have enabled mining companies to be in firm control of the Namibian minerals. They have acquired a high degree of freedom of action in the production and disposal of the Namibian minerals. By owning and operating the deposits, they are in a position to control the terms of supply of the minerals at the world market to their own advantage. The activities of De Beers in the marketing of diamonds provides a vivid example. It will be shown below that the control relationships between the subsidiaries and the parent mining companies based outside Namibia are far stronger and have

proved more significant than the regulation and revenue relationships between the subsidiaries and the Namibian colonial administration.

Operating subsidiary companies in Namibia are regarded as organic parts of the parent companies situated abroad which are in fact control centres. This enables parent companies to control the information on prices, costs, reserves, production conditions, and all other factors which are needed to devise proper controls. All these factors make it difficult for the colonial administration to prevent transfer pricing from taking place.

In addition, the colonial administration has adopted actual realised prices as a basis for calculating gross income as opposed to open market (arm's-length) price. Since Namibian subsidiaries sell the minerals to affiliates, the prices are usually lower than open market prices. This means that the colonial administration does not monitor the marketing of the minerals.

2 MARKETING AND LEGISLATIVE PROVISIONS

Apart from the regulation of diamonds and uranium, control over other minerals is exercised almost exclusively in terms of the provisions of the Mines, Works and Minerals Ordinance 20 of 1968 and the regulations made thereunder. The Ordinance contains four main provisions which regulate the marketing of the Namibian minerals. These are ss.38(1), (3) (4) and (5); s.44(2); s.87; and s.88. The legislation

divides mineral rights into two phases - prospecting and mining phase,. A prospecting phase restricts the rights of the mining rights holder to prospecting only.

The provisions of s.38 principally deals with the marketing of minerals during the prospecting phase. Section 38(1) empowers the Mining Commissioner to issue a permit authorising the removal of mineral samples from the site of the prospecting operations. This aims to achieve two main objectives: (1) it prohibits the removal from the site of prospecting operations of any minerals which have been recovered in the course of prospecting, and (2) it prohibits the disposal of such minerals without obtaining a permit issued by the Mining Commissioner. In addition, s.38(3) of the Ordinance states that "no base mineral sample weighing more than ten pounds shall be sold: provided that the mining commissioner may issue a permit for the sale of samples weighing more than ten pounds <u>on good cause shown</u>".[1]

S.38(b) makes it an offence to contravene the provisions of the Ordinance. In addition, it empowers the Mining Commissioner to "demand from the persons concerned payment of the value of the minerals which have been unlawfully removed or disposed of or may confiscate such minerals for the benefit of the Minister and may further declare forfeited the claim from which such minerals have been recovered, and if such amount is not paid the Mining Commissioner may institute

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[1] my emphasis

civil proceedings for its recovery". S.38(4) prohibits any person from receiving or purchasing minerals from any person unless the seller is in possession of a permit issued by the Mining Commissioner. The buyer is also required to obtain a permit from the Mining Commissioner if such minerals are exported abroad.

In this chapter and in Chapter IV, we have extensively relied on the information of the Thirion Commission. Therefore, for the interest of the reader, it is necessary to explain the background to the Commission. It was appointed in 1982 by the colonial administration to investigate allegations of administrative corruption in Namibia. A Supreme Court judge from the Republic of South Africa was appointed as its chairman. The Commission extended its terms of reference to include the mining industry because of the relationship between the industry and various government control boards such as the Diamond Board.

The Commission was required to report to the so-called Administrator-General on its findings and to make recommendations to him regarding "'(a) any steps which ought to be taken against any person or body as a result of or arising from the findings of the Commission; (b) the steps which in the opinion of the Commission ought to be taken to rectify any irregularity, overstepping of powers, misappropriation or misapplication found by it or the consequences thereof, and to prevent the repetition thereof; (c) the steps which in the opinion of the Commission ought to be taken to eliminate any shortcomings ... (d) any other

matter concerning its terms of reference which the Commission may deem necessary or expedient.'"[2]

Among the personnel which assisted the Commission included Mr. Martin Grote, an economist, who was a research officer in the Department of Finance and the Director of the Department of Justice. Part I of the report deals with the Commission's investigation "of the exercise by State functionaries of the duties entrusted to them under statutes dealing with control over prospecting and mining and the disposal and export of minerals."[3] The report also deals with the adequacy or otherwise of the current measures and institutions for regulating marketing of minerals and taxation of income from the sale of minerals.

In the course of the investigation, the Commission examined a number of documents and files. These included files of the Mining Commissioner, reports of the Inspector of Mines, deeds of grant relating to prospecting and mining rights and minutes of the Diamond Board. According to the Commission, "Non-contentious matters were dealt with by way of informal discussions with officials and the Receiver of Revenue. Matters of a contentious nature were dealt with at public sessions of the Commission at which witnesses were required to give evidence."

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[2]See Thirion Commission p.2.

[3]ibid.

Among the chief witnesses included Gordon Brown, a former employee of CDM. He worked for the company from June 1968 to June 1983. "For the first five years he was employed as a mining supervisor. Thereafter, for another period of five years he was employed as a works study officer in management services and for the last five years he was a technical assistant to the general manager."[4] His evidence included the allegation of overmining by CDM. He alleged that CDM overmined both in stone size (carats per stone) and grade (carats per M^3). He also alleged that overmining was the consequence of the unrealistically high production targets set for CDM by the De Beers Board of Directors. During the proceedings, the Commission was guided by the principle established in Dukes v. Marthinusen,[5] namely that if witnesses or experts are called "by both sides to express their views and their bona fides is not attached ... it is the function of the judge to appraise the value of their testimony." The most important aspect of Brown's evidence is that CDM's own documents "prima facie corroborate every aspect of [his] evidence."[6]

The Commission found irregularities in a number of public bodies and also in a number of mining companies. CDM was heavily criticised. As the Economist put it, "What is De Beers' case for the defence? Part of its problem in this

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[4]See Thirion Commission, (1985), p. 253.

[5](1937) AD 12, see also Thirion Commission, (1985), p. 317.

[6]See op. cit, Thirion Commission, p. 280.

issue is its obsessive secrecy. In 1984, when it was already evident that Mr. Thirion was coming to harsh conclusions about CDM, De Beers agreed that its senior management could give evidence but only in camera. The judge said no it must be in open court."[7] According to the Financial Times, "De Beers, which has frequently complained bitterly about its inability to make representations to the Thirion Commission, refused to allow the Commission's investigators to examine accounts which would have confirmed or refuted strong allegations of transfer pricing by the diamond company."[8]

In practice, the provisions discussed above are not enforced because the colonial administration is not interested in exercising any control over mining activities. This conclusion was confirmed by the Thirion Commission's Report[9]. The Commission reported that the "mining commissioner confirmed in evidence that it is not the practice of his office to confine permits under section 38(3) to quantities of mineral samples weighing not more than 10lbs or to require good cause to be shown before granting a permit for the sale of a mineral sample in excess of 10lbs. The provisions of the proviso to section 38(3) have therefore to a large extent

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[7]See The Economist, London, (1986), 15 March, pp. 76-81 at p.81 col. a.

[8]See The Financial Times, London, (1986), 18 March, p.36, col. a.

[9] see Thirion Commission, (1985), Eighth Interim Report.

become a dead letter".[10] This incompetence and complicity has enabled the mining companies to take advantage of the situation.

According to the findings of the Commission, during the five year period, 1979-1983, the mining companies removed 51,605 tonnes of mineral "samples", i.e., 10.321 tonnes per annum.[11] On top of the list were two companies, Tsumeb Corporation Ltd and Omitara Mines (Pty) Ltd. Tsumeb Corporation Ltd is reported to have exported large quantities of mineral "samples" to overseas markets where they fetched high prices.[12] During the three year period, 1978-1980, Omitara Mines (Pty) Ltd exported 420.252 tonnes of "samples" to France[13] close to 100 tonnes at a time.

As we have noted above, the rights of the prospectors are limited and restricted to prospecting only. At the prospecting phase, the colonial administration is still the legal 'owner' and holder of the title to all minerals. The legal consequences of the prospecting phase are that, technically, the administration at this stage owns any minerals which are discovered by prospecting licence holders and discovery does not give the holders of such licences any rights. This also applies to the mineral samples which are

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10 see Thirion Commission, Eighth Interim Report, 1985, p.37

11 ibid., p.40

12 ibid.

13 ibid., p.37

removed by the prospecting licence holders. It is also arguable that the State being the 'owner' of all minerals during this phase, is entitled to maintain all legal and equitable actions for actual or threatened injury that are accorded to owners of property at common law. This is in addition to the provisions of the Ordinance which make it an offence for any person to exercise any mining right without the consent of the Mining Commissioner. The Mining Commissioner is also entitled to institute civil proceedings for the recovery of the minerals.

In terms of s.38(1), the Mining Commissioner is empowered to issue mineral sample permits subject to such conditions as he may deem fit. The main aim of s.38(1) which also authorises ore samples to be removed from the site of prospecting (subject to the Mining Commissioner's permission) is only to enable such samples to be identified, assayed or analysed. Therefore, it is open to the Mining Commissioner to insist that the companies should furnish him with the information relating to the nature of the mineral samples, their value, and their destination. It is submitted that although the Mining Commissioner is empowered under s.38(3) to authorise the sale of base minerals samples weighing more than ten pounds under certain conditions, the main purpose of the section is to deal with mineral samples required for test purposes (i.e., chemical or metallurgical testing). The key word of the section is the word 'sample'. The Shorter Oxford English Dictionary defines the word sample as "a relatively small quantity of material from which the quality of the mass, group, species etc., which it represents, may be

inferred". The removal of 100 tonnes of mineral 'samples' at a time compared with the statutory limit of 10 pounds can hardly qualify within the true construction of the section.

In addition, since the permit issued under s.38(3) is valid for 12 months, it has been abused by the mining companies since there is nothing to prevent them from using the same permit over and over during the period of its validity, apart from the requirement that each sample should not weigh more than 10 pounds. Indeed, as we have already pointed out above, even this limitation has not been observed by both mining companies and the mining commissioner. The loophole could easily be rectified by requiring a permit for every consignment of mineral samples sent abroad instead of the current situation where the permit is valid for a year without any significant restrictions being imposed on prospectors. The only reason why the State has taken no action could be the considerable influence of the mining companies. It is reported that from 1979 to 1983 "mining companies exported on average 10,321 tonnes"[14] of mineral samples per annum. Therefore, minerals extracted during the prospecting phase have been turned into "a flourishing trade in mineral 'samples'".[15] These findings led the Thirion Commission to the conclusion that "one has here yet another instance of minerals of which the State is the owner, being

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14 op.cit., Thirion Commission, p.40

15 ibid.

sold without the State having obtained a proper recompense or compensation".[16]

Apart from the legal controls discussed above, the Ordinance contains provisions whose main objective is to control the disposal of minerals during the mining phase. Under s.44(2), the owner of the mining area cannot dispose of any minerals mined in the area except under the authority of the Mining Commissioner. Section 87 obliges the producer of any precious metal to sell the metal through a commercial bank and to render to the Mining Commissioner an assay certificate showing the price and quantity of such precious metal and a duplicate note from the bank. Finally, s.88(1) prohibits the export of any precious or base minerals without an export permit issued by the Mining Commissioner.

The statutory provisions discussed above aim to achieve three main objectives: first, that the Mining Commissioner keeps control over all minerals mined in the Territory, from the prospecting phase through to the mining phase; second, that the colonial administration has adequate powers to control and combat illegal mining by unauthorised persons; and third, that all Namibian minerals are sold at market-related prices so that the State can get its fair share of company profits through taxation. As the Thirion Commission concluded, in

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16 ibid.

practice, the "efficacy of these provisions to achieve either of those aims is questionable".[17]

It should be noted that these statutory provisions are only designed to protect the interests of the mining companies from the illegal diggers, especially with regard to precious stones. A number of companies are also involved in the export of by-products such as silver and/or gold."[18] As an example, Tsumeb Corporation exported 69,734kg of silver, and 22,184kg of gold in 1983 alone.[19] In addition, although s.88 obliges the exporter of Namibian minerals to produce an export permit issued by the Mining Commissioner to the stationmaster (in the case of export by rail) at the place of consignment; collector of customs at the port where the minerals are shipped (in the case of export by sea); and to the postmaster (in the cases of export by post), the section does not cover instances where minerals are exported by road or air. This loophole significantly reduces the effectiveness of the permit system especially in the case of precious stones and metals which can easily be exported by air to overseas markets. In addition, Namibian minerals can easily be exported by air or road to South Africa where they could be shipped to overseas markets in order to avoid the application of s.88. It is therefore not surprising that the

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17 this is the conclusion reached by the Thirion Commission, see particularly p.102 of the report

18 ibid., p.103

19 ibid.

Thirion Commission concluded that the "implementation of the system has become largely a purposeless formality".[20]

Apart from the limited control of the colonial administration discussed above, one additional factor for its weakness is the nature of the mining agreements which multinational mining companies have been able to secure. The trend has been to secure comprehensive agreements covering all aspects of the company's operations over a long period of time. Most mining agreements in Namibia have the effect of treating mining companies under the terms and conditions which require little regulation and decisions by the colonial administration. The most notorious mining agreement is the Halbscheid Agreement discussed in Chapter I regarding the exploitation of Namibian diamonds. De Beers sought as far as possible to escape subjection to general legislation and general administration applying to other minerals. This is one of the factors which puts CDM (De Beer's operating subsidiary company in Namibia) in a privileged position. The full significance of such privilege will become clearer as we examine the content of the Halbscheid Agreement in Chapter IV.

3 MARKETING OF DIAMONDS

De Beers was established in 1888 (by Cecil Rhodes a South African immigrant from Britain) after the amalgamation of two

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20 ibid., p.105

diamond companies, Kimberley Central and the French Company.[21] In order to gain an advantage over its rivals, De Beers managed to centralise and control the marketing of diamonds. According to Lanning, the company entered into a contract, in 1890, with a group of London diamond merchants and assigned them the sole marketing rights. They included some of the most influential and dominant such as Wernher Beit and Company; Barnato Brothers; Rosenthal and Sons Company; and A. Dunkelsbuhler and Company.[22]

However, De Beers' dream of monopolising the diamond industry could only be achieved if it also controlled production not only in South Africa but also in important diamond mines of Africa. To this end, its object was "'to acquire by purchase, amalgamation, grant, concession, lease ... any houses ... farms, mines ... waterworks or other works ... diamonds and other precious stones, gold and other minerals ... machinery, plant ... patents for invention ... to carry on the business of miners in all its branches ... To acquire any tract or tracts of country in Africa or elsewhere ... To treat with rulers or governments of any country for the acquistion by the company of benefits or valuable rights.'"[23]

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[21]See Lanning Greg with Mueller Marti, (1979), Africa Undermined - Mining Companies and the Underdevelopment of Africa, Penguin Books, p. 41.

[22]ibid.

[23]ibid., quoted from Paul Emden, (1935), The Randlords, Hodder and Stoughton, London, p. 260.

Remarkably, most of De Beers' objectives were achieved. Close associations with diamond producers such as Angola and Zaire were established. After the First World War, a major coup came when De Beers managed to obtain a diamond concession (through the conclusion of the Halbschied Agreement discussed in Chapter I) in Namibia. It is stated that in negotiations "with the Union government, Oppenheimer [Ernest Oppenheimer, the father to Harry Oppenheimer the current Chairman] emphasised his South African connections and pointed out that most of the capital for Consolidated Diamond Mines came from South African residents. He won the contract on condition that 'your corporation and those who are associated with you in this matter undertake to work the assets of the companies you are acquiring at all times, with due and proper regard to the interests of the Union government and of the Territory of South West Africa.'"[24]

After the diamond concession was obtained, the first major task was to integrate both buyers and producers into one organisation. De Beers established the Diamond Corporation in 1930 whose main task was (and still is) to sign long-term diamond marketing contracts with producers outside South Africa. Finally, to "prevent future clashes with the South African government and the Administration of South West Africa [as Namibia was then called], Oppenheimer persuaded the two governments to become members of the Diamond Producers Association in 1934."

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[24] ibid., p. 58.

One of the principal problems for Namibian diamonds is to establish whether or not the country is receiving a fair price. Diamonds come in a wide range of sizes and qualities, and valuation is a highly skilled task which Namibians do not possess. It has proved difficult for the Diamond Board to check the assortment and valuation of diamonds. Since Namibian diamonds are controlled by de Beers, and since the diamond industry requires great skill and expertise, De Beers has used its position to gain the maximum profit from Namibia's diamond industry. Apart from controlling the Namibian diamond industry through CDM, De Beers controls a substantial part of world diamonds. As a result, it is in a position to set the price of diamonds without worrying about being undercut by other diamond producers. The only primary consideration of the company is what the market can bear.

De Beer's main interest is to manipulate the price of diamonds by controlling its production throughout the world. In the late 1860s, alluvial diamonds were discovered in South Africa. In 1871, the great Kimberley pipes were discovered. As for Namibia, gem diamonds were discovered in large quantities in 1908, thus, by the turn of the century, there was a possibility that world markets would be flooded with diamonds, thus, bringing down its price. During the German colonial period, Namibian diamond production threatened De Beer's dominant position. The company made several unsuccessful attempts to gain control of the Namibian diamonds, even to the extent of attempting to buy the diamond

fields.[25] What worried De Beers during the German colonial period was that instead of selling the diamonds through De Beers, a contract was made between the German Government and the Belgian syndicate, Coetermans-Kryn-Walk. The syndicate composed of three large firms based at Antwerp to which the exclusive right to cut all diamonds produced in Namibia was reserved.[26] During this period, Antwerp was the principal market for diamonds. In 1911, there were 16,000 workmen employed in the various branches of the diamond industry, 300 diamond cutters, 200 brokers and 300 manufacturers. In contrast, Rotterdam, which was the principal rival, employed 8,000 workmen.[27] De Beers eventually managed to convince the German Government to form a cartel in order to protect the diamond industry from falling prices.

In 1913, an agreement was reached in London between the managers of De Beers and Dr. Solf, the German Imperial Secretary of State for the Colonies to cooperate in the production and sale of diamonds in the world market.[28] Notwithstanding the fact that the German colonial occupation did not last long after the discovery of diamonds, 2,130,000 carats valued at £8.500,000 British pounds were produced from

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[25] see The Times - London, 26 December, 1908, p.4, col.a. It was speculated that a British company wanted to buy the diamond field for £125,000 within a year of their discovery

[26] see The Times - London, 10 April, 1912, p.14, col.c.

[27] ibid.

[28] see The times - London, 12 November, 1913, p.19, col.f

1909 to 1914.[29] Within two months of their discovery in July 1903, 2,720 carats were produced. The monthly production from September to December was 6,644; 8,621; 10,228; and 11,549 carats respectively or 39,762 in total. This amounted to about £55,000 in value.[30] The rate of production increased considerably during the subsequent years, e.g., from February 1910 to 31st March 1911, diamond output amounted to 813,323 carats. During the same period, a total of 798,865.5 carats were sold for 21,389,456 marks (roughly £1,065,000).[31]

3.1 The Diamond Board and Marketing Contract

The terms under which mining companies exploit mineral resources in Namibia are often embodied in written agreements. Although some of these agreements are secret, some have been made public such as the Halbscheid Agreement regarding diamond concession rights acquired by CDM. In this section, we examine the provisions of this agreement insofar as it relates to the marketing of diamonds. In order to understand the legal implications of the agreement, reference must be made to the establishment and functions of the Diamond Board in Namibia.

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29 see Leake S. Hangala, Structure of Namibian Mineral Industry, p.26

30 see The Times - London, 23 January, 1909, p.8, col.a

31 see The Times - London, 24 May, 1912, p.22, col.a.

The Diamond Board was established in 1921 by the Diamond Board Establishment Proclamation of 1921. After the repeal of this Proclamation in 1939, another proclamation called the Diamond Industry Protection Proclamation 17 of 1939 was promulgated. Section 4 of the proclamation sets out the functions of the Board. These include the following: "4.(1) to supervise the carrying out of all interproducer's agreements and all sales agreements, and all sales of diamonds; ... (c) to attend to the receipt, valuation, transport, insurance and assortment of diamonds sold; (d) to collect and receive from the purchasers the records of sales under all sales agreements and the moneys due thereunder ...; (e) to advise the Administrator on the question of terminating any interproducers agreement or sales agreements; (7) Every producer, shall whenever called upon in writing to do so by the Board, or the Inspector of Mines for the Territory or any person authorised by him, forthwith deliver all diamonds produced by him to the Board ... (8) no person other than the Board shall export any diamonds from the Territory".

Section 9(1) states that no person other than the Administrator (now the Administrator-General) is authorised to sell or dispose of any diamonds won in the territory. The sale or disposal of any diamonds in contravention of the section is void and of no effect. Finally, section 10 states that the "Board shall not, save on the written authority of the Administrator, deliver or allow any diamonds to pass out of its possession, except in pursuance of a contract of sale

entered into in S.W.A. by the Administrator exercising the powers conferred upon him by section nine...".

3.1.1 Namibian diamonds and the Central Selling Organisation

To appreciate the manner in which the Diamond Board fulfils its statutory functions, it is necessary to explain how Namibian diamonds reach the world market. Namibian diamonds contribute a significant share of De Beer's profits and are vital to De Beer's monopoly position in the diamond industry. Diamonds from Namibia and South Africa, which together form the Diamond Producers Association, pass to the central Selling Organisation - a collective name for a group of De Beers controlled companies. In order to preserve its dominant position, De Beers encouraged the formation of the Diamond Producers Association (DPA). The members are the South African Government (in its capacity as producer through the State Alluvial Digging company), De Beers, CDM, the Namibian administration, and the Diamond Corporation Ltd. The DPA was established in 1934 to coordinate the sale of diamonds produced in South Africa and Namibia. It is managed by a board of seven, two from De Beers, two from the Government of South Africa (one of which is to be the chairman), one each from the Diamond Corporation, CDM and Namibian administration. Its main objects are (1) to receive and sell diamonds from its members; (2) to regulate the value

of gem diamonds from its members; and (3) to advise its members on the regulation of the production of diamonds.[32]

All Namibian diamonds go through the DPA before they reach the international market. From Namibia, all diamonds have to go to South Africa where they are handled and sorted by companies controlled by De Beers. As a result, Namibian diamond sales are adversely affected in two ways. First, CDM sells the diamonds to De Beers group of companies at prices which are markedly lower than those prevailing in the world market; and second, Namibian diamonds are sorted by the De Beers group of companies. This is significant because each quality category has a different price tag. There are about two thousand quality categories with the price range of $1.70 to more than $3,500 per carat.[33] As a consequence of diamond sorting by De Beers, Namibian diamonds are undervalued. By contrast, other diamond producers outside South Africa who have close ties with the CSO employ independent expert diamond valuers to grade their diamonds.

Countries such as Tanzania, Angola, Sierra Leone, Botswana and Zaire have either trained their own citizens to undertake the valuation of diamonds, or have contracted independent valuers.[34] In Botswana, the government established a company

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[32] for a detailed discussion see the Thirion Commission, op.cit., p.174

[33] op.cit., Leake S.Hangala, Structure of Namibian Mineral Industry, p.26

[34] op. cit. Lanning Greg with Mueller Marti, (1979), Africa Undermined, p. 420.

called Botswana Diamond Valuing Company (BDVC). It is 55 per cent owned by the government through Batswana Development Corporation, and the rest of the shares are held by De Beers.[35] It is stated that the company "trains Batswana in diamond-sorting and diamond marketing techniques at the London headquarters of the De Beers Central Selling Organisation".[36] After sorting and valuing the diamonds, they are sold to the CSO "under joint supervision by De Beers and Government valuers. Diamonds are sorted and valued against a sample parcel and price book prepared by the CSO. Both the sample parcel and the price book are reviewed from time to time to ensure that they are in line with the market and the government valuer has full access to them."[37] In addition, the Government maintains regular consultation with the CSO through "Marketing Meetings where senior Government officials who deal with minerals (Minerals Policy Committee) [are] briefed on the status and problems of the market as well as CSO regulatory policies."[38] Perhaps the most important development is that De Beers Botswana Mining Company Ltd, a joint venture held equally between the Government and De Beers, acquired 5 per cent interest in De

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[35]See Hartland Thunberg Penelope, (1978), Botswana: An African Growth Economy, Westview Press, p. 50.

[36]ibid.

[37]See Marole B. (1987), "DEBSWANA JOINT VENTURE: A Case Study", paper presented to a Workshop on Negotiating with Transnational Corporations in the Mineral Sector and Regulating Mining Operations, 13-17 October, Chobe, Botswana, United Nations Centre on Transnational Corporations, New York, pp. 1-8 at 7.

[38]ibid, p.6.

Beers. This entitles the company to two seats on the board of De Beers and other CSO companies. The arrangement enables the Government to obtain information and consultation on matters relating to the diamond industry. Moreover, it has an opportunity, through participation at the board and other meetings, to contribute towards decision making and to ensure that its interests are protected.

In Sierra Leone, the Government Diamond Office (GDO) undertakes the sorting of diamonds.[39] It is also reported that a company called Precious Minerals Marketing Company (PMMC) has recently been established in Sierra Leone.[40] Its main functions are to deal and export alluvial gold, diamonds and other minerals. Finally, in Zaire, the government is advised by a Belgian diamond merchant.[41]

Therefore, it is clear from the above discussion that unlike Namibia, other countries have managed to establish their own sorting organisations by training their own nationals. It is, however, submitted that they are not yet in a position to match De Beers' considerable expertise. It has been stated that when "the diamonds have been sorted in the country of

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[39]See Ralph Gerald Saylor, (1967), The Economic System of Sierra Leone, Duke University Press, Durham, N.C. p. 137. For further details on West African diamonds, see Greenhalgh P.A. L. (1985), West African diamonds 1919-1983: An Economic History, Manchester University Press.

[40]See British Overseas Trade Board, (1985/86), Hints to Exporters - Sierra Leone, p.20.

[41]op. cit. Lanning Greg and Mueller Marti, (1979), Africa Undermined, p. 420.

origin they still have to be checked by the CSO, which naturally will concentrate on correcting mistaken over-valuation, while being less anxious to remedy undervaluation."[42]

The situation is made worse by the fact that the Namibian Diamond Board exercises little control over the marketing of diamonds notwithstanding wide powers conferred to it by the Diamond Industry Protection Proclamation 17 of 1939. Indeed, this Proclamation has become an instrument which consolidates De Beers' monopoly control over the diamond industry. The Diamond Board is in fact staffed by De Beers' employees. The Board does not employ ordinary administrative personnel, instead, it employs a number of accredited agents to carry out its administrative functions. As a result, De Beers has considerable influence over the activities of the Board. As the Thirion Commission discovered, the Secretary of the Board is the "manager of De Beers ... and also company secretary of CDM and alternate director of CDM".[43] At the diamond field in Orangemund, the Board has a "local secretary, an assistant local secretary and two additional assistant local secretaries - all four being full-time employees of CDM. In London the Board has ... two deputy agents who are managers of CSO Valuations (Pty) Ltd, a De Beers company. At Cape

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[42] ibid.

[43] op.cit., Thirion Commission, p.181

Town [in South Africa] the Board has three agents; all of whom are employees of De Beers Marine (Pty) Ltd".[44]

Therefore, close relationship between the Diamond Board and De Beers is exceptional given the fact that one of the Board's main functions is "to advise the Administrator-General on the question of terminating any sales agreements".[45] Indeed, we may pose a question, can the Board which is dominated by De Beers' employees advise the Administrator-General to terminate a sales contract with De Beers if it turns out that Namibia does not get an equitable benefit from such a contract? It should be obvious that there is a clear conflict of interest in the present arrangement and yet, according to the Board's Chairman, the members of the Board "are all appointed by the State."[46]

The question to be raised is that why should the State appoint the Board's personnel who are almost all De Beers' employees when their duty is supposed to monitor the activities of De Beers' group of companies? According to the Chairman of the Board, he does not see any such conflict of interest. He goes on to state that "Some of your questions were critical of the fact that the Secretary of the

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[44] ibid.

[45] S.4(1)(e) of the Diamond Industry Proclamation No. 17 of 1939.

[46] See the Diamond Board Chairman's letter of 5th August 1982 in the appendix, p. 2, first paragraph line 4.

Diamond Board is an employee of De Beers and that the Board's Offices are those of CDM. We are satisfied that this is the most efficient way of handling the secretarial affairs of the Board."[47]

Notwithstanding the above criticisms, it is realised that it is generally difficult to effectively monitor the diamond industry given De Beers' dominant position. Diamonds are classified in two thousand quality categories, each with a different price tag. It would be unrealistic to expect the Board which does not have qualified personnel to monitor the diamond industry 100 per cent. Furthermore, the problem of effective monitoring is not unique to Namibia. However, what distinguishes Namibia from other diamond producers is the fact that other countries have taken steps aimed at minimising their weak bargaining position. Indeed, even Botswana which has quite recent diamond industry has strived to control the industry by training its own nationals. This enables the government to influence the industry from production right through marketing. The Government has also taken steps to monitor De Beers thorugh board representation in the operating joint venture company. These steps are significant and have gone a long way to reduce these countries' weak bargaining position.

The Cape Town agents are responsible for taking possession of all the diamonds which are won in the territorial waters by

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[47] ibid.

De Beers Marine Ltd, a wholly owned De Beers subsidiary. Once the diamonds reach Cape Town, they are sorted according to their size, value and colour. Diamonds from CDM are sent to Kimberley by the Board's agents. It is clear therefore that in practice, the Diamond Board is making use of the services of De Beers and its subsidiary companies "for the purpose of performing its control functions in respect of these companies".[48] Once diamonds reach South Africa, they are handed over to CSO Valuation Ltd. for assortment in terms of its contract with CDM. It should be noted that CSO Valuation Ltd. is also De Beers controlled company. In South Africa, Namibian diamonds become part of the Diamond Producers Association.

All the diamonds acquired by the DPA from its members are sold to The Diamond Purchasing and Trading Company Ltd. (PURTRA),[49] which is 53 per cent owned by De Beers. PURTRA in turn sells the diamonds to The Diamond Trading Ltd (DITRA), and finally, DITRA sells the diamonds at its ten 'sights' annually in London to buyers who are selected and approved by De Beers. As a result of this arrangement, PURTRA receives a 10 per cent commission on the diamonds which it buys from DPA.[50] The contract establishing the DPA is the basis of De Beer's Central Selling Organisation (CSO), the body which controls the sale of diamonds in the world

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48 ibid., p.183

49 the arrangement is contained in clause 14 of the contract

50 op.cit., Thirion Commission, p.180

market of the capitalist countries. It is estimated that CDM currently produces about 26 per cent of the CSO each year.[51] As Table III:1 below illustrates, the diamond industry is by far the most strictly controlled of the world's commodity markets. De Beer's main objective was to establish a powerful monopoly. It is stated by the company that the "policy of De Beers as leader of the diamond industry is to maintain the long-term stability and prosperity of the industry as a whole. To that end De Beers established and built up the Central Selling Organisation (CSO)".[52]

It is estimated that between 80-85 per cent of gem and natural industrial diamonds are marketed by De Beer's CSO.[53] Apart from Namibia and South Africa, other major diamond producing countries outside the socialist countries are Botswana (50 per cent State-owned); Zaire (MIBA - 100 per cent State-owned); Angola (DIAMANG - 61 per cent State-owned); Sierra Leone (DIMINCO - 51 per cent State-owned); Ghana (Consolidated African Selection Mine - 55 per cent State-owned); and Australia.[54] Other less important African producers are Tanzania, Lesotho, Ivory Coast, Guinea, Liberia

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51 see Greg Lanning with Marti Mueller, Africa Undermined, (Penguin Books, 1979) p.406

52 see De Beers Consolidated Mines Ltd Annual Report, 1982, p.48

53 see US Department of the Interior, Bureau of Mines Bulletin, 671, Mineral Facts and Problems (1980 Edition) p.349

54 op.cit., Greg Lanning with Marti Mueller, Africa Undermined, p.401

and Central African Republic.[55] There are three channels through which natural diamonds reach the CSO. First, diamonds which are produced in Namibia and South Africa are channelled through the DPA. Second, long-term contractual sales by foreign producers - such as Zaire, Angloa, Tanzania, Botswana, and Sierra Leone - are handled by The Diamond Corporation Ltd (wholly owned by De Beers) or its subsidiaries or related companies. In 1982, De Beers also entered into an agreement with the Argyle diamond mine, in Western Australia, to market 95 per cent of the diamonds through CSO.[56] Third, some of the diamonds are bought on the open market (some of these are from central and west Africa) through De Beer's associated companies. For further details on the CSO see Table III.1.

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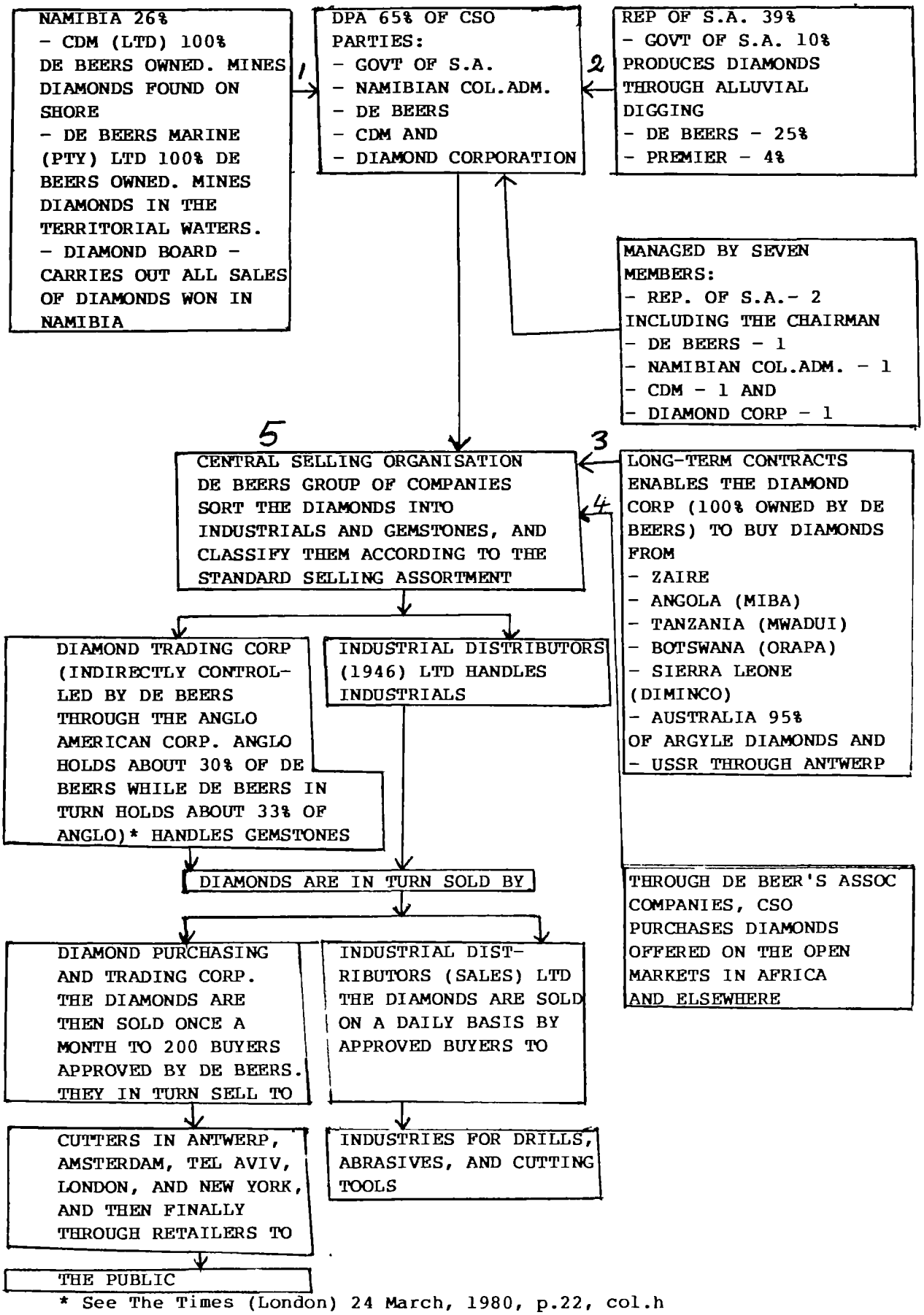
55 ibid.

56 see Chamber of Mines Report, Namibia 1982, p.7

Table 111.1

THE WORLD DIAMOND TRADE



* See The Times (London) 24 March, 1980, p.22, col.h

Source: Based on information from G Lanning and M.Mueller, (1979), Africa Undermined, pp.400-421; Thirion Commission, (1985), pp.180-181; U.S.Dept. of the Interior, (1980), Bureau of Mines Bulletin - Mineral Facts and Problems, p.349; Chamber of Mines Report, (1982), Namibia, p.7; and De Beers Consolidated Mines Ltd., (1982), Annual Report,, p.48.

3.1.2 Evaluation

The arrangement discussed above shows that the distinguishing feature of De Beers in relation to other mining companies operating in Namibia is that it owns and controls productive and distributing channels of Namibian diamonds. Its subsidiary companies (CDM and De Beers Marine Ltd) operate in an integrated manner and are subject to centralised decision-making by De Beers. As a result, it is submitted that De Beers is in essence dealing with itself. It is able to fix diamond prices from its Namibian affiliates without making use of the machinery of the ordinary market. These transactions are based on an arbitrary system of intra-company transfer pricing designed to maximise advantages to De Beers by shifting tax from Namibia. However, it is submitted that other companies are also involved. For instance, Tsumeb failed to report silver and gold content of blister copper it exports for refining. It is stated that as a result, "the Namibian authorities have been unable to verify independently how much Tsumeb earns from precious metals. The amounts were not small. In 1983 alone, 103.18 tons of silver were recovered from Tsumeb's blister copper and lead ingots. Apart from tax avoidance, the same companies appear to have made wide use of transfer

pricing devices to limit that part of their income which would be counted as generated and taxed in Namibia."[57]

The Thirion Commission found several cases in the minutes of the Diamond Board in which transfers and exchange of diamonds between De Beers and DICORP had taken place. It also found that in some cases, diamonds were sent to South Africa for sawing before sale. In all these cases, no export duty was paid.[58] The Commission also concluded that unless "the Board's control extends all the way from the production site to the sorting table and from there to the final sale and is exercised by persons who are independent of the producer, the purported control remains a sham".[59] The Halbscheid Agreement between CDM and the colonial administration gave De Beers an added advantage. CDM was granted a diamond concession in an area covering 3.5 million hectares or 36,000 square kilometres.[60] The area covers one of the richest gem diamonds in the world. Thus, in securing access to the Namibian diamonds, De Beers succeeded in securing exclusive access by legally monopolising control over the diamonds.

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[57] See Financial Times, London, 1986, March 18, p. 36, col. a.

[58] op.cit., Thirion Commission, p.197

[59] ibid., p.185

[60] see Windhock Observer, - Namibia, 6 July, 1985, p.27, col.c.

3.2 Diamond Profits

De Beer's investment in Namibia is by far the most important to its profits. Table III:2 below shows CDM's contribution to De Beer's profits after tax. It should be noted that these figures do not give the real extent and nature of CDM's profit contribution to De Beers. A number of factors such as transfer pricing, tight secrecy in the diamond industry, elusive and misleading information published by CDM must be taken into account.

According to Hangala, total diamond production during the period 1953-1970 amounted to 44,766,325 metric carats. CDM expatriated a net profit after taxes of about US$1299 million.[61] As Table III illustrates, CDM is one of De Beer's most profitable companies. It is estimated that in "the five-year period to 1967, the annual profits of CDM ... averaged £7.5 million ... after tax. This is equivalent to an average rate of return of 500 per cent" on its original investment.[62] It is also stated that "in 1970, which was not a good year for De Beers, it made more profit than the twenty most profitable South African companies combined".[63] It is important to note that CDM contributed 40 per cent of De Beer's profits after tax during the same period (Table III:2

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61 op.cit., Leake S. Hangala, Structure of Namibian Mineral Industry, p.24

62 op.cit., Greg Lanning with Marti Mueller, Africa Undermined, p.472

63 ibid., p.447

TABLE III:2 - CDM'S PROFIT CONTRIBUTION TO DE BEERS

A 1956-1962

YEAR	DIAMONDS: VALUE IN US$ MILLION	NET PROFITS IN DE BEERS
1956	49	31
1957	47	28
1958	38	25
1959	43	31
1960	44	33
1962	32	43

B 1970-1979

YEAR	% OF GEMSTONE PRODUCTION BY DE BEERS GROUP MINES	PROFITS AS % OF DE BEERS GROUP AFTER TAX
1970	48	40
1971	44	33
1972	43	39
1973	42	41
1974	39	40
1975	41	42
1976	40	41
1977	41	45
1978	39	45
1979	31	40

Source: A Nicolas De Kun, The Mineral Resources of Africa (Elsevier Publishing Company - London 1965) p.165
B S.Hangala, Structure of Namibian Mineral Industry, University Printing Press, Helsinki, 1985) p.28

above. It is also important to note that Namibia produces 98 per cent gem diamonds which are more valuable than the industrial diamonds found in South Africa.

In addition, a number of other factors determine the profitability of CDM in Namibia, these include: (1) cheap method of extraction - there has been a trend towards an open cast system of mining. This trend can be attributed to several factors, e.g., surface mining yields a higher recovery rate than deep mining and does so more economically. (2) Cheap labour - African employees in Namibia are paid low wages.[64] (3) Favourable tax system - mining companies in Namibia pay low taxes than in any other country in Southern Africa. These issues are discussed in detail in chapter IV.

4 URANIUM

The maturity of the industrial revolution and the associated emergence of multinational companies in the capitalist countries created an entirely new environment for mineral exploitation, marketing, and use. The scale of operations, complexity of extraction, process, and technology grew. This resulted into mineral exploitation to become an elaborate chain of activities which included prospecting, extraction and marketing. In the case of uranium, processing, enrichment, and reprocessing was added into the list of

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[64] see report in the Sunday Times - London, 7 April, 1974, p.10, col.b.

activities. Mining legislation and regulation reflects this new development.

We have already noted in the proceeding chapter that the Atomic Energy Act of 1967 provides the South African Government with control of all uranium mined in Namibia. Section 2 vests the sole right to produce nuclear or atomic energy in the State. It also provides for the control of processing, enrichment, reprocessing, possession and disposal of source material. Therefore, by contrast with the case for other minerals, the 1967 Act gives the South African administration direct control of Namibia's uranium. Therefore, in discussing the Namibian uranium industry, a number of factors must be taken into account. It must be noted that unlike diamonds, details of uranium contracts are normally kept secret by all parties concerned. It is also difficult to provide a reliable overall assessment of the Rossing mine mainly due to political reasons.

RTZ has adamantly refused to reveal to whom and on what terms Namibian uranium is sold. In addition, although it is a British company, it has decided to shelter under s.30 of the Atomic Energy Act of 1967 which bans the disclosure of any information about South Africa's nuclear programme. The secrecy provision has resulted in even the Articles and memorandum of Association of Rossing being withdrawn from public scrutiny.[65] In addition, whereas export and sales

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[65] see Windhoek Advertiser - Namibia, 29 April, 1985

policies of countries such as Australia, Canada and the US are largely based on non-proliferation and peaceful use of nuclear energy, South Africa (not being a member or signatory to the Treaty on the Non-Proliferation of Nuclear Weapons) pursues its nuclear policy with practically no legal restrictions. The South African Government policies are therefore mainly concerned with maximising returns rather than with other issues such as nuclear proliferation and international security. This explains why South Africa is the most secretive among uranium exporters.

4.1 A brief history of uranium

Radioactive ores were mined long before uranium came to prove its potential. It is stated by Gray that "At first, radioactive ores were mined for radium, used for medical purposes; uranium was a by-product with limited use and less value".[66] Up to about 1912, the only uranium and radium bearing ores in the world were located in Czechoslovakia at Joachymsthal mines.[67] Other sources were later discovered in Colorado and Utah. In 1915, a third source was discovered in Africa in Zaire where Belgian prospectors discovered uranium and radium.[68] The Shinkolobwe mine in Katanga region of Zaire started production in 1921 by Union Miniere du Haut

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66 see Earle Gray, The Great Uranium Cartel, (McClelleland and Stewart, Toronto, 1982) p.16

67 ibid., p.17

68 ibid.

Katanga. Zairean uranium played an important role in manufacturing the world's first nuclear bomb.

During the early 1940s, the Shinkolobwe uranium mine was the largest source of uranium in the world. Towards the end of 1940, Union Miniere started shipping Zairean uranium to New York - USA mainly because the company feared that Germany might invade the then Belgian Congo. During the period when the Manhattan Project was under way (i.e., the project assigned to manufacture a nuclear bomb), 1,200 tons of Zairean uranium was used.[69] Later, uranium was discovered in Canada, Australia, South Africa, Spain, France, Gabon (in 1963 at Oklo and Mouna),[70] and Niger (in 1974).[71] Brazil and Argentina are among minor uranium producers.[72] Finally, extensive uranium exploration in developing countries has indicated potential commercial reserves in a number of countries such as Algeria, Mauritania, Senegal, Guinea, Togo,Nigeria, Ethiopia, Madagascar, Angola, Somalia, Zaire (the Shinkolobwe mine was exhausted in the early 1960s and closed down), Mexico, Peru, Chile, Bolivia and Colombia.[73]

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69 ibid., p.23

70 see UN Centre on Transnational Corporations, Transnational Corporations and Contractual Relations in the World Uranium Industry: A technical Paper, (United Nations, New York, 1983) p.26

71 ibid.

72 ibid.

73 ibid., p.58

After the Second World War, the major world powers embarked on an arms race to develop new weapons of mass destruction. In August 1949, the Soviet Union became the second nation to explode an atomic bomb, followed by Britain in October 1952.[74] The atomic bomb was followed by a more deadly and powerful bomb, the hydrogen bomb, and in November 1952, the US exploded the word's first thermonuclear device. This was followed by the Soviet Union in August 1953.[75] In addition to producing weapons, new technology revealed that electricity could be produced commercially from power plants utilising a controlled fission process.[76] It was later discovered that the amount of energy that could be obtained by this process was considerable, and as a consequence, nuclear power began to be seen by leaders in the East and West as the source of energy for the future. Multinational corporations also realised that nuclear power would provide an opportunity for massive investments and profits. This led to the emergence of the concept of the 'peaceful atom', as put forward by President Eisenhower's "Atoms for Peace" proposals in 1953.[77]

To the general public, the promise of a "peaceful atom" was very attractive initially because it added a ray of hope in a

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74 op.cit., Earle Gray, The Great Uranium Cartel, p.40

75 ibid.

76 see R.Rometsch, international Safeguards on the peaceful uses of nuclear material, (Nuclear Law Bulletin - OECD) vol.13, April, 1974, p.66

77 ibid., p.67

world entangled in a massive arms race. This led to a wide variety of corporations (both private and public) devoting their expertise to developing nuclear power. In June 1954, the Soviet Union became the first nation to produce electricity from nuclear power. This was followed by Britain in May 1956, and by the US in December 1957.[78]

4.2 Uranium Contracts

Once nuclear power proved to be a viable commercial enterprise, markets for nuclear power reactors spread to the Third World countries including South Africa. The racist South African regime began to undertake an ambitious nuclear power programme in order to lessen its dependence on imported oil, and thus, to be in a better position to cope with an oil embargo. Nuclear power today is big business. It requires a vast input of capital and expertise. It is for these reasons that companies which originally showed the most interest were those with large organisation and reserves of capital. Companies such as RTZ decided in 1966 to invest in Namibian uranium mining despite the fact that the territory is illegally occupied. Any misgivings about this illegality of South Africa's presence were set aside in view of the possibility of huge profits and protection from both the home country (Britain) and South Africa. A number of factors influenced RTZ to invest in illegally occupied Namibia.

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78 op.cit., Earle Gray, The Great Uranium Cartel, p.41

Before we discuss Namibian uranium contracts in detail, it is necessary to discuss uranium sales contracts generally.

4.2.1 Analysis of Sales Contracts

Most uranium industry trade is focused on uranium oxide. It is the nuclear fuel most commonly sold under contract. The next phase in the nuclear cycle is called Uranium Hexafluoride (UF6). Due to a number of factors, conversion of uranium oxide (U3O8) to UF6 is limited by technological constraints, as a result, few companies from developed countries operate the facilities which are located in developed countries. In 1983, there were less than 10 conversion facilities in the world, excluding socialist countries. Not a single one is located in the developing countries.[79] Furthermore, enrichment of UF6 is strictly controlled by national governments in which enrichment facilities are located. This trend is a continuation of government policy dating back to the period when the industry was exclusively used to manufacture nuclear weapons. Therefore, government control over enrichment processes restricts sales of uranium hexafluoride (UF6) and the enriched uranium. It is for this reason that the discussion in this section mainly refers to the marketing of uranium oxide (U3O8).

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[79] op.cit., UN Centre on Transnational Corporations, Transnational Corporations and Contractual Relations in the World Uranium Industry: A technical Paper, p.30

The uranium world market is highly concentrated in terms of both buyers and sellers. In 1983, Canada was the leading supplier followed closely by Namibia and South Africa.[80] Among the importers, Japan was the largest, followed by West Germany. It is submitted that developing countries do not enjoy a strong bargaining position mainly due to the fact that uranium production is concentrated in developed countries. In 1980, developed countries accounted for 80 per cent of non-socialist uranium production.[81] Most uranium sales contracts are regulated and distinguished by the time dimension and frequency of delivery. For the purposes of our discussion, three types of sales contracts have been identified namely, (a) spot sales; (b) short-term contracts; and (c) long term contracts.

A Spot Sales contracts

Spot sales contracts refer to those transactions which are made for a fixed price on a single occasion. It is important to note that, unlike in many other mineral commodities, there is no official spot market for the trade and pricing of uranium. In most cases, delivery of uranium oxide - which is usually traded in this way at the international market - usually occurs immediately or soon after purchase. The price which the purchaser pays is normally the prevailing spot price at the time

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80 ibid.

81 ibid., p.60

of signing the agreement. The other distinguishing feature of a spot sales contract is that each sale is under a new and different agreement, unrelated to any earlier sale.[82] Spot sales are, however, not significant because electricity authorities are likely to favour making firm forward arrangements for a large proportion of their anticipated uranium requirements so as to avoid the situation where attempts to obtain substantial quantities at short notice cause significant pressure on prices. Notwithstanding this potential disadvantage, spot sales still serve a useful purpose in that they help to smooth the relationship between supply and demand.

B Short-term Sales contracts

In contrast to spot sales, short-term uranium contracts are a bridge between spot sales and long-term commitments between the buyer and the seller. In addition, a short-term sales contract involves more than one uranium delivery by the seller to the buyer under the same contract terms over a short period of time, usually 18 months or less.[83] As we have seen above, although spot sales contracts allow both buyers and sellers maximum flexibility, they can work to the disadvantage of either party. They do not afford buyers

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82 ibid., p.105

83 ibid., p.106

with surety of supply and prices may work to the disadvantage of either party. The buyer is vulnerable when prices increase, while the seller is vulnerable when prices decrease. Finally, spot sales contracts may work to the considerable disadvantage of the seller in that he is not guaranteed an outlet.

It is also submitted that short-term contracts play a significant role due to the shortcomings of the long-term contracts. There are a number of factors which may work against long-term contracts. In trying to reach agreements on prices to be paid for uranium, considerable difficulties could be encountered. Cost changes arising from general inflationary conditions and from changes in exchange rates cannot be forecast accurately, and the possible advent of new uranium producers and the effects of change in mining and milling techniques are further complicating factors. Also consumers would not generally be in a position to make firm forward commitments for all their long-term uranium requirements, principally because of the possibility of changes in demand for electricity. In the long term, neither the uranium requirements in a given time period nor the rate of growth of requirements can be predicted with precision. Therefore, short-term contracts are used to redress the problems of extremities associated with both spot sales and long-term contracts.

C Long-term contracts

Both producers and consumers prefer long-term contracts (compared with short-term contracts) to cover a substantial proportion of their uranium transactions. As for producers, long-term contracts reduce many of the risks associated with the establishment and operation of mining and milling operations. Producers may also be able to obtain substantial advance payments on contracts or borrow against the income expected from contracted sales. Given the fact that there are more producers than consumers, most producers took steps to protect their industries. It is stated that to "protect their market share and provide for future outlets, uranium producers cultivated long-term relationships with the operating nuclear utilities. The logical outgrowth of this was the long-term sales contract".[84] Long-term contracts range from 2 to 20 years, with deliveries divided into a predetermined schedule of "equal allotment, based upon the known requirements of the buyer's facilities".[85] Deliveries may commence several years later after the contract is entered into, e.g., Rio Algom contracts entered into in 1974 had clauses which stipulated deliveries to commence in 1981, 8 years after the contracts were concluded.[86]

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84 ibid., p.107

85 ibid.

86 see Rio Algom Ltd Annual Report, 1979, p.4

In order to provide for flexibility, most long-term contracts incorporate a 'base' price, together with provision for renegotiation for adjustments to the base price to provide for general cost increases. This helps to protect producers from erosion of their 'real' profits. The parties normally base contract prices on a 'cost-plus' formula, so that prices paid would be adjusted to take account of actual increases in uranium mining and milling costs in the supplying countries. The practice in the early 1960s was to quote a fixed price in the contract.[87] Although this method resulted in stable prices and provided producers with protection of their market shares while at the same time enabling consumers assured supplies at known prices, increasing world uranium prices during the 1970s meant that sellers were losing considerable potential profits. In addition, producers were beginning to experience rising production costs. As a result, most long-term contracts began to incorporate clauses such as base price, market price, negotiated price and cost of production price.

Therefore, negotiated prices afford highly flexible pricing in response to both market circumstances and the particulars of each long-term contract transaction. A combination of price formulas discussed above are widely being used by Rio Algom, RTZ's subsidiary company

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[87] op.cit. UN Centre on Transnational Corporations, Transnational Corporations and Contractual Relations in the World Uranium Industry: A technical paper, p.108

operating in Canada. Most of the long-term contracts entered into in 1966 were mainly of the "base-price-plus escalation type".[88] Most of them were later renegotiated "to recognise changes in economic conditions". Finally, contracts entered into in 1974 provided for prices to be determined on an annual basis at the "higher of a minimum price and a settlement price to be determined in advance of each delivery year, taking into account free world market conditions for uranium oxide for the delivery year".[89]

4.2.2 Rossing Uranium Contracts

In May 1971, Rossing Uranium Ltd announced its intention to develop an open-cast uranium mine.[90] By 1975, all the details relating to the financing of the mine were completed[91] and the construction of the main processing plant was completed in June 1976.[92] The completion of the processing plant enabled its commissioning and commercial production of 771 tons of uranium oxide during the same year. Once Rossing became a commercially viable mine, RTZ started offering shares in the mine to potential customers with the added lure of long-term delivery contracts at fixed prices.

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88 see Rio Algom Ltd Annual Report, 1979, p.4

89 ibid.

90 see RTZ Annual Report and Accounts, 1971, p.33

91 ibid., 1975, p.34

92 ibid., 1976, p.32

Given the fact that uranium is a strategic mineral, most cutomers tend to be government agencies (i.e., State owned or controlled companies). This means that although privately owned comapnies such as RTZ mine uranium, contracts between sellers and buyers are usually settled at governmental level.

The first most important customer in RTZ's dealings was the British Government. As Grenada Television Ltd., World in Action programme stated in 1980,[93] "How Britain came to be involved in the Rossing contract is a mystery". Mr. Anthony Wedgwood Benn, the then minister responsible for the signing of the contract, alleged that the original 1968 contract was with RTZ's subsidiary company in Canada and Namibia became the source after a "secret" switch.[94] This position is supported by the Labour Party. It is stated that "The involvement with Namibian uranium began in 1968 when the AEA[95] was authorised to conclude a contract with Rio Algom (a Canadian subsidiary of RTZ) ... In early 1970 the contract was switched to Riofinez, a South African subsidiary of RTZ, to exploit deposits at the Rossing mine in Namibia."[96]

On the other hand, RTZ maintains that Namibia was always intended to be the source. RTZ's Alistair Frame put it in these terms: "the contract originally was with Rossing always

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[93]"Follow the Yellowcake Road" 10.3.80.

[94]ibid.

[95]Atomic Energy Authority.

[96]See the Labour Party (April 1981), Statement by the National Executive Committee, Namibia, p. 7.

was with Rossing and there was no attempt to switch."[97] Alun Roberts states that the British Government signed a "contract with RTZ for Namibian uranium" in March 1968.[98] In 1968, a contract was signed between the British Government and the company to deliver 7,500 tons of uranium oxide. This was to be delivered, initially, between 1976 and 1982, but technical problems and a fire which destroyed one plant at Rossing meant that the duration of the contract had to be extended to a date which is currently unknown. At the present moment, the exact duration of the contract is shrouded in secrecy although it is officially stated that it ended in December 1985. In a letter dated 18th July 1984, RTZ chairman, Anthony Tuke, stated that the "'date on which the CEGB contract with Rossing Uranium will terminate depends upon all the formalities of that contract being satisfied, and the CEGB will decide that. I cannot give you a specific date for this, ... we anticipate that these will be finalised in September or October this year'". In November 1984, a Foreign Office official announced that the contract would end "'early in 1985'". Again on the 21st January 1985, an official from the Department of Energy, Alastair Goodlad, gave a written reply to a parliamentary question stating that the "'contract with the Rossing mine has already terminated'". The same answer was repeated on 26th March

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[97] op. cit. "Follow the Yellowcake Road."

[98] See Alun Roberts, The Rossing File: The Inside Story of Britain's Secret Contract for Namibian Uranium, CANUC, p. 63, for a detailed discussion see particularly pp. 22-33. See also SWAPO of Namibia, (1982), Trade Union Action on Namibian Uranium, London, p. 24.

1985 stating that deliveries "'under the contract were completed in December 1984'".[99]

It has also recently been revealed by Mr Tony Benn, the former British Energy Secretary, that on 29th January 1976, the Cabinet amended the contract to increase the quantity by a further 1,100 tonnes. This means that the total amount of Namibian uranium was increased to 8,600 tonnes.[100] As Table III:3 illustrates, with Britain openly committed, other customers followed but until recently, their identities have remained secret. It later transpired that other customers include Japan, West Germany and France. Iran was also initially involved in the Namibian uranium. Its involvement was part of the late Shah's grant design to transform his country into a modern industrial power. Plans were made to build up a massive nuclear power programme. An estimated 20 nuclear power plants were to be built at a cost of US$30 billion.[101] This required a large amount of uranium, some of which was to come from Namibia.

Between 1975 and 1976, Iran contracted to buy 1,784 tons of Namibian uranium oxide at $27 a pound, considerably below the market price, at that time $40.[102] Other reports suggest

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99 see CANUC - Update on the CEGB - Rossing Contract, 1983-1985

100 see South, February, 1983, p.67

101 ibid., p.66

102 see The Times - London, 30 December, 1979, p.19, col.b.

Table III:3 Namibian Contracted Uranium Deliveries MTU

YEAR	BNFL (now) to CEGB	JAPAN	IRAN	FRG	FRANCE	TOTAL
1976	-	-	-	400	-	400
1977	630	690	-	800	-	2100
1978	630	1070	100	900	-	2690
1979	630	2010	100	1000	-	3740
1980	830	2310	(470)	1000	-	3940
1981	1250	2710	(1000)	340	110	4410
1982	1250	2810	(1000)	340	460	4760
1983	1250	2710	(1000)	340	850	5160
1984	1250	2710	(1000)	340	1380	5680
1985	1250	2710	(1000)	340	1380	4430
1986		3360	(1000)	340	1380	5080
1987		2380	(1000)		1380	3760
1988		2380	(1000)		1380	3760
1989		1150	(1000)		1380	2530
1990		1150	(1000)		1380	2530

Source: Michael C.Lynch and Thomas L.Neff, The Political Economy of African Uranium and its Role in International Market (Bendix Field Engineering Corporation, Grand Junction Co. (USA) March 1982, Unclas UN Ltd. 1982) p.36

that the total delivery of uranium contracted by the Shah was between 30,000 to 50,000 STU 308.[103] In addition, the Shah agreed to take a secret 15 per cent stake in the mine itself. The contract was subsequently cancelled when there was a change in Government. It later came to light that towards the end of 1979, the Iranian Government tried to dispose of Namibian uranium delivered to West Germany for processing into hexafluoride. In December 1982, after the cancellation of the contract by Iran, RTZ singed a 15 year contract to supply 4,000 tonnes of uranium oxide to the Taiwan Power Corporation. Unconfirmed reports suggest that this uranium is likely to come from Rossing, possibly comprising supplies which had originally been contracted to Iran.[104]

It is interesting to note that in the interests of secrecy, RTZ decided to set up a 'letter box company' in Switzerland at a place called Zug. It was reported in 1979 that the Namibian uranium trade was being organised at a "private house in the small Swiss town of Zug. The house, at number 10 Baarenstrasse, is staffed by a single secretary. She refers all enquirers to a firm of Zurich lawyers, Pestallozi and Gmur. Their specialty is the setting up of 'letter-box companies' on behalf of big multinationals. That Zug house is the nominal headquarters of RTZ Mineral Services ... in

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[103] see Michael C.Lynch and Thomas L.Neff, The Political Economy of African Uranium and its Role in International Markets (Bendix Field Engineering Corporation, Grand Junction Co. (USA) March 1982, Unclas UN Ltd) p.83

[104] see New Statesman, 28 January, 1983

reality, RTZ Mineral Services is operated from its parent company's London headquarters in St James' Square".[105] The main function of RTZ Mineral Services is to handle RTZ's world sales of uranium oxide and hexafluoride. This explains how the Japanese Government managed to cancel the uranium contract with Rossing only to contract the same amount with RTZ.[106]

Therefore, RTZ Mineral Services is intended to conceal the source of Namibian uranium. It could also be the case that RTZ sought to establish this "letter box company" in order to avoid embarrassing some of its uranium customers who may be reluctant to contract directly with Rossing. This explains how the Japanese Government, through Mitsubishi International Corporation, managed to cancel the uranium contract with Rossing only to contract the same amount with RTZ through its wholly owned "company", RTZ Mineral Services.

According to Yoko Kitazawa, some of the functions of RTZ Mineral Services is to provide "services related to the extraction and sales of natural and refined minerals and executing in-transit shipping."[107] In reality, the company

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[105] see The Sunday Times - London, 30 December, 1979, p.19, col.b.

[106] see New Statesman, 28 January, 1983; Swapo Press Release of 5th February, 1983; C Lynch and Thomas L.Neff, The Political Economy of African Uranium and its Role in International Markets, op.cit., p.60

[107] See Yoko Kitazawa, "On the illegal Japanese Uranium Deals", in United Nations, (1985) Seminar on the Activities of Foreign Economic Interests in the Exploitation of

(Footnote Continued)

is "not simply a paper company but a ghost company. This means that transactions with Mitsubishi's head office in London are directly with Rossing in Namibia ... The Rossing - RTZ - Mitsubishi connection is a typical example of the true nature of the transnational corporations which readily ignore, for their own profit-seeking, the sufferings of the victims of colonialism and racial discrimination."[108] The policy of the Japanese Government seems to be that unless the imported uranium shows a Namibian certificate of origin, no action can be taken against the importer.[109]

A Uranium Prices

There is considerable difficulty in predicting the uranium market mainly because of its chronic instability. From 1946 until 1960, uranium markets boomed, largely because of the US military demands. It is reported that uranium deliveries to the US Atomic Energy Commission reached "a peak of 34,400 tons of uranium oxide (U3O8)"[110] most of it imported. Once the military requirement was met, the industry began to experience a slump. Further problems were faced when the US decided to impose an official embargo on uranium

(Footnote Continued)
Namibia's Natural and Human Resources, Ljubljana, Yugoslavia, 16-20 April 1984, New York p. 55.

[108] ibid.

[109] ibid. p.56.

[110] see New Scientist, January-March, vol.85, 1980, p.549

imports in 1964. This measure was intended to protect the viability of the domestic industry. Prices fell from over US $44/kg of uranium oxide (U308) to less than $15.

A number of factors helped to transform the uranium slump into a boom. Deprived of the US market (the world's largest uranium market), producers in Namibia, Canada, Australia, South Africa, France and multinational companies such as RTZ decided to form a club which entered into what was called 'informal marketing arrangements'.[111] The move was first backed by the Canadian Government with its mining industry to form an international price-fixing and market sharing cartel for uranium. The first meeting of major international uranium producers is reported to have taken place in Paris in 1972. At this meeting and other subsequent meetings, policies were developed to regulate market quotas, terms and conditions of sales, and the awarding of sales agreements. This was later confirmed by a senior Canadian federal official who was reported to have said that "'anything the producers did was with the blessing of the Canadian Government'".[112] In 1972, the Canadian Government was forced to establish a minimum export price for uranium. In August 1972, the

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[111] see Financial Times - London 22 January, 1980, p.15, col.a.

[112] see The Sunday Times - London, 5 September, 1976, p.41, col.a

Canadian Minister of Mines and Energy stated that: "'To stabilise the current uranium marketing situation and to promote the development of the Canadian uranium industry, I have today issued a direction to the Atomic Energy Control Board covering such aspects as minimum selling prices and volumes of sales to export markets'".[113] During the early days of the cartel, the spot price for uranium soared from US $5 a pound to $40.[114]

It is interesting to note that it was during the period of the cartel that Rossing announced its intention to develop an open-cast uranium mine in Namibia. During the first half of the 1970s, RTZ's fortunes in the uranium industry multiplied, the cartel succeeded in pushing the price of uranium to profitable levels. There were other factors simultaneously existing which contributed to the uranium price rise. These factors include the Australian government policy regarding uranium development, Canadian uranium export policies, Opec price increases and the Westinghouse announcement of its decision not to honour its contract commitments to supply uranium to its customers. Westinghouse, (a nuclear power plant manufacturer and influential middleman in the international uranium market) sold 80

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[113] see The Times - London, 24 August, 1972, p.16, col.h.

[114] spot price refers to small quantities of uranium bought from the open market at short notice.

million pounds of uranium, 65 million of which it did not have, to its customers for $1,000m, in the hope of picking it up later at low prices. The strategy of the company was to offer supplies of uranium as an inducement to utilities to buy its nuclear plants. This proved to be a very serious miscalculation because uranium prices rose even faster.

In September 1975, the company was forced to plead "commercial impractability" (force majeure) as a reason for not supplying its customers with uranium.[115] One of the most decisive factors was Opec's decision to raise the price of oil in 1973. This move led to uranium prices soaring even further. Following the reduction in oil supply from the Middle East, the EEC formulated a policy whereby it was to become independent of Middle East oil supplies by a massive expansion of its nuclear programme. Uranium prices rose even further due to surging demand as nuclear programmes grew all over the world in response to oil price rises. This situation led utilities to scramble, scrambling into the market to obtain the necessary fuel for reactors ordered or being built.

Political developments in Australia added to Rossing's market opportunities. Australia's uranium development was delayed because of the Government's desire to keep

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[115] see Financial Times - London, 22 January, 1980, p.15, col.a.

the industry under national control. The Australian Labour Government imposed an embargo on uranium exports, and halted new uranium mine developments. This move forced one Australian company, Queensland Mines, to declare force majeure on the supply of uranium to Japan.[116] In 1977, the United States announced the gradual lifting of the embargo on uranium imports. Utilities were permitted to import 10 per cent of their uranium requirements in 1977. It is stated that the "percentage was gradually increased to 15 per cent in 1978, 20 per cent in 1979, 30 per cent in 1980, 40 per cent in 1981, and 60 per cent in 1982", and it was totally lifted in 1984.[117]

In the case of Australia, stringent conditions on uranium reprocessing were imposed when the Conservative Government lifted the uranium export ban. The lifting of the ban did not completely remove the political sensitivity of the industry. The Labour Party even threatened to abrogate international contracts if it were returned to power.[118] The move by the Conservative Government to impose stringent conditions on uranium contracts led Japan to threaten Australia that it would

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[116] see The Times - London, 24 August, 1972, p.16, col.h.

[117] op.cit., UN Centre on Transnational Corporations, Transnational Corporations and Contractual Relations in the World Uranium Industry: A technical paper, p.56

[118] see The Times - London, 5 September, 1977, p.5, col.b.

Table III:4 The Estimated price of uranium and UK expenditure on Namibian supplies, 1978-1984 (March 1982 prices)

YEAR	PRICES		EXPENDITURE[3]	
	WORLD MARKET PRICES[1] ($/LB)	NAMIBIAN CONTRACT (PRICE[2] $/LB)	AT WORLD MARKET PRICE	AT NAMIBIAN CONTRACT PRICE
1978	48	16	235.5	78.6
1979	42	14	196.4	65.5
1980	36	12	160.3	53.4
1981	35	12	148.3	50.8
1982	34	11	137.3	44.5
1983	32	11	123.1	42.4
1984	31	10	113.6	36.6
		TOTALS	1,114.5	371.8

Notes:

1 1980 to 1985 estimates are derived from CEGB/P7, Table 5, p.31; the 1978 figure is estimated from M.Radetski 'Uranium' (London; Croom Helm, 1981); and the 1979 figure is linearly interpolated between those for 1978 and 1980.

2 These are derived on the basis that, as of January 1977, the contract price was about one-third of that prevailing on the world market - see The Rossing File (London: CANUC, 1980) p.47. This is assumed to hold between 1978 and 1984.

3 Discounted to 1993 and expressed in $ million.

Source: The Sizewell B PWR and Namibian Uranium - Proof of Evidence by Robert Rosenthal, Sizewell B Power Station Public Inquiry RR/P/1.

turn to South Africa if new terms were too tight.[119] This partly explains why Namibian uranium is so important to Japan. Finally, Namibian uranium is attractive to customers because there are no restrictions on reprocessing or the product being used to manufacture nuclear weapons. Canada[120] and Australia[121] prohibit customers to use their uranium for the manufacture of nuclear weapons. The provisions of the agreement between these two countries and their customers are verified by the International Atomic Energy Agency (IAEA) (and the European Atomic Energy Commission - Euratom - with the EEC customers). This enables the two governments to decide as to whom should uranium be sold, and under what conditions should such sale be allowed. In respect of the UK, the attraction of Namibian uranium has been stated in these terms: "'RTZ supplies the uranium upon which the military programme ... depend .,. RTZ and the Government have a direct interest in trying to acquire uranium without safeguards ... the defence interest in unsafeguarded uranium is the only possible explanation ... for the decision to shift to Rossing from Canada'".[122]

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119 see The Sunday Times - London, 26 January, 1977, p.63, col.h.

120 see The Times - London, 1978, 17 January, p.4., col.f; UN Centre on Transnational Corporations, Transnational Corporations and Contractual Relations in the World Uranium Industry: A technical paper, op.cit., p.55; and Rio Algom Ltd Annual Report, 1977, p.3

121 see The Times - London, 1981, 22 September, p.15, col.b

122 Statement by Tony Benn (Labour Minister for Technology and responsible for the UK Atomic Energy Authority from 1966-1970). He made the statement at the (Footnote Continued)

B Uranium Profits

RTZ has made enormous profits on its uranium operations in Namibia. Up to 1978, the Palabora Copper mine in South Africa used to be the company's principal investment in Southern Africa with its holding of 29 per cent in Palabora Mining Company Ltd.[123] This picture was radically changed in 1979 when Rossing became fully operational. Since 1979, Rossing became by far the most profitable investment in Southern Africa with profits several times higher than the Palabora Copper mine in South Africa. In 1979, Rossing represented 47.8% of total uranium sales in RTZ group of companies, and 49% in 1980.[124] Rossing's contribution to RTZ profits is illustrated by Table III:5 below.

It is clear from Table III:5 that RTZ's most profitable investment in Africa is Rossing. It is interesting to note that between 1980 and 1981, Rossing became the third largest profit contributor to RTZ's net profit attributable to its shareholders.[125] Rossing's 1982 results were even more encouraging since it was the second largest contributor to RTZ's net profit.[126] Given these huge profits, it is

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(Footnote Continued)
Bristol Commission of Inquiry into RTZ, on 27 November, 1982, see The RTZ - The Alternative Report, 23 May, 1984

123 see RTZ Annual Report and Accounts, 1972, p.33

124 see Trade Union Seminar on Namibian Uranium, London, 19-31 June 1981

125 see RTZ Annual Report and Accounts, 1980, p.49 and 1981, p.49

126 ibid., 1982, p.51

BIJLAGE 5

RTZ

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BPR/AC
7 September 1978

Dear Sir

In reply to your letter of the 27th August, we regret that under the South African Atomic Energy Act we are unable to give you information about the contracts of Rossing, except for the one with British Nuclear Fuels which was made public in answer to a question in the House of Commons. This contract is for 7600 tons but no other details were made public.

The same restriction, of course, applies to the Palabora Mining Company.

Yours faithfully

B P Ree

B P Ree (Miss)
Social Responsibility Adviser

unlikely that the company (RTZ) will ever abandon its illegal involvement in Namibia's uranium industry as a consequence of international pressure. This reluctance is coupled with the double protection which it enjoys both from the British Government and from the racist South African regime. Its involvement in the Namibian uranium industry has resulted in large amounts of uranium oxide (U308) being shipped out of the country every year.[127] From 1976 to 1982, Rossing produced and exported 27,613 tons of uranium oxide.

Mr Colin Macaullay, Rossing's Managing Director confirmed in 1985 that the company (Rossing) depends on 'exclusively' long-term contracts. He went on to state that very "few new sales of uranium are occurring, nor have they occurred for some years.... Rossing has to rely on existing contracts". According to him, Rossing's long-term contracts ran "through the rest of the decade and the rest of the century", but to keep the mine running at full production, "it will need more contracts in the nineties".[128] This explains why the strategy of the company has been to lure customers by offering lower prices than those prevailing at the world market. Compared with the 1970s, conditions in the uranium world market have changed. The 1970s was exceptional in that the surge in demand coincided with uncertainties over supplies, pushing prices up. Today, the situation has drastically changed because of a number of factors. First,

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[127] see the appendix

[128] see Windhoek Advertiser - Namibia, 30 April, 1985, col.a.

Table III:V RTZ's Geographical profit analysis - Africa region

1977-1983

COUNTRY	YEAR	TURNOVER OF GROUP OF COMPANIES (%)	GROUP PROFIT BEFORE TAX (%)	NET PROFIT ATTRIBUTABLE TO RTZ SHAREHOLDERS (%)
S.A.	1977	90.8	18.8	3.2
S.A.	1978	95.8 (4.5)	24.3 (8.6)	6.2 (6.3)
NAMIBIA		81.3 (3.9)	4.5 (1.6)	2.0 (2.0)
S.A.	1979	123.7 (4.5)	45.3 (10.0)	9.3 (6.2)
NAMIBIA		128.1 (4.7)	27.2 (6.0)	12.6 (8.4)
S.A.	1980	149.8 (4.9)	44.4 (8.3)	10.0 (6.4)
NAMIBIA		161.3 (5.3)	54.4 (10.7)	21.1 (13.6)
S.A.	1981	125.6 (3.8)	23.0 (6.6)	5.3 (5.2)
NAMIBIA		157.9 (4.8)	63.0 (18.1)	21.4 (20.9)
S.A.	1982	155.0 (3.9)	29.8 (8.7)	3.6 (2.9)
NAMIBIA		217.9 (5.5)	91.2 (26.8)	32.3 (25.8)
S.A.	1983	169.5 (3.5)	36.5 (6.3)	7.1 (3.6)
NAMIBIA		169.9 (3.5)	62.5 (10.9)	14.6 (7.4)

Source: RTZ Annual Report and Accounts, 1977-1983 pages 40, 45, 49, 51 and 53 respectively. Note no separate Namibian statistics have been made since 1984.

projections for future nuclear capacity have been lowered drastically due largely to lessened demand, rising costs and environmental and licensing restrictions.

Secondly, uranium reserves have steadily risen following the discovery of reasonably assured resources in Australia and a uranium expansion programme in Canada. Finally, civil nuclear industry has become a highly politicised industry following nuclear accidents. Environmental opposition in many western countries has brought nuclear growth to a virtual standstill. All these factors force Rossing to offer its uranium below the world market price. This is illustrated by Table III:6. It is important to note that Rossing uranium prices were renegotiated upwards probably in 1985. It is stated that "profits have fallen from a peak in 1982 so that by early 1985 they reached their lowest point for a decade. Rossing has had to renegotiate its secret long-term contracts with nuclear utilities in the major Western countries as a result."[129]

However, Rossing is still able to make substantial profits. It is estimated that South Africa receives about US $500 million per annum "from the Rossing output".[130] There are two major reasons why this is so, first, Namibian uranium is

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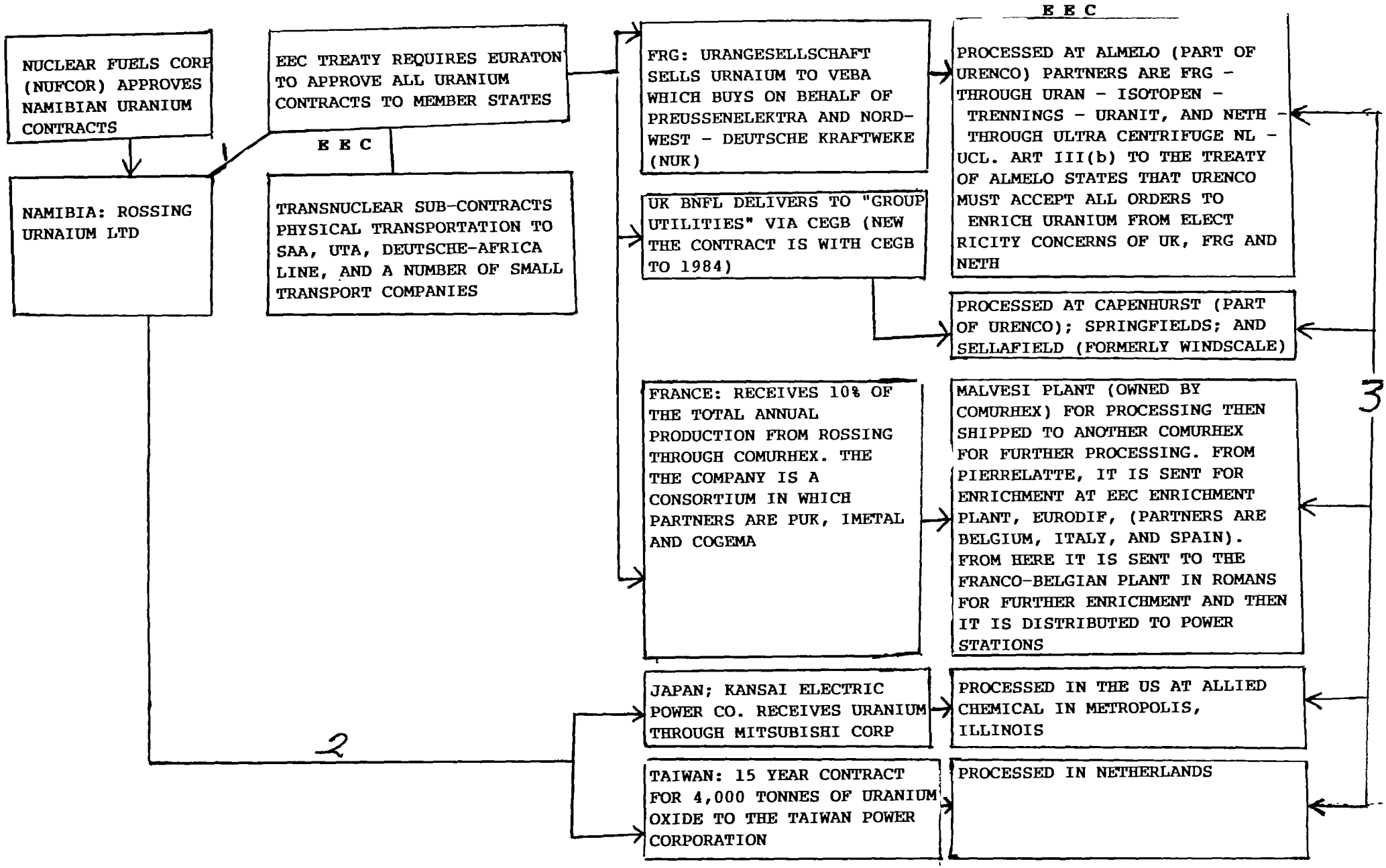
[129] See Brian Hackland et al, (1986), "Behind the diplomacy: Namibia, 1983-5" Third World Quarterly, vol. 8, pp. 51-77 at 54.

[130] see UN Plunder of Namibian Uranium, (New York, 1982) p.15


NUCLEAR FUELS CORP (NUFCOR) APPROVES NAMIBIAN URANIUM CONTRACTS
NAMIBIA: ROSSING URNAIUM LTD
EEC TREATY REQUIRES EURATON TO APPROVE ALL URANIUM CONTRACTS TO MEMBER STATES
EEC
TRANSNUCLEAR SUB-CONTRACTS PHYSICAL TRANSPORTATION TO SAA, UTA, DEUTSCHE-AFRICA LINE, AND A NUMBER OF SMALL TRANSPORT COMPANIES
1
2
FRG: URANGESELLSCHAFT SELLS URNAIUM TO VEBA WHICH BUYS ON BEHALF OF PREUSSENELEKTRA AND NORD-WEST - DEUTSCHE KRAFTWEKE (NUK)
UK BNFL DELIVERS TO "GROUP UTILITIES" VIA CEGB (NEW THE CONTRACT IS WITH CEGB TO 1984)
FRANCE: RECEIVES 10% OF THE TOTAL ANNUAL PRODUCTION FROM ROSSING THROUGH COMURHEX. THE THE COMPANY IS A CONSORTIUM IN WHICH PARTNERS ARE PUK, IMETAL AND COGEMA
JAPAN; KANSAI ELECTRIC POWER CO. RECEIVES URANIUM THROUGH MITSUBISHI CORP
TAIWAN: 15 YEAR CONTRACT FOR 4,000 TONNES OF URANIUM OXIDE TO THE TAIWAN POWER CORPORATION
EEC
PROCESSED AT ALMELO (PART OF URENCO) PARTNERS ARE FRG - THROUGH URAN - ISOTOPEN - TRENNINGS - URANIT, AND NETH - THROUGH ULTRA CENTRIFUGE NL - UCL. ART III(b) TO THE TREATY OF ALMELO STATES THAT URENCO MUST ACCEPT ALL ORDERS TO ENRICH URANIUM FROM ELECT RICITY CONCERNS OF UK, FRG AND NETH
PROCESSED AT CAPENHURST (PART OF URENCO); SPRINGFIELDS; AND SELLAFIELD (FORMERLY WINDSCALE)
MALVESI PLANT (OWNED BY COMURHEX) FOR PROCESSING THEN SHIPPED TO ANOTHER COMURHEX FOR FURTHER PROCESSING. FROM PIERRELATTE, IT IS SENT FOR ENRICHMENT AT EEC ENRICHMENT PLANT, EURODIF, (PARTNERS ARE BELGIUM, ITALY, AND SPAIN). FROM HERE IT IS SENT TO THE FRANCO-BELGIAN PLANT IN ROMANS FOR FURTHER ENRICHMENT AND THEN IT IS DISTRIBUTED TO POWER STATIONS
PROCESSED IN THE US AT ALLIED CHEMICAL IN METROPOLIS, ILLINOIS
PROCESSED IN NETHERLANDS
3

Notes:
1 transportation to EEC countries
2 transportation to Japan and Taiwan
3 processing plants

Source: based on information from CANUC News, No.3, Spring 1983, p.9; The Guardian, Londopn, 1983, 12 May, p.26, col.d., SWAPO, (1982), Trade Union Action on Namibian Uranium, pp.24-48; and UN, (1982), Plunder of Namibian Uranium, pp.11-14.

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cheaper because of the racial discrimination in wages, low taxation rate, and lack of stringent legal controls in health, ecology,and the environment. Secondly, open cast mining is much cheaper than underground mining. In addition, uranium will remain an important source of energy. According to one estimate, "one drum of uranium oxide contains the energy equivalent of 23,000 barrels of crude oil".[131]

C Transportation and Processing

Namibian uranium undergoes four processing stages. At Rossing, it is first mined as uranium ore, then milled (crushed and treated with chemicals at the plant) in order to yield a concentrate called uranium oxide (U 0). At this stage uranium oxide is transported from Namibia for further processing due to the fact that processing beyond uranium oxide is a technically complex business. Uranium which is destined for Europe is supposed to be transported by a company called Transnuclear (owned by BNFL - 33%, French and West German procurement agencies have a similar stake).

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[131] see SWA/Namibia Information Service, Mining brief, July 1980, 0.10

Because of political reasons, the company sub-contracts the transport of uranium from Namibia to Europe. Although these contracts are kept secret, it has been revealed that services of South African Airways (SAA), UTA, and Deutsche-Africa Line have been used. Once in Europe, services of various non-union small transport companies are used (including the now famous UK company called Edmundsons of Morecambe Ltd).

When Namibian uranium reaches Europe, it undergoes three processing stages before it is used in the nuclear reactors.[132] First, uranium oxide (U308) is converted into hexafluoride (UF6); secondly, hexafluoride is processed into fuel rods which are fed into nuclear reactors to generate electricity. The processing stages can be extended into reprocessing spent fuel to produce plutonium which can be used in fast breeder reactors. Most of the plutonium which is produced by the United Kingdom is exported to the US[133] and Japan. Transportation and processing of Namibian uranium is illustrated by Table III:6.

5 BASE METALS

Tsumeb Corporation Ltd (TCL) is the principal producer of base metals in Namibia. The company owns five mines - Tsumeb, Kombat, Matchless, Asis West and Otjihase - which are served by a copper and lead smelter. In the early 1970s.

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132 see CANUC News, no.3, Spring 1983, p.9

133 see unconfirmed report in The Guardian - London, 12 May 1983, p.26, col.d.

Tsumeb accounted for 80 per cent of the base metals produced in the territory.[134] The company's dominant position is partly due to the ore body which is mined in its concession areas. It has been remarked that the "ore body at Tsumeb is unique in that a tremendous variety of metals occur within a single body - copper, lead, zinc, cadmium, and silver".[135] in addition, the company produces a variety of minerals such as arsenic trioxcide, cadmium, germanium, pyrit,[136] and gold.[137] It also has metallurgical plants, one is a smelter of blister copper and the other is a lead smelter.

Other small producers of base metals include Oamites Mine Co. Ltd (Falconbridge of Canada Ltd has a major shareholding); Rosh Pina mine (owned by Iron and Steel Corporation of South Africa); Uis mine (also owned by Iron and Steel Corporation of South Africa); and Helicon and Rubicon mines (managed by SWA Lithium Mines).[138]

Most base mineral processing - concentration, smelting and refining - is carried out in Namibia. Facilities for fabrication are located close to the areas of large consumer

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134 see op.cit., SWA/Namibia Information Service - Mining Brief, p.11

135 ibid.

136 op.cit., Leake S.Hangala, Structure of Namibian Mineral Industry, p.44

137 op.cit., Thirion Commission, p.103

138 op.cit., Leake S.Hangala, Structure of Namibian Mineral Industry, pp.46-47; and Proswa Namibia Foundation, Mining in SWA/Namibia, pp.7-10

countries in Europe, Japan, and America. In the case of copper, there are two generally internationally quoted prices. Copper exports to North America are quoted at the US foreign price. This is the price "at which the US buys imported copper and is the price quoted on the New York Commodity Exchange". The official price for exports to other countries is quoted as the 'London Metal Exchange' (LME) price. The main customers of Namibia's base metals are France, the Netherlands, the UK, the Federal Republic of Germany, Italy, USA, Japan, and South Africa.[139]

Although there are no recent official statistics on mineral exports, the 1966 official figures (the last date of official figures) provide a detailed analysis on country by country basis. The figures show that there were four largest buyers of base minerals: the US (R16.7 million), Belgium (R9.4 million), West Germany (R3.9 million - for copper and vanadium), and South Africa (R3.3 million - for zinc and lead). In addition, it is interesting to note that South Africa accounted for 50 per cent of Namibia's mineral exports.[140] It is also reported that the principal base mineral is blister copper. In 1966, it accounted for 76 per cent of US mineral purchases. South Africa accounted for 63 per cent of purchases in refined lead.[141]

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[139] op.cit., Leake S.Hangala, Structure of Namibian Mineral Industry, p.47; and the Thirion Commission, op.cit. p.118

[140] op.cit., G Lanning with M Mueller, Africa Undermined, p.476

[141] ibid

Most mining companies in Namibia sell their minerals through their parent companies and affiliates outside the territory. This provides an opportunity to the companies to use transfer pricing techniques to make profits appear wherever it is more covenient to them. This means that the producer list price system is the most commonly used in order to govern sales not only within affiliates in Namibia but abroad as well. The Thirion Commission found that there is considerable difference in producer list prices when compared with the London Metal Exchange, sometimes the LME prices are "more than 100% higher".[142]

Producer list price in the case of minerals refers to mineral prices which are set by the mining companies themselves. In most cases, such prices are substantially lower than "free market" prices. In the case of Namibia, producer list prices are normally controlled by the companies to serve the interests of a vertically integrated industry. One example will suffice to illustrate this point. From 1979 to 1983, Imcor Zinc (pty) Ltd's Rosh Pinah mine mineral sales of silver, lead and zinc concentrates amounted to R84,447,190. This was R64,395,525 less than the official London Metal Exchange (LME) of R148,842,715.[143] All Imcor Zinc's mineral production is sold to Zincor, both Zincor and Imcor Zinc are wholly owned subsidiaries of Iron and Steel Corporation which is in turn owned by the South African Government. Unlike

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[142] op.cit., Thirion Commission, p.117

[143] See The Thirion Commission, p.116. See also Table III:7 for zinc and lead concentrates.

Nambia, other major mineral producers such as Zambia base their prices on official LME quotations.[144]

The utilization of producer list price may, however, not necessarily mean that the prime motive is transfer pricing. For a number of legitimate reasons, mining companies may find it advantageous to sell their minerals below the prevailing market price. They may prefer an assured stable market over a long-term sales contract. However, if such sales are between affiliates, as is often the case in Namibia, there is a need to regulate such sales in order to minimise loss of revenue to the State. As the Appendix on Imcor Zinc shows, there is considerable difference between producer list prices and free market prices. What is even more strange is the fact that there could be a difference of up to 100 per cent in some cases.

Finally, as the Appendix on TCL's unit prices of refined lead shows, in most cases, mineral sales prices to South Africa are always lower than sales to countries such as Italy and Japan (even if one takes into account exchange rate fluctuations, transportation costs to South Africa should be far much less than to Japan and Italy. This should have been reflected in the prices). The considerable difference between producer list prices and free market prices led the Thirion Commission to conclude that "there is reason to

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[144]See Richard L. Sklar, (1975), Corporate Power in an African State, University of California Press, p.777. For a detailed discussion on Zambia see Chapter VII below.

believe that transfer pricing in the form of the sale of minerals at prices which are not market-related, is practised by certain mineral producers ... with resultant loss of revenue to the State".[145] Given the examples above, it is submitted that South Africa (through its wholly owned and subsidiary companies) and multinational mining companies are the major beneficiaries at Namibia's expenses.

The problem is compounded by the fact that most of these minerals are exported to South Africa. According to Hangala, Namibia is the most important source of South Africa's tin requirements. Most of the tin concentrates from Uis mine (in Namibia) are "shipped directly to the Vanderbijlpark Steelworks in South Africa. They provide nearly 50 per cent of South African tin requirements for use in the production of electrolytic-plated sheet".[146]

These operations have provided enormous profits to the mining companies. In the case of Tsumeb Corporation, from 1963 to 1967, the annual profits of the company averaged £6 million after tax. This is equivalent to an average rate of return of 350 per cent on its original capital investment. Profits more than doubled from R5 million in 1972 to R13.2 million in 1973. The company continues to make huge profits notwithstanding the fact that the market for most base metals, especially copper, is experiencing severe recession.

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[145] Op. cit., Thirion Commission p.119.

[146] op.cit., Leake S.Hangala, Structure of Namibian Mineral Industry, p.47

In the eight year period to 1980, the annual profits of the company improved considerably. Hangala estimates that net profits between 1973 and 1980 were R77.4 million.[147] This represents, on average, the annual net profits of R9.67 million. Namibia's production figures of copper, refined lead, zinc, tin, silver and refined cadmium are provided in the appendix.

Our discussion in this chapter shows that the colonial administration does not in fact control the marketing of minerals. Multinational mining companies have a free hand in the disposal of the Namibian minerals. This was also noted by the Thirion Commission which concluded that "at present the state has no marketing policy at all".[148] The Commission's Report went on to state that there is also "the possibility that rare and valuable minerals such as germanium dioxide and gallium may be leaving the country. At present the state has no means whereby to physically verify the correctness of monthly returns or the validity of the permits in relation to the constituent parts of the minerals actually exported".[149] Therefore, provisions in the mining legislation which purport to control the marketing of the minerals produced in the territory have become a dead letter.

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147 ibid., p.46

148 op.cit., Thirion Commission, p.104

149 ibid., pp.102-103

6 CONCLUSION

We have seen that the State has legal power to impose restrictions in respect of mineral exports and marketing. Accordingly it is also important to note that the legislation does not impose any significant limits upon the capacity of the State to control mineral exports. The scope of the power is aptly provided for in the 1968 Ordinance, the Diamond Industry Protection Proclamation 17 of 1939 and the Atomic Energy Act of 1967. Therefore, it is a matter for the State to determine the means of control, and the matters to be taken into account in exercising the control. The power conferred by the above statutes enables the state to prohibit, regulate and control the exportation and marketing of Namibian minerals. It follows therefore that the power to regulate the exportation and marketing of Namibian minerals necessarily comprehends the power to decide who may export or market minerals, and on what terms should such minerals be sold.

The means and the criteria by which this choice is to be made are for the state to decide. The Diamond Board has wide powers to decide how Namibian diamonds are disposed of. These powers have not been used for the benefit of the country as a whole. Instead, as shown above, they have been used almost exclusively for the benefit of De Beers.

CHAPTER IV - TAXATION OF INCOME FROM MINING

1 INTRODUCTION

In most mineral producing developing countries, mineral ownership by the State means that mineral resources are the heritage of the people and the individual holder of mineral rights is entitled only to a reasonable return on his investment. This view is today generally accepted by most Third World mineral producing countries which have the welfare of their people at heart. The exploitation of a mineral deposit leads eventually to the exhaustion of the minerals. It follows from this that it is in the interests of the national economy that any mineral deposit that can be profitably exploited should be worked in the interests of the country.

Therefore, the State should ensure that the revenues obtained from mining operations should bear some relation to the value of minerals extracted by the mining company exploiting it. As will be discussed below, in the case of Namibia, the taxation of income derived from mining operations totally ignores these issues. The colonial administration puts more emphasis on the interests of foreign investors, and this is clearly reflected in the legislation. Mineral exploration is regarded as a costly activity which carries a high element of risk. In addition, foreign investors argue that during the initial stage of mining development huge amounts of capital is borrowed at a high interest which can only be compensated

by a high rate of return on investment after the production stage is reached.

It must, however, be noted that in most cases, the claims are usually exaggerated because mining does indeed yield a high return on capital and it is precisely this which makes investment in mining attractive to foreign multinational companies. The question whether the investor should be allowed to recover his capital investment is usually not in dispute, it is the conditions (i.e., the rate and speed) under which he should be allowed to do so which are matters for debate. As shown in Chapter II, South Africa is keen to attract foreign investment both to its own territory as well as to Namibia. South Africa's rate of capital accumulation is insufficient to pay for the costs of advanced technology and management skills necessary in the mining sector to sustain her economic development. In order to attract such investment into the Namibian mining industry, the regime has tended, over the years, to offer special inducements to foreign investors.

Therefore, it is submitted that the legislation applicable to the taxation of income from mining operations is constructed on automatic incentives provided by a good investment climate to foreign investors. Any mining company which invests in Namibia can be guaranteed all the concessions on its shopping list - a lower tax rate; and generous provisions for immediate write-off of capital expenditure against gross profits. In addition, capital and profits are freely allowed to be repatriated out of the territory.

In 1981, tax legislation in Namibia was placed under the direct control of the Administrator-General. The current tax structure is regulated by the 1981 Income Tax Act which is exclusively applicable to Namibia. The Act contains special provisions applicable exclusively to mining. Differential tax rates are applicable to income from mining of different minerals such as precious stones, gold and uranium, and base metals. Differential rates of tax do not, however, apply to individuals who derive income from mining operations; such income is taxed in the hands of the individual at the same rate as income derived from other sources. A distinction must therefore be drawn, in the case of companies, between mining income and non-mining income.

With the exception of dividends received by residents in Namibia, which are taxable regardless of source, taxation is based entirely on income derived in the territory. There are two types of taxes provided for under the statute namely: the normal income tax for companies and individuals; and the non-resident shareholders' tax levied on certain companies (i.e., mining companies as well as other non-mining companies). In addition to direct taxation, the Mines, Works and Minerals Ordinance 20 of 1968 provides for payment to the State of licence fees and rentals in consideration of the grant of mining rights which by statute are vested in the State.

2 FISCAL PROVISIONS

Before we discusss relevant statutory provisions and their impact on the tax system, it is important to note a few points. First, many of the financial issues relating to mining taxation in Namibia are so complex that we cannot, in the space of this chapter, do full justice to them. Secondly, the main objective of this chapter is to summarise the main features of the tax legislation which apply to mining operations. Finally, relevant provisions relating to income tax system, as well as royalty regimes are explained in non-technical language.

Our purpose in this section is to discuss and analyse the fiscal provisions of the tax legislation so as to elucidate the nature and incidents of the legal relationship between the colonial administration and multinational mining companies. For this purpose, we shall look at the procedure adopted in raising revenue from the mining industry.

2.1 Pre-production phase - licence fees and rentals

It must be noted that rights and obligations of the parties, in the mining industry, are determined by the phase at which private investors conduct their mining operations. These rights and obligations are also reflected in the physical provisions. During the prospecting and exploration phases, private investors are required to pay certain charges to the State. These are payments, referred to in this section as licence fees and rentals, which are due to the State before

income tax becomes payable when the mining phase is reached. It is important to note that there are important distinctions between licence fees and rentals. Licence fees vary greatly from country to country. However, in most cases, they include licence application fees, recording fees, filing fees, registration fees, inspection fees, search fees, and fees payable to the State for the transfer of rights. On the other hand, rentals usually refer to surface charges and other rights that are payable to the State in respect of prospecting and mining licence areas held by the concessionaire. In Namibia's case, there is no standard yardstick on which rental charges are imposed. As a result, there are considerable variations on the rate of rentals that private investors pay to the State. This is discussed in detail below.

The pre-production phase is wholly regulated by the 1968 Mines, Works and Minerals Ordinance. A series of payments for the various grants obtainable from the colonial administration are specified in the Ordinance. Under section 20(4) of the Ordinance, a prospecting licence holder is required to pay R25 per annum on every licence issued by the mining commissioner. Section 30(1) requires a claimholder to pay R2 per claim per month until his claim either lapses or is converted into a mining area. Once such claim is converted into a mining area, the claimholder is required to pay R2 per hectare per year(s.47(1)).

In addition, the legislation imposes what is referred to as "Special Grants of Prospecting". Section 60(1) empowers the

Minister to grant to the prospecting licence holder the exclusive right to prospect in any defined area for any particular mineral or minerals, subject to such terms and conditions as he may deem fit. Section 60(2)(c) requires the holder of such grant to pay a rental determined by the Minister. The holder of exclusive prospecting rights granted in terms of section 60 has a right to obtain an exclusive mining right which entitles him to mine the minerals. However, this right is subject to a number of conditions including the payment, in addition to taxation or any share of profits as may be provided for in the mining grant, of a rental determined by the Minister (s.61(4)(c)).

The statute does not set a percentage or fixed amount for rental dues in the case of exclusive prospecting right and exclusive mining right. As a result, fiscal provisions are determined on an individual basis between the mining companies and the so-called Administrator-General. The Thirion Commission discovered that the annual rentals determined under s.60(2)(c) in respect of prospecting grants show considerable variation from one grant to the other. In addition, they bear no relation to the size of the areas or the value of the prospecting rights. The situation is even worse in the diamond industry, e.g., CDM holds prospecting and mining rights in the diamond area No.2 which covers an area of 3,066,250 hectares. A rental of only R400 p.a. is payable; Grant 14/2/4/148 covers an area of 14,000 hectares but a rental of R200 p.a. is payable; and Grant M46/3/16

which covers an area of 7,000 hectares, a rental of R200 p.a. is also payable in respect of it.[1]

In the case of diamond area no.2 which covers more than 3,000,000 hectares, only one grant applies to it. It is interesting to note that even the Thirion Commission was forced to comment that this kind of grant "is a relic of a bygone age". The rental which is payable for the area is only R400 p.a., which is currently applicable to it. Another example of the dominant position of multinational mining companies is the rental payable in respect of the Sperrgebiet (Diamond Area No.1). The area covers 2,829,000 hectares, and it is still regulated under the Halbscheid Agreement (i.e., the agreement which enabled CDM to acquire a diamond concession). A rental of only £406.4.0 p.a., has been payable in respect of the area since 1922. The duration of the agreement was extended by s.10 of the Finance Act no.91 of 1971 of the Republic of South Africa to 31 December 2010 without altering the amount of the fee payable by CDM. The result is that the fee payable by CDM for its mineral rights in respect of the Sperrgebiet has remained unaltered for more than 60 years, and it is likely that it will remain unaltered until 2010 as long as Namibia remains a colony. In addition, it must be noted that the Diamond Area No.1 covers what were some of the richest gem diamond fields in the world and yet

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[1] see Thirion Commission, Eighth Interim Report, (1985), p.54

CDM has been paying a nominal fee while the diamonds have almost been exhausted.

The significance of prospecting and mining rights fees to the revenue of the colonial administration are minimal in that they do not constitute compensation for the value of the minerals mined. Their only significance is to speed up the rate of prospecting and mining development. It must also be noted that all expenditures incurred by the mining companies during the pre-production stage are regarded as capital and thus deductible for tax purposes once a mine starts to make a profit at the production (extraction) phase. Some of the deductions allowed include expenditure on "surveys, boreholes, trenches, pits and other exploratory work preliminary to the establishment of a mine ... together with any other expenditure which in the opinion of the Secretary is incidental to such operations (s.18(b) of the Income Tax Act No.24 of 1981).

2.2 Production Phase

Upon development of a mine, the next stage is that of production or mining. The interests of the colonial administration and the companies do not seem to conflict with regard to rates and levels of production. The main reason is that the legislation does not impose restrictions on production. The aim of this section is to analyse the provisions made under various statutes which determine the extent to which the colonial administration influences or affects decisions relating to such critical matters as

taxation. Therefore, we will attempt to address ourselves to the following questions: What is the nature of the financial provisions? In what forms does the colonial administration receive its financial returns under the arrangement in question? Are there provisions for payment of a royalty and taxes?

2.2.1 Royalties

A royalty as used here, describes the rent or tax payable to the colonial administration purely on the basis of 'ownership' of the minerals. The basic advantage of a royalty is that it is a guaranteed payment to the colonial administration for the depletion of the mineral resources, irrespective of whether the companies make a profit or not. In addition, royalties also avoid complex problems such as the rationale and admissibility of deductions from profits for purposes of assessing tax.

The royalty system was heavily depended upon by the German colonial administration. In 1908, an agreement was reached between the German colonial administration and the Deutsche Colonail Gesellschaft f"ur S"udwest Afrika (the company entitled to the exclusive mining rights in Namibia during the German period) to introduce a royalty system. The German legislation provided for the payment of mineral extraction tax, fixed at 2 per cent and later increased to 10

per cent on the value of the diamond output.[2] In addition, the legislation provided for the imposition of export duty.

It is interesting to note that apart from the diamond industry, there is no royalty levied on minerals today. It was stated in a booklet prepared by the then Administrator in 1928 that: "the mine owner must pay ... an output royalty of 2 per cent of the value of the minerals before treatment". This fixed percentage was provided for under Proclamation No.59 of 1920. In 1941, Royalty Proclamation No.19 of 1941 repealed the 1920 proclamation and provided for the fixed per centage payment of royalties on gross proceeds of certain minerals. The formula was provided as follows: gold 2 per cent; guano and phosphates 5 per cent; tin 4 per cent; vanadium, lithium, beryllium, salt and semi-precious stones 2 per cent; and finally, tungsten, tantalum, titanium, cadmium, copper, lead, zinc, silver, and fluorspar 1 per cent. Minerals not covered by the proclamation were exempted from royalty.

Proclamation 19 of 1941 was repealed by Proclamation 9 of 1944. It also amended s.62 of the Mining Consolidation and Amendment Proclamation No.4 of 1940 by empowering the then Administrator to fix the amount payable as a royalty in respect of all precious minerals except diamonds. This enabled the Administrator to promulgate Proclamation No.10 of 1944 which enabled him to fix a royalty on the gross proceeds

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[2] see I.Goldblatt, (1971), History of South West Africa from the beginning of the nineteenth century, Juta and Company Ltd - Cape Town, p.238, see also The Times, London, 1909, 29 January, p.6, col.b

of the sale of gold and silver ores. This proclamation was repealed by another proclamation (Proclamation No.17 of 1946) in 1946 but nothing was substituted in its place. The result is that since 1946, no royalty has been payable on mineral production apart from the export duty on diamonds.[3] In contrast, the Mineral Rights Tax Act of 1972 of the Republic of Botswana provides a 3 per cent royalty on the gross market value of any minerals, other than coal, oil shale, natural gas, precious metals and precious stones. in the case of precious stones, the State is entitled to 25 per cent royalty payment from the annual realised profits. In addition, every holder of mineral rights is required to pay a "mineral rights tax", which is assessed at (1) R40 per square kilometre of land on which such rights are held or (2) 10 per cent of the value of the minerals produced, whichever is higher.[4]

In the case of diamonds, the notorious arrangement between the colonial administration and the South West Finance Corporation, a wholly owned De Beers subsidiary, presents the most striking illustration of economic exploitation by multinational companies in Namibia. According to the Consolidated Royalty Agreement of 1922-3, a royalty of 22.5 per cent of the aggregate of the Diamond Profits Tax and the Diamond Export Duty is payable to the South West Finance Corporation by the colonial

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3 op.cit., Thirion Commission, p.81

4 ibid.

administration.[5] This is supposedly justified on the ground that the company succeeded to some of the rights of the Deutsche Kolonial Gesellechaft f"ur S"udwest Afrika. As Table I below shows, diamond taxes for the nine year period from 1977 to 1985 totalled R919.6 million of which R103.1 million (about 10 per cent) was paid to the South West Finance Corporation in respect of the said agreement. This represents, on average, an annual payment of about R11.45 million. All royalty payments due to the company come from diamonds won in the Diamond Area No.I, formerly the Sperrgebiet.

TABLE IV:1 Revenue Collected by the Central Revenue Fund from Diamonds and the Amount Paid to the South West Finance Corporation: R Millions

YEAR ENDING 31 MARCH	**1977**	**1978**	**1979**	**1980**	**1981**	**1982**	**1983**	**1984**	**1985**
TAX FROM DIAMOND MINES	63.1	108.2	198.9	174.8	134.5	53.0	46.0	73.1	68.0
LESS TRANS-FERS TO SWF CORP	7.1	14.5	18.6	18.6	16.3	6.9	5.8	8.3	6.5
TOTAL DIAMOND TAXES 1977-85									**919.6**
TOTAL PAYMENTS TO SWF CORP 1977-85									**103.1**

SOURCE: compiled from Statistical/Economic Review, SWA/Namibia 1985, p.17

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[5] op.cit., I.Goldblatt, History of South West Africa from the beginning of the nineteenth century, p.240

Apart from the huge sums involved, the agreement between South West Finance Corporation and the colonial administration is peculiar because it contradicts the notion that the colonial administration is supposed to be the owner of the minerals. Therefore, under the terms of the law applied by the illegal administration, the payment of royalties under normal circumstances should be due to the colonial administration instead of paying the company which does not have legal ownership of mineral rights.

It is submitted, however, that a royalty - being a payment made irrespective of profits - is not generally accepted by the mining companies. Since royalties are paid out at an earlier point in time than profits, they are regarded by the companies as a marginal cost. If the rate of the royalty is high, it can be argued that this can increase the cost to the companies and render mining operations unprofitable. This can also lead to premature abandonment of partly developed mines or to negative decisions with regard to the development of marginal ores, i.e., the mining right holder is likely to ignore minerals of low quality and grade in order to avoid costs. This can prevent the development of an otherwise a profitable mineral reserve. In addition, a royalty payment is usually fixed at a standard charge regardless of fluctuations in the cost of production not only between different mineral rights holders, but in different mines of the same mineral rights holder. Finally, the system can result in discrimination among mining companies because it takes a higher proportion of the profits in less profitable mines.

Although there may be inherent defects with a royalty system, it can still serve a useful purpose since it can be viewed as compensation to the owner of minerals for the exhaustion of a national asset.

2.2.2 Income tax

As we have already discussed above, fees and rentals that are charged for certain procedural formalities amount to insignificant sums and are intended to cover administrative costs rather than generate revenue to the State. In addition, we have also seen that royalties play an insignificant part since they are currently applicable only to the diamond industry. Their insignificance in the case of Namibia may stem from the fact that they are not favoured by the mining companies. Their application expose them to a great deal of uncertainty as to whether they will be able to extract the minerals profitably. We have already noted that they represent an additional cost of extraction to the companies, one that can be incurred whether or not the mining project is profitable.

On the other hand, a commitment to pay an income tax on profits appears less risky. As is the case with a tax system based on profit, if there are no profits, the companies have no obligation to pay tax to the colonial administration. They incur significant obligations only if profits are significant. Therefore, the most important fiscal regime in Namibia today is income tax levied on profits of mining companies and individuals who derive their income from mining operations. It is not surprising therefore to note that the colonial administration has increasingly resorted to income

taxation to appropriate a share of the profits arising out of mining operations.

A History of Mining Taxation

The object of this section is to briefly discuss the historical background of mining taxation in Namibia. Our aim is to analyse taxation laws which were applicable to the territory and their relationship with the taxation laws of South Africa. However, it must be noted that only those laws relating to income taxation are considered. Those relating to royalties have already been discussed above. Furthermore, only those laws dating back to the 1960s are discussed mainly because we have not been able to gain access to those dating back before this date.[6]

Until recently, the tax system in Namibia was more complicated than that operating in South Africa. The reasons for this are many. They include the fact that in addition to tax ordinances and proclamations promulgated in the Territory, a member of the South African Acts of Parliament relating to income taxation had dual application both in South Africa as well as in Namibia. In some cases, especially issues relating to tax rates, these Acts were subject to minor modifications insofar as they were applicable to

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[6]In discussing taxation generally, most available materials start with the 1960s. However, the author is reliably informed that the UNCTC has published some work on taxation in Namibia for which Professor H. Green was consultant. Unfortunately, I have not been able to gain access to these materials.

Namibia. In addition, there used to be two institutions or revenue funds to which income derived from mining operations in Namibia was payable. The proportion of funds due to these two accounts used to be regulated by a number of income tax statutes, both of the South African Parliament and ordinances and proclamations promulgated in Namibia. A good example of these are Income Tax Act No. 113 of 1977 (which provided a ratio under which income was paid into the two accounts discussed below) and Proclamation No. 85 of 1979. The two accounts were South West Africa Account of the South African Consolidated Revenue Fund (i.e. a joint account held by South Africa and Namibia), and the Territory Revenue Fund established for the exclusive use by the whites in Namibia.

Before major changes were introduced in 1981, the principal statute governing taxation of income from mining operations in Namibia used to be Income Tax Act No. 58 of 1962. This is a South African Act which had dual application both in South Africa as well as in Namibia. The only minor difference was that insofar as it applied to Namibia, some modification was thought necessary, especially provisions relating to the rate of taxation. The Act empowered the South African Parliament to fix income tax rates applicable to Namibia. These used to be fixed annually by the South African Parliament until 1977 when the responsibility for this was transferred to the Administrator-General in Namibia. Insofar as the power to fix income tax rates

for companies was concerned, he exercised it under the Rates of Normal Tax (Companies) Act, promulgated annually in the Official Gazette. Taxes paid by the companies, including mining companies, used to be paid into two accounts mentioned above. The Territory Revenue Fund for whites in Namibia used to receive one-seventh of the total income. This account was managed and controlled by the then South West Africa Legislative Assembly (a whites-only assembly).

In 1979, important changes took place. Both the South West Africa Account of the South African Consolidated Revenue Fund and the Territory Revenue Fund were abolished by Proclamation No. 85 of 1979. Two accounts were established in their place, one called the Central Revenue Fund for Namibia and another account which is still exclusively managed and controlled by the whites for their exclusive benefit. In contrast to the earlier arrangement, the 1979 changes require all taxes from the mining industry to be paid into the Central Revenue Fund for Namibia. The account for whites receives one-eighth of taxes raised from non-mining business activities. The proportion of the tax which is paid into this fund is now regulated under the Rates of Normal Tax (Companies) Act No. 16 of 1980.

Although we have been unable to discuss the history of tax laws from the early days of the South African rule, it is submitted that the main objective of the South African regime during this period (and indeed up to the present period) was to offer generous tax concessions to private foreign investors. The extent of

the concessions suggest that South Africa is very keen to attract and retain private foreign investment in Namibia's mining industry. The policy seems to encourage greater prospecting, exploration and development of mineral resources, and to offer tax concessions as a device to compensate private investors for the high risks which are involved in prospecting and exploration. At the same time, South Africa seems to be directly and indirectly benefiting from these concessions through its State mining companies as well as through dividends from joint venture mining enterprises with other private mining companies. It also benefits indirectly through income which is generated by a number of private South African mining companies operating in Namibia. Indeed, the income which these companies generate from Namibia forms an important part of the South African capital and helps that country to industrialise. It is in this context that some of the tax concessions offered to the mining companies in Namibia should be viewed. The full extent of these concessions and their effect in Namibia is discussed in detail elsewhere in this Chapter.

B The 1981 Income Tax Act and Types of Taxes Payable

In 1981, major changes in respect of tax laws applicable to Namibia took place. The major South African Statute, the Income Tax Act No. 58 of 1962 ceased to apply to Namibia. It was replaced by the Income Tax Act No. 24 of 1981. This Act is exclusively applicable to Namibia. Apart from the diamond industry,

it regulates all income taxation matters arising from mining operations (and other income taxation from other business activities which are not relevant to our discussion). It is the most detailed and most comprehensive Act ever to have been introduced specifically for Namibia. Before we discuss some of its provisions in detail, it is important to point out that the issues covered in the Act are complex, technical, and comprehensive. Therefore, it will not be possible to discuss all the provisions of the Act. Our main aim is to discuss and analyse those provisions of the Act that have direct relevance to our general discussion.

The issues discussed in this section include persons liable to pay income tax on their income derived from mining operations; the accounting principles employed in determining what constitutes taxable income; the deductions allowed; and types of income tax payable by taxpayers. The Act identifies two categories of persons who are liable to income tax, namely, companies and natural persons. A distinction is made between resident persons and non-resident persons. Furthermore, a distinction is also made between domestic companies and non-domestic companies. However, it is submitted that for tax purposes, the distinction between a domestic company and a non-domestic company is not very important because all companies that carry on mining operations or derive income from such operations are treated equally. The Act defines a "domestic company" as "a South West African" company or a company which is managed and controlled in Namibia (s.1(viii)).

Therefore, a domestic company is regarded as a company which is (a) incorporated in Namibia under the Companies Act (regardless of shareholders' nationality), or (b) if the management and control of the affairs of the company are exercised in Namibia notwithstanding the fact that it is not incorporated in Namibia.

Three types of taxes are imposed by the Act, namely personal income tax paid by individuals; corporation tax paid by companies; and dividend shareholders' tax paid by both individuals and companies in their capacity as shareholders. However, for the purposes of our discussion, we shall limit ourselves to the last two taxes. All mining companies operating in Namibia are liable to pay corporation tax (s.6(2)). The rate of this tax is dependent upon the type of mineral that is mined. For tax purposes, minerals are divided into three categories, namely: diamonds, uranium (including gold, silver, oxmiridium, and pyrites), and base metals. The importance of the distinction will become clear when we discuss income tax rates in the next section. However, it is important to point out that base metals are accorded preferential income tax rates in contrast to uranium and diamonds.

For income tax purposes, a distinction is also made between companies that carry on a mining business in Namibia (i.e. those which operate mines) and those which simply derive a rent from mining activities (i.e. those which merely receive dividends). All companies which carry on mining operations pay corporation income tax, while those which simply derive a rent in the form of

dividends are only liable to pay dividend shareholders' tax. In order to determine the method of calculating taxable income, it is important to discuss the accounting principle that is provided in the Act.

The most important provisions of the Act may be divided into three parts. These are: provisions determining the types of receipts and profits which are assessable or chargeable to income tax; the deductions that are allowed from the gross income in calculating taxable income; and the rates of income tax payable on the taxable balance of chargeable income after deductions have been made. The procedure for determining chargeable income is provided for under s.36 and s.17 of the Act. Section 36 distinguishes profit from capital in order to arrive at chargeable income for income tax purposes. Broadly speaking therefore, chargeable income may be referred to as income from a mining business operation less capital and other incentives offered by the Act. The most important deductions that are allowed are those of a capital nature. Two types of capital expenditure are identified by the Act, namely pre-production and production or development expenditures. All these expenditures are deductible before arriving at taxable or chargeable income.

Section 36 of the Act allows all mining companies to offset against income all capital expenditure incurred before the mine comes into production. The section also allows all capital expenditure during the life of the mine to be deducted from chargeable or

taxable income. The effect of the section is therefore that all capital expended before or after production is allowed to be offset against income earned in the year of assessment of tax. If it turns out that such expenditure exceeds the income, the balance is allowed to be carried forward to be offset against any income in the succeeding year or years until it is redeemed. Section 17 details some of the deductions that are allowed. These include expenses incurred on: legal expenses (s.17(c)); repairs on machinery, implements, utensils and other articles (s.17(d)); acquisition of machinery, implements, utensils, and articles (s.17(e)); premium or consideration paid for the right to use or occupy land or buildings, the right to use any plant or machinery, patent, design or trade mark, scientific research, and any sum contributed to a pension fund (s.17(g)); and expenses on managerial advice and other expenses incurred both in Namibia and abroad (s.17(1) and s.17(1)(b)).

The Act also allows provision for depreciation. It allows a scheduled deduction over a period of years, for instance, s.17(f) provides that there shall be deductible from chargeable income an allowance equal to twenty per cent of the cost of erecting buildings in the year of assessment, and four per cent of such cost for each successive year for a period of twenty years.

As noted above, another tax that is levied under the Act is dividend shareholders tax. Any person who derives a rent in the form of dividends is required to pay shareholders' tax. For tax purposes, the word

"dividend" is broadly defined as any amount distributed by a company to its shareholders. The phrase "amount distributed" is given a wider meaning. It includes any "profits distributed, whether in cash or otherwise, and whether of a capital nature or not, including an amount equal to the nominal value, at the time of issue thereof, of any capitalisation shares awarded to shareholders and the nominal value of any bonus debentures or securities awarded to shareholders" (s.1(vii)(b)). Therefore, if a shareholder receives dividends including the award of shares, the amount so received is treated as part of the shareholder's income and is taxable accordingly. The rate of the shareholders' tax is currently levied at 15 per cent of the amount distributed (s.45).

C Special regimes and the rate of taxation

We have already intimated above the the Income Tax Act no.24 of 1981 contains special provisions applicable exclusively to mining. In addition, differential tax rates are applicable to income from mining of different minerals. Taxation of mining companies is determined in accordance with the general principles of taxation under the Act, subject, however, to a number of special provisions, some of which are applicable to mining generally, and others are applicable to mining operations for different types of minerals.

Base metals - before 1981, the Income Tax Act no.58 of 1962 used to fix the rate of taxation payable by mining companies engaged in base metal production at 35 per cent of taxable income (compared with a basic rate,

at that time, of 40 per cent plus 5 per cent surcharge for all such companies operating in South Africa). In 1979, the rate was increased to 40 per cent by the so-called Administrator-General.[7] The rate of taxation on companies which produce base metals is now determined under s.6(2)(e) of the 1981 Income Tax Act. The current rate of taxation is fixed at 42 per cent.[8] This rate is the same applied to other companies operating in Namibia.

Uranium and gold taxes are also governed by the 1981 Income Tax Act. The Act provides that uranium taxation should be computed on the same basis and on a similar rate as those of gold. Section 1(xix) states that mining for gold or to mine for gold "includes mining for uranium or to mine for uranium". It is also important to note that for tax purposes, other minerals recovered in association with gold mining operations, such as silver, oxmiridium and pyrites, are deemed as income from gold mining (s.6(3)). Income from other sources accruing to a gold mining company is taxed at non-mining company rates. It is submitted that the wording of the statute, especially where it refers to minerals which "results directly from mining for gold" is misleading because there are no gold mines in

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7 see U.N. Centre on Transnational Corporations, (1981), The Role of Transnational Corporations in Namibia August, first draft report, p.2-9

8 see op.cit., SWA/Namibia Budget 1984-1985, p.13, paragraph 70

Namibia. At the present moment, gold is mined as a by-product, this means that there are no minerals which are won "in the course of mining for gold". This means that apart from uranium and other precious metals mentioned in the statute, mining companies pay only 42 per cent on their taxable income from gold since it is mined as a by-product of other minerals such as copper.

The rate of taxation applicable in respect of gold and uranium provided for under 2.6(3) is more complicated than the formulas used in other minerals. The tax on income from gold and uranium mining is on a sliding scale. It is based on the ratio of taxable income to gross revenues. The current formula for the gold and uranium mining tax rate, expressed as a percent, is Y=60-480/X. In interpreting the formula, it is stated that "Y is the tax rate and X is the per cent of revenue that is profits. For example if profits are 8 per cent of revenues, the tax rate is zero; if profits are 20 per cent of revenues, the tax rate is 36 per cent; and if profits are 40 per cent, the tax rate is 48 per cent".[9]

Diamond taxation was initially regulated by the old German Ordinance, the Imperial Mining Decree of 1905 and later under the Mining Consolidation and Amendment Proclamation of 1940. Currently, diamonds are subject

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9 see Leake S.Hangala, (1985), Structure of Namibian Mineral Industry, University Printing Press, Helsinki p.54 see also Bureau of Mines, US Department of the Interior Mineral Persepctives - Namibia, August, p.18

to three types of tax: the Diamond Company Income tax, Diamond Profits tax (payable only in respect of diamonds found or won in specified areas), and the Diamond Export Duty (this is more or less a royalty tax).

The Diamond Company Income Tax, as established by the Administrator-General in 1980, is 50 per cent of taxable income.[10] The second most important category of diamond taxation is the Diamond Export Duty regulated by the Diamond Taxation Proclamation no.16 of 1941. Under s.3(2) of this Proclamation, all rough and uncut diamonds exported from Namibia by the Diamond Board are subject to a 10 per cent levy on the proceeds of the sale. The levy is deducted from the operating profit in order to arrive at the amount classified as taxable income. Finally, the third category of diamond taxation is the Diamond Profits Tax. Under s.4 of the Diamond Taxation Proclamation no.16 of 1941, 15 per cent of what the Proclamation terms "Profits Tax" is levied on all diamonds won or found in Diamond Area No.1, formerly the Sperrgebiet.[11] However, this provision is of little significance since the 15 per cent levy is deductible from the income tax payable under the 1981 Income Tax Act (s.11).

It must be noted that the 1973 Commission of Enquiry into the Diamond Industry of South Africa and

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10 see op.cit., SWA/Namibia Budget, 1984-1985, p.13, paragraph 68

11 The area is defined under s.10 of the said proclamation

Namibia found that the overall diamond tax rate in Namibia was lower than that applicable in other gem diamond producing countries in Africa. The Commission found that the average rate in South Africa was 69.7 per cent; in Botswana, the government was receiving between 65 and 70 per cent of profits by way of royalty, taxes and dividends (from 50 per cent government equity) and in Tanzania, the government profits included income tax at 50.65 per cent, plus a 5 per cent levy on the gross value of diamonds and a royalty rate of 15 per cent on the gross value of diamonds.

Thus, despite its record of high profitability, the diamond industry in Namibia is, on average, subject to a lower rate of tax than the generally less profitable diamond mines in South Africa, Botswana and Tanzania. It is also important to note that the assessment of Diamond Profits Tax is done by the tax assessor appointed under the Diamond Taxation Proclamation of 1941. As we noted in Chapter III above, although the Diamond Board is supposed to supervise the diamond industry, in practice, most of the senior employees of the Board are also CDM employees. We have also seen that that CDM company secretary is also the Secretary of the Diamond Board.[12]

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[12] see The Economist, London 15-21 March, 1985, pp.76-81

In order to appreciate fully how Namibia is put at a disadvantage, it is necessary to compare tax rates which have been imposed in Namibia with those of other countries such as Canada. Before we discuss tax rates in detail, it is important to note that the rate of tax if viewed in isolation, may be misleading insofar as it is intended to be used as an indicator of the government take. Other equally important factors such as capital allowances and other deductions which mining companies are allowed to make from their gross income should also be taken into account as they are as important as the tax rate in determining the magnitude of the government take. The share due to the State can be substantially higher (notwithstanding the seemingly lower rate of taxation) if certain types of allowances and deductions are not allowed in contrast to a higher rate of taxation where these deductions are allowed.

Furthermore, there are other factors which need to be taken into account in assessing the benefits which a host country receives from the exploitation of its mineral resources. Modern mining legislation and mining project agreements impose upon private foreign investors obligations that constitute ancillary advantages in favour of host countries in addition to the physical arrangements. These obligations cover a wide range of issues such as education, training of employees, medical services, and scientific advancement. In the case of Namibia, it is needless to state that all these benefits are visibly absent from the terms of the mining concessions.

In comparing tax rates between Namibia and Canada, another important factor must be taken into account, namely, minerals in Namibia are taxed differently depending on the type of mineral that is being mined. Again in Canada, there are two main taxing authorities, the Federal Government and States governments. It is for these reasons that any comparison should take these factors into account. Therefore, for the purposes of our discussion, the comparative rate of taxation used in this section is that between the Federal Government of Canada and the rate of taxation in base metals in Namibia. The Federal basic rate of taxation has varied over the years. In the years 1973 to 1983 on which data is available, the rate of corporation tax on mining companies has been as follows: 49 per cent in 1973; 48 per cent in 1974; 47 per cent in 1975; 46 per cent in 1976 "and subsequent taxation years."[13]

The accounting principle is complex but in its basic form, important items are exploration and development expenditure. Exploration expenditure is deductible in full in the year in which it is incurred and in subsequent years if it is not deducted in a prior year.[14] On the other hand, development

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[13]See Tolmie Ross J., (1976), "Canadian Mineral Landholding System, Royalties, Rentals and Taxation", in Negotiating and Drafting Mining Development Agreements: An inter-regional workshop arranged by the United Nations, Buenos Aires, 1973, Mining Journal Books Ltd., London, p. 66; also Robert B. Parsons, (1982), Canadian Mining Taxation, Butterworths, Toronto, p.1; and s.123 of the Income Tax Act.

[14]ibid, s.66(1)(2), see also op. cit, Robert B. Parsons, (1982), Canadian Mining Taxation, p.31.

expenses are deductible at the rate of "30 per cent per annum on a declining balance bases."[15] Capital cost allowance is allowed on four major classes of items namely Class 10 - mining buildings and equipment acquired after production - 30 per cent; Class 12 - cost of mine shafts and other underground working - 100 per cent; Class 28 - cost of pre-production on certain buildings and equipment 30 - 100 per cent; and Class 29 - assets used "primarily for manufacturing or processing beyond the prime metal stage" - 50 per cent.[16] In addition to the 46 per cent income tax rate, there is a 5 per cent levy referred to as "temporary" surtax.[17] It is clear from the foregoing discussion that unlike Namibia, there are no open-ended tax concessions that are allowed as deductions. Indeed, it is stated that a "general provisions of the Income Tax Act denies a taxpayer the right to deduct amounts in respect of capital outlays, and thus effectively disallows the deduction of depreciation and amortization expenses that are recorded in a taxpayer's books of account.[18]

Furthermore, it is stated that a "withholding tax of 15 per cent (to be increased to 25 per cent unless governed by reciprocal tax treaties) is imposed [on] dividends,

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[15] ibid, see also s.66(2)(2).

[16] Op. cit, Robert B. Parsons, (1982), Canadian Mining Taxation, p.45.

[17] ibid. p.21.

[18] ibid. p. 44. Emphasis added.

royalties, and interest paid by Canadian companies to non-residents."[19] A royalty rate on leases in 1976 was 5 per cent of gross "production for the first three years and 10 per cent thereafter."[20]

In contrast, there are no royalty payments imposed on similar minerals in Namibia except diamonds which, for reasons discussed below, exist only on paper. Apart from a withholding tax of 15 per cent, there is no withholding tax paid on royalties and interest, indeed these items are deductible in the case of Namibia before arriving at taxable income. Comparable rates of taxation for base minerals in Namibia over the years have been 35 per cent, increased to 40 per cent, and then increased to the current rate of 42 per cent. Indeed, even these rates may be misleading in that base "metal mines operating on State Land are allowed a ten per cent deduction on normal tax."[21] Furthermore, unlike Canada and South Africa, there are no royalty payments in Namibia. Therefore, the mineral rent due to Namibia is considerably reduced.

In contrast to Namibia, comparable rates in South Africa over the years have been 40 per cent, 46.2 per cent, and the current rate is 50 per cent. In addition, a surcharge of 5

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[19]Op. cit. Tolmie Ross J., (1976), Canadian Mineral Landholding System, Royalties, Rentals and Taxation, p. 67.

[20]ibid.

[21]For details see Mining in SWA/Namibia, Proswa Namibia Foundation, p.2.

per cent is imposed. Furthermore, in addition to income taxation, the legislation (e.g. the Mining Rights Act 1967 and the Precious Stones Act 1964) provides for payment to the State of a lease consideration for the grant of mining rights which by statute are vested in the State. The consideration may take the form of a share of profits, in which event the share of profits payable is fixed by the Mining Leases Board. Indeed, even the colonial administration in Namibia recognise the fact that tax rates in Namibia are lower than those in South Africa. For instance, it is stated in 1987/88 budget that "tax rates ... in SWA/Namibia are in general lower than in South Africa."[22] However, it is alleged that this is because South Africa grants more concessions but this is not supported by legislation (see Section 5). It is further stated that from "the viewpoint of the entrepreneur the present environment in our country is far from ideal, ... We therefore see a lower tax rate as a partial compensation for these unfavourable local circumstances."[23] This view is in sharp contrast with at least one school of thought within the business community "that would prefer the present uncertainty to continue."[24]

The final point that needs to be noted is that in comparing tax rates between Canada and Namibia, important factors that

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[22]See SWA/Namibia Budget 1987/88, p.5. Emphasis added.

[23]ibid., emphasis added.

[24]See Chamber of Mines of SWA/Namibia Report, (1982), p.5, see also Chapter I.

are in Canada's favour must be taken into account. First, unlike Namibia, Canada benefits from down stream mining activities such as processing and consumption. Second, Canada enjoys considerable benefits from the exploitation of her mineral resources, her citizens participate on equal terms (at all levels of the mining industry) with private foreign investors. Third, the State itself is an active partner in the exploitation of the mineral resources, therefore, some of the benefits that accrue to the State are in the form of dividends. Finally, Canada is one of the capital exporting countries, indeed, the export of its capital to developing countries includes Namibia where Canadian mining companies are active. Therefore, it is respectfully submitted that all these factors should be taken into account in comparing tax rates between Canada and Namibia.

3 THE IMPACT OF INCENTIVES ON INCOME TAX

Special tax allowances and deductions have been made available to the mining companies under the 1981 Income tax Act and previous acts. Section 36 of the Act provides for substantial capital and redemption allowances with respect to mining expenditures. Thus, mining companies are allowed to deduct from income derived during a year of assessment from mining operations the amount of all capital expenditure incurred during that year of assessment. Section 36(1) provides that: "the amounts to be deducted ... from income derived during a year of assessment from the working of any mine shall be, where such mine commences production during

any such year of assessment, the amount of capital expenditure incurred up to the close of that year of assessment, and thereafter in respect of each succeeding year of assessment, the capital expenditure incurred during such succeeding year of assessment".

The meaning of 'capital expenditure' is expressly defined to include: (a) expenditure on shaft sinking and mine equipment; and (b) expenditure on development, general administration and management (including any interest and other charges payable on loans) prior to the commencement of production or during any period of non-production (s.36(3)(a) and (b)). It must be noted that the true construction of s.36(3)(a) limits the definition of capital expenditure to equipment the use of which is directly connected with the conduct of the mining operations and not activities incidental thereto or in connection therewith. It is interesting to note that notwithstanding the restrictive definition of the said section, it was discovered by the Thirion Commission that the Receiver of Revenue attached a wider meaning to the section to include the provision of housing which can hardly fall within the meaning of "shaft sinking and mine equipment".[25]

Statutory provisions that pertain to pre-production expenditures reflect an underlying philosophy of the colonial administration that such expenditure should be written off before any obligation to pay tax arises. Therefore, capital

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[25] op.cit., Thirion Commission, p.156

expenditure incurred by the taxpayer in respect of mineral operations fall into one of the following categories of pre-production expenditures namely: (a) searching for, discovery of, testing or securing access to minerals; (b) acquisition of certain rights on or over such deposits: (c) machinery and other works which would have little or no value to mining rights holder if the mine ceases to be worked; and (d) development, general administration and management prior to the commencement of production or during any period of non-production.

In addition to s.36 of the 1981 Income Tax Act, exploration and development expenditures such as "preliminary surveys, boreholes, shafts, development and equipment" are treated as capital expenditures and entitles the successor mineral rights holder to treat them as such (s.37(1)). Thus, where a mining company (the successor company) has acquired all or substantially all of the property used by the predecessor company, the successor company becomes entitled to deduct in subsequent years the cost of such expenditure since it is treated as capital expenditure. One example will suffice to demonstrate the effect of the section. In 1980, Tsumeb Corporation Ltd purchased a 70 per cent share of Otjihase mining property at a consideration of R32 million. The management of the mine was taken over by TCL and operated on the basis of a joint venture with Otjihase.[26]

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[26] ibid., p.147

As a result of the deal, TCL has not paid tax since 1979 despite the fact that in 1980, mineral sales amounted to R128,312,599, the highest sales for 13 years up to 1982. During the four year period (1981 to 1984), mineral sales amounted to R88,662,380; R110,943,604; R122,781,000; and R131,877,000 respectively.[27] The effect of this agreement was that in terms of sections 36 and 37 of the 1981 Income Tax Act, the colonial administration allowed TCL to deduct the full R32 million as a deduction from the company's 1980 income. Thus, what would have been a profit of R21,700,414 on which the company could have paid income tax of R8,680,165 was converted into a loss, to be carried forward, of R10,288,586.

In addition, the company spent capital expenditure on the Ojihase mine (from 1981 to 1984 expenditure amounted to R13,631,674) and by 1984, TCL's assessed loss was still R43,254,869, The result is that the company has not paid tax since 1980 and it is not likely to pay tax for some years to come until the accumulated loss has been offset against income. The consequences of these generous write-off provisions has enabled mining companies to reduce their taxable income by considerable amounts. In addition, there is considerable fluctuation in the payment of income tax as a result of the current practice whereby all allowable expenditures are written off against income in the year in which production commences and thereafter, any further

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[27] ibid., p.131

expenditure is written off in the year in which it is incurred. The weakness of the provisions is clearly demonstrated in the performance of eight mining companies discussed below and their contribution to the Central Revenue Fund.

(1) The SWA Company (Pty) Ltd - from 1970 to 1982, the company sold minerals to the value of R56,534,231 but paid only R1,695,272 in tax. The tax was paid in four tax years, 1972, 1974, 1975 and 1976. In 1977, the company sold minerals valued at R21,023,444 but it did not pay any tax. Finally in 1974, it paid R887,031 in tax when the sales totalled R6,129,987 but in the following year, the tax liability dropped to R188,376 despite the fact that mineral sales totalled R7,144,175, an increase of R1,014,188.[28]

(2) Deblin Mining Company (Pty) Ltd - during the 13 year period, 1970 to 1982, the company sold minerals valued at R9,345,785 but only paid R286,280 in tax.[29]

(3) Oamites Mining Company Ltd and Otjozonjati Mine Ltd sold minerals worth R93,051,319 and R3,365,331 respectively but only paid tax in the sum of R2,781,053 and R797,178 respectively.[30]

(4) Imcor Zinc (Pty) Ltd (Rosh Pinah) started mineral production in 1969 but only paid tax for the first time after

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28 ibid., p.130

29 ibid.

30 ibid. p.131

11 years (i.e., in 1980). From 1969 to 1979, the company sold minerals valued at R63.6 million.[31]

(5) SWA Lithium Mines (Pty) Ltd did not pay tax for 13 years (from 1970 to 1982) notwithstanding the fact that it sold minerals worth R4,043,518. From 1977 to 1982, the colonial administration spent R58,000 on building roads leading to the mine. The total expenditure on roads for specific mines for the 5 years period (from 1978 to 1982) was R5,138,289.[32]

(6) TCL - for the 13 years up to 1982, the company sold minerals worth R847,859,709. During the same period, it paid tax in the sum of R49,654,471, this represents 5.86 per cent of the mineral sales.[33]

(7) Imcor (Pty) (Uis Tin Mine) - the company paid tax only once during the 13 year period to 1982. This was in 1979 when it paid R136,273 when mineral sales amounted to R9,548,930. During the 13 year period, the total mineral sales amounted to R75,217,034. By January 1980, it was making a profit of "R500,000 per month".[34]

(8) Rossing Uranium Ltd - from 1976 to 1982, mineral sales amounted to R1,440,93 million but due to the provisions discussed above (i.e., exemption from taxation provisions), no tax has been paid up to 1982. At the same time, the

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31 ibid.

32 ibid.

33 ibid.

34 ibid., p.132

colonial administration has spent R2,038,387 "in building and maintaining roads leading to the mine".[35]

Finally, incentive provisions have been abused by the mining companies. In order to avoid taxation, they have resorted to channelling what would have been taxable income into expansion projects some of which may not be justified on purely economic considerations. The incentive provisions have also encouraged mining companies to indulge in capital intensive projects at the expense of labour intensive mining projects which Namibia needs in order to alleviate the high rate of unemployment. This has resulted in Namibia being turned into a net importer of expensive, but often unnecessary capital equipment. The problem is compounded by the fact that no limitation is placed on the type of capital goods or mining projects which would qualify for a deduction in terms of s.36 of the 1981 Income Tax Act. All these factors adversely affect the income which the colonial administration derives from the mining industry.

4 COLONIAL NEGLECT AND ITS IMPACT ON INCOME TAX

We have seen in the preceding section that where a taxpayer has incurred substantial exploration and development expenses, this can substantially reduce his taxable income (at times even to nil even though he reports a higher amount of pre-tax profits for accounting purposes). Under such

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35 ibid.

circumstances, proper accounts are essential if business profits are to be correctly calculated for tax purposes. The absence of proper accounts may result in an undercharge which may later have serious consequences. In the case of Namibia, there is lack of supervision by the colonial administration in the activities of the mining companies. This colonial neglect has resulted into serious consequences in so far as income tax is concerned. A few examples from the findings of the Thirion Commission will suffice.

Under Regulation 132 of the Regulations published in Government Notice 143 of 1st October 1968 the mine owner is required to render, at monthly intervals, a return for the preceding month, to the Chief Inspector of Mines all the information required including the value and quantity of mineral ore exported or sold. In spite of this requirement, the Thirion Commission found that there is persistent failure to render returns in respect of the production and sale of particular minerals.[36] In addition, there are discrepancies and inconsistencies in comparison between monthly returns, annual reports, inspection reports, permits and other relevant information.[37] Some examples include the following (1) Imcor (Pty) Ltd (Uis tin mine) omits to mention the presence of a number of by-products in its tin concentrates and yet in 1980, the company "exported tantalite to the value

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36 ibid., p.88

37 ibid., p.90

of R386,755,18".[38] It is assumed that tantalite has been produced as a by-product since the company started production.

(2) Otjihase Mine did not mention the gold content of the copper concentrates which it produced in 1981 and 1982. In 1966 and 1983, the gold content was 34,385 kg and 21,986 kg respectively.[39]

(3) The returns of Brandberg West Mine (SWA Company Ltd) during the four year period, 1977 to 1980 showed its wolfram production which was "332,089 tonnes (54 per cent) lower than the figures ... reflected in the US Minerals Yearbook".[40] The discrepancies and inconsistencies were discovered in the total of about 25 mines.[41] Therefore, in order to determine whether the taxpayer can be said to have evaded payment of taxes, he must be shown to have excluded from his total income an amount which he is legally obligated to include, in computing his total income for purposes of assessment of tax. The examples given above clearly show that mining companies have employed unlawful means which seek to withhold tax which is otherwise payable.

In addition, fictitious and improper characterisation is being made of income or expense items. CDM features prominently in this practice, e.g., the Thirion Commission

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38 ibid., p.89

39 ibid.

40 ibid.

41 ibid., p.87

discovered that the company used to enter what was called 'head office expenditure' in its records. During the 5 year period to 1978, the amount involved totalled R49.4 billion divided into R5,982million in 1974; R6,000 million in 1975; R9,288 million in 1978.[42] It is also reported that after 1978, the item 'head office expenditure' disappeared from the company's records and was replaced by what it termed 'indirect capital expenditure' and the amount of such 'expenditure' was significantly increased. It must be noted that the expenditure referred to refers to De Beers, CDM's parent company. Indeed, the Thirion Commission was forced to conclude that head office expenditure "is a favourite item whereby multinational companies effect a distribution of income among its subsidiaries so as to reduce the liability for the payment of tax".[43]

Companies such as De Beers are involved in elaborate schemes to avoid taxes. It has set up several wholly-owned subsidiaries with a view to facilitating transactions which are advantageous from the tax point of view. Since exemptions and deductions which are capable of providing the scope for tax avoidance have not been restricted or controlled by appropriate legislation, it has provided an opportunity to mining companies to avoid tax as much as possible. In 1978, the Marine Diamond Corporation Ltd (MDC) leased its mineral rights for the mining of diamonds to CDM.

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42 ibid., p.326

43 ibid., p.327

MDC is a wholly owned subsidiary of CDM which is in turn a wholly owned De Beers subsidiary.

Under the agreement, CDM undertook to pay MDC an annual rental equivalent to the annual net profit derived by CDM from the two foreshore areas in addition to a royalty of 4.5 per cent of the value of all diamonds recovered in the areas of the lease. When the Administrator-General increased the rate of taxation on diamonds to 50 per cent, the agreement was altered. Prospecting grant was added and CDM undertook to pay an annual rental which was greater of the sum of R500,000 or an amount equivalent to the annual net profit derived by CDM from the two foreshore areas whichever was the greater.[44]

MDC carries out prospecting operations in these areas on behalf of CDM. According to the Thirion Commission's findings, CDM is planning to spend R10 million annually on prospecting. R7,247,879 was spent on prospecting and the figure was to rise by R1 million per annum over the five year period totalling R48 million. Calculated at the rate of 50 per cent as diamond income tax, this means that the colonial administration would forego about R26 million in tax which it would receive if the agreement had not been entered into. Under s.36 of the 1981 Income Tax Act, CDM is entitled to deduct from its current income, for tax purpose, the expenditure incurred on prospecting in the leased areas. On

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[44] ibid., p.137

R500,000 rental which CDM undertook to pay MDC, MDC pays income tax at the ordinary rate for companies, which is 42 per cent of the taxable income since it is deemed to be not involved in the diamond operations but merely deriving income from diamond operations (which is taxed at 42 per cent compared with 50 per cent for companies involved in diamond operations).

It is also alleged that CDM is involved in overmining. The exploitation of the diamond resources by CDM is partly governed (in addition to the Mines, Works and Minerals Ordinance No. 20 of 1968) by the Halbscheid Agreed discussed above. Clause 3 of the Agreed partly states that "CDM when working any area pegged under this agreement, shall conduct operations as thoroughly and economically as it does on its other mining fields and shall carry on mining satisfactorily to the Administration and not with a view to exhausting the superficial and more valuable deposits to the detriment of the low grade deposits."[45] It is important to note that the phrase "carry on mining satisfactorily to the Administration" implied supervision by the colonial administration over CDM's mining activities.

According to a TV documentary entitled "Disappearing Diamonds" shown in Britain in September 1987, it is alleged that overmining took place after the death of Sir Ernest

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[45]For details see Thirion Commission Report, 1985, p.229. Emphasis added.

Oppenheimer, CDM's founder member. He is quoted by a Namibian newspaper to have said that "'Unless you deliberately mislead your shareholders ... there is only one method of working South West Africa. That is to see what diamonds you have got and work the average grade.'"[46] According to the Financial Times, the "change in emphasis occurred only a few years after Mr. Harry Oppenheimer had assumed the chairmanship of De Beers following the death of his father, Sir Ernest Oppenheimer. CDM concentrated on preferential extraction of richer areas, particularly those which contained the larger and more valuable gems. The reason is still unclear, but it appears to be due to a combination of fears over De Beers' status in Namibia once the territory wins its independence from South Africa and demands from De Beers' marketing division for more diamonds than could be extracted if average material was worked."[47]

According to the documentary referred to above, "De Beers had 'stolen' assets of about one billion pounds from its Consolidated Diamond Mines in Namibia by excessive overmining in breach of a 64 year-old agreement [i.e. the Halbscheid Agreement]. Contrary to accepted mining practice, this involved working the reserves with the largest stones and the highest grade ... effectively reducing the life of the

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[46]For details on overmining and transfer pricing allegations see The Namibian, (Namibia) 2nd October, 1987, p.4; and The Guardian, (London), 29 September, 1987, p.4.

[47]See The Financial Times, London, 18 March, 1986, p. 36, col. a.

mine."[48] In addition to the various sources quoted above, the strongest evidence concerning overmining charges comes from De Beers' own documents. The three most important of these are: a Life of Mine Forecast 1977, a Life of Mine Review September 1981, and a General Manager's Report of January 1978. CDM admitted the authenticity of these documents.[49] It is also important to note that when the copies of the documents were presented before the Thirion Commission, "CDM was represented by an attorney who was keeping a watching brief, no objection was raised to the admissibility of the documents ... when the attorney representing CDM addressed the Commission, ... he alluded to these documents as stolen documents."[50]

It is also stated by Roger Murray that when the documents were presented to an independent diamond expert, they indicate that "CDM may have extensively overmined in the 1970s, that the life of the mine may be shorter than anticipated and that its profitability may be decreasing."[51] According to the documents, "the average size of the stone mined fell from 0.88 carats in 1972 to 0.66 carats by 1981 ... the ore grade is falling from 0.3 carats per cubic metre in 1968 to an expected 0.04 carats per cubic metre in 1993.

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[48]Quoted from The Namibian, 2nd October, 1987, p.4.

[49]See Roger Murray, (1984) "Leaked documents spark CDM diamond controversy." African Business, November, p.57.

[50]See The Thirion Commission, p. 258.

[51]Op. cit. Roger Murray, (1984) "Leaked documents spark CDM diamond controversy."

Output, which [was] just under 1M carats [in 1984], 98 per cent of which [comprised of] high-quality gemstones, is expected to start declining rapidly from 1990."[52] The documents also revealed that in "1968 the General Manager recorded overmining by 323 per cent. Much later in a 1981 report, a senior manager warned that the mine would 'power dive' itself into early closure unless the rate of overmining diamonds was slowed down."[53] In 1982, CDM's resident director Mr. Hoffe expressly stated that "CDM is an old mine nearing the end of its life."[54] He went on to state that the 1982 ore reserve estimate indicated that CDM has a life of "between 12 and 15 years but because prospecting is continuing it is estimated that CDM will continue producing at least until 2000 A.D."[55] If these allegations are true, there is no doubt that CDM is prima facie in breach of Clause 3 of the Halbscheid Agreement.

It is also important to note that although CDM claims that its mining programme will lead to 97 per cent recovery, the central issue is whether or not CDM gave priority to mining out more valuable stones in breach of clause 3 of the Agreement. Moreover, even if the recovery programme proves successful, it does not mean that the revenue of the company will not be affected if it is true that more valuable stones

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[52] ibid.

[53] Quoted from The Namibian, 2nd October, 1987, p.4.

[54] See The Thirion Commission, p. 250.

[55] See letter addressed to Mr. Lang in the Appendix.

have been mined out. It must also be noted that the Halbscheid Agreement represents a good example of colonial neglect. Notwithstanding the fact that mineral rights are vested in the State, the agreement provides that a royalty of 22.5 per cent of the aggregate of the Diamond Export Duty and Diamond Profits Tax should be payable to the South West Finance Corporation (another De Beers subsidiary company). The royalty is paid from diamonds produced in the area known as the Sperrgebiet" as is now or may at any time hereafter be owned, leased, controlled or worked by CDM and its successors in title."[56] The arrangement has a distorting effect on company tax which CDM pays to the State. This can only be appreciated if the provisions of the income tax statutes are briefly discussed.

In terms of the Diamond Taxation Proclamation No. 16 of 1941, CDM is required to pay a 15 per cent diamond profits tax and 10 per cent diamond export duty. Under s.11 of the Income Tax Act 1981, the amount assessed as diamond profits tax and diamond export duty is deductible from the company tax payable by CDM. Since the 22.5 per cent royalty payable to the South West Finance Corporation is calculated on the aggregate of the Diamond Export Duty and Diamond Profits tax, the colonial administration pays out a larger amount as a royalty than what CDM pays to the State. Indeed, one is forced to conclude that these "taxes" are being used as a

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[56]Consolidated Royalty (1941 Amendment) Agreement. For details see The Thirion Commission, 1985, p. 78.

device to pay a larger share to the South West Finance Corporation. It is for this reason that any discussion of diamond taxation in Namibia which does not take this factor into account may be misleading. It was also held by the Thirion Commission that "Not only does the State receive no income from Diamond Profits Tax but it in actual fact foregoes tax ... since the State derives no benefit from it, but is at the end of the day actually out of pocket as a result of the fact that the tax serves to increase the amount of the royalty payable by the State to S.W.F., it must be abolished."[57]

It should also be remembered that diamond rights from the Sperrgebiet were owned jointly between the German colonial administration and the German diamond company. When South Africa assumed the administration, the rights of the State were "leased" to CDM. There is no evidence that CDM paid for the "lease". At least this should have been reflected in CDM's tax obligations. Instead, the State is paying a royalty to a private company for the rights which by statute belong to the State. It is submitted that the arrangement represents colonial neglect par excellence. Indeed, even if the arrangement could be viewed in the context of attracting private investment, it could have been renegotiated. This is a universal practice in the mining industry (See Chapter VII).

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[57]See The Thirion Commission, 1985, p.163.

The investment policy of the colonial administration seems to be based on the assumption that foreign investors would only invest in Namibia if they can obtain higher returns than in neighbouring countries. Mining companies operating in Namibia have been guaranteed stability of tax obligations. It is interesting to note that in South Africa, the rate of taxation on mining and non-mining companies (excluding gold and diamond companies which have different tax rates) has just been increased from 46.2 per cent to 50 per cent. The so-called Policy Advisory Committee for Finance and Economics in Namibia recommended against any increase in the rate of taxation on the ground that that this "would contribute little or nothing to solving the Central Government's financial problems".[58]

While the colonial neglect continues, South Africa and mining company shareholders continue to receive enormous sums in the form of dividends. It must be noted that Namibian mineral resources significantly contribute to the revenue of the fascist South African regime through its parastatal sector as well as through private South African mining companies which operate in Namibia. The well known South African state owned company, Iscor, obtains vital supplies of Namibian minerals such as zinc and tin from Namibia. The minerals are obtained through its two operating subsidiary companies namely, the Industrial Minerals Mining Corporation established in 1958 (wholly owned and operates Uis tin mine) and Imcor

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[58] op.cit., SWA/Namibia Budget 1984-1985, p.13

established in 1969 (51 per cent owned and operates Rosh Pinah lead and zinc mine). The company supplies over half of Iscor's tin concentrates. It must be recalled that the Industrial Minerals Mining Corporation is one of the companies mentioned by the Thirion Commission and said to have paid tax only once during a 13 year period. It is clear therefore that the less tax it pays in Namibia, the more South Africa benefits.

South Africa's plunder of Namibia's mineral resources is illustrated by Imcor Zinc (pty), the fourth largest mining company in Namibia, wholly owned by the South African State company, ISCOR. The rental which it pays for its mineral rights was fixed at R2 per hectare per annum. It was disclosed by the Thirion Commission that "the rental cannot be changed unilaterally during the currency of the grant ... certain of the grants are to run until such time as the mineral deposit has become exhausted. In respect of these grants the State is contractually bound to a rental of R2 p.a. per ha. for the life of the mine ... however long that may be."[59]

Furthermore, the Industrial Development Corporation (IDC) has a shareholding in Rossing Uranium mine and it is also one of the major shareholders in Oamites mine[60] (the company which

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[59] See The Thirion Commission Report, 1985, p.78.

[60] see Proswa, Namibia Foundation Publication on Mining in SWA/Namibia, p.8

is also mentioned by the Thirion Commission). In the case of IDC's shareholding in Rossing, it is reported that the illegal racist regime received £3.6 million and £7.2 million when Rossing profits in 1979 and 1980 were £27.2 and £54.4 million respectively.[61] This partly explains why the rate of taxation in Namibia is lower than that of South Africa. Therefore, the colonial neglect in Namibia benefits the South African regime and foreign multinational companies.

5 ALTERNATIVES

Our discussion in the preceding sections shows that sharing a mineral rent can be a constant source of conflict between the interests of Namibia and those of private foreign investors. An equitable alternative of income taxation should be found to minimise these conflicts of interest. The object of this section is to briefly discuss options or alternatives that could be adopted in place of the current open-ended system of permitting write-off of investments and other tax concessions before any obligation to pay income tax arises. Issues covered in this section include limitation on the loan to equity ration; taxing interest payments remitted abroad; and limitation on the repatriation of capital, interest and profits.

It is submitted that any alternative system must take into account two important factors. As owner of the mineral

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[61] op.cit., Role of Transnational Corporations in Namibia, p.4-2

resources, the State should be entitled to receive an equitable proportion of the mineral rent that is generated as a result of the exploitation of its mineral resources. At the same time, an equitable tax system should recognise the legitimate needs of private foreign investors to receive more than the going rate of return on their capital.

In the case of Namibia, there is a need to control and limit some of the open-ended tax concessions that are granted to private foreign investors. Among these should be put a limitation on loan to equity ratio. It is a well known fact that revenues from the exploitation of mineral resources may be considerably reduced as a result of loan to equity ratio. Where the amount of loan capital is unreasonably high in relation to equity capital, the likely result is that there may be an unfairly large interest deduction in the calculation of taxable income. If, as is often the case in Namibia, the loan is from a parent or another company in a vertically integrated industry, the loan to the equity ratio can work at the expense of the host State. The main attraction for the mining companies is that they are able to get a large part of their capital investment in the form of repayment of loans rather than out of dividends withholding tax. A high level of interest payments, given the fact that they are chargeable as a cost, have the effect of reducing the income tax liability. The current position in Namibia is that the tax legislation does not restrict interest payments on such loans. The problem could be minimised by restricting such interest at rates charges by unrelated parties or some pre-agreed formula or yardstick.

There is also a need to amend the provisions of s.36 of the 1981 Income Tax Act to limit the aggregate amount of capital expenditure that can be allowed as a deduction from taxable income. The amended section could limit capital expenditure deductions on project by project basis (i.e. expenditure incurred in relation to any one mine), as opposed to a company tax assessment basis. Indeed, this is the requirement in South Africa under s.36 of the Income Tax Act No. 58 of 1962. (as amended). The amendment could minimise the current practice of cross-subsidisation among the projects of the mining companies. The effect would be that capital expenditure incurred on a mine could only be offset against income from that particular mine. This method has long been adopted by the oil industry. The main objective is to prevent oil companies from offsetting losses arising from other projects against profits arising from oil activities. The principle has since been referred to as "ring fencing".[62] Another alternative could be to link the accelerated tax concession to reinvestment guarantees. This could be done by stipulating a minimum percentage of the write-offs granted for capital expenditure to be reinvested in the Territory.

It has already been noted that s.36 of the 1981 Income Tax Act provides for an accelerated capital write-off. The effect of the section has already been illustrated by TCL example. An alternative to the section exists in South

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[62]See generally Daintith, Terence and Willoughby G.D.M. (eds), (1977) United Kingdom Oil and Gas Law, Oyez Publishing Ltd, London, p.101.

Africa under s.36 of the Income Tax Act No. 58 of 1962. Capital redemption under the provisions of the Act is spread over the whole life of the mine. The Act stipulates that for each year of assessment the unredeemed balance of capital expenditure at the beginning of the year should be added to deductible capital expenditure incurred during that year. The aggregate thereof is then divided by the estimated life of the mine to obtain the amount deductible from income in that specific year of assessment. This aims to strike a balance between the interests of the State and those of the investor. Furthermore, in order to limit the current rate of repatriation of capital and profits, a tax should be imposed on interest payments remitted outside Namibia. There should also be a limitation on the repatriation of profits by requiring mining companies to re-invest a portion of their profits in the country for a specified period of time. The restriction could also be applied to a portion of the redeemed capital.

All these measures would go a long way to minimise the current problem that has been identified in the preceding section. Indeed, if some of these problems are to be minimised, Namibia needs to adopt some of the measures that are currently in force in South Africa itself. In sum, the South African tax laws could provide an answer to Namibia's problems.

6 VERTICAL INTEGRATION AND ITS EFFECTS ON INCOME TAXATION

The object of this section is to evaluate and analyse problems associated with effective control of a vertically integrated industry and the impact these problems have on income taxation. In order for any tax system to be effective, State personnel must be capable of analysing the intricacies of interfirm transactions, transnational accounting, and international taxation as used in the mining industry. The inexperience or lack of personnel in this area is likely to be one of the main handicaps of effective control of a vertically integrated industry. It is also likely to affect the State in its effort to achieve a more favourable outcome in dealings with transnational corporations.

The growth of multinational mining companies has raised a number of problems of effective control of their activities by host mineral producing countries in the Third World. In most cases, investment decisions are made by parent companies and not by the operating subsidiaries situated in a host developing country. Furthermore, investment decisions are made in the context of an overall investment strategy aimed at maximising the affiliates' total income. This results in direct involvement or control by the parent companies over the conduct of their operating affiliates.

6.1 Problems associated with determination of Income

A vertically integrated industry presents considerable problems to the host State in determining the income of the operating subsidiary of a multinational company. Among the problems that most developing countries face are determining the sources of income that are to be taxed, the prices that govern sales made by the operating subsidiary to other affiliated companies within the group, the application of provisions relating to capital allowances, and finally the calculation of costs, expenses, and other deductions that are chargeable against gross income. Therefore, the biggest problem that developing countries face is that multinational mining companies operate globally. The companies may be motivated to conduct their mining operations in such a way that they shift recorded profits from one tax jurisdiction to another in order to achieve a number of objectives. These may include reducing taxes on their taxable income if the physical regime of the host country is regarded as being too severe; to avoid accumulation of profits in a country regarded to be politically unstable (in some cases notwithstanding the fact that the physical regime in such a country may be favourable to the companies);[63] and to avoid exchange controls and other restrictions that may be imposed by the host State.[64]

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[63]Namibia provides a good example.

[64]This seems to be the experience in Namibia where companies tend to shift profits from "RSA currency control [to] finance global expansion" per Professor Green's comments.

The problems stated above reflect the nature and structure of multinational mining companies. They are not confined to the experience of one country such as Namibia but are problems faced by most if not all mineral producing countries. Therefore, transactions in a vertically integrated industry such as the mining industry present universal problems, and more so in developing countries. Part of the problem is that the laws and administrative machinery of most developing countries are not sufficiently developed to cope with affiliate transactions. It will be shown below that although many developing countries have taken measures aimed at minimising adverse effects caused by affiliate transactions (transfer pricing), considerable problems still remain unresolved. Affiliate transactions or transfer pricing has forced many developing countries to undertake constant monitoring of these transactions by taxing authorities. Among the issues covered in the monitoring process have included mineral sales and intra-trade purchase prices of goods and services.

One of the major problems experienced by mineral producing countries is the method to be applied in determining the price to govern sales of the mineral resources produced in their countries. Pricing is an important part of mineral taxation for it establishes the method for valuing minerals, which in turn determines gross revenue upon which income tax is imposed. If the accounts of the operating subsidiary mining company are not effectively monitored, profits may be reduced by manipulating accounts so as to inflate costs and deflate earnings. The resulting consequence is the reduction

of the operating subsidiary's tax liability. This may be achieved in several ways, for instance, mineral sales to affiliates may be set at artificially low transfer prices. In most cases, these prices are much lower than those which could be obtained in arm's length transactions. Several options are available to the mineral producing countries to deal with this problem. In recent years, pricing has been used as a method of increasing taxation or rent collection. Some countries require that taxes should be calculated on the basis of market prices (if these prices are higher than transfer prices). As a result, many forms of pricing have been adopted. They include spot market prices, reference prices, and posted prices. These prices reflect mineral producing countries' desire to arrive at an arm's length price which is a neutral market price between unrelated parties. However, the use of open-market prices may not necessarily solve some of the problems discussed above because such prices are likely to swing widely. This may have an impact on taxation. The experience in copper provides a good example.

In some cases, the absence of openly quoted prices may present considerable problems to the taxing authorities as there may be no criteria on which to determine the price which could be realised. This is the case in minerals such as uranium. In these cases, the only solution may be for the host State to assume control over part of the sales so as to have a reliable standard. Developing countries have taken further steps to minimise problems associated with mineral sales within affiliates. Some of them, notably Zambia, have

established single channel State monopoly marketing companies. This is discussed in detail in Chapter VII. In other countries where mineral sales are made to unaffiliated parties, actual realised prices are used as a basis for calculating income tax. However, if mineral sales are to affiliated parties, some adequate yardstick of value is normally specified.

Apart from the problems associated with the determination of arm's length prices in mineral sales, the pricing of goods and services among affiliates can have an adverse effect on the operating subsidiary's net income on which it is taxed. It is often the case that mining companies buy most of their equipment and inputs through affiliates. This can provide the companies with an opportunity to price the goods so that profits are generated where they serve the interests of the group. Where imported goods are over-priced, this is likely to result in a diminished net income of the operating subsidiary on which it is taxed. This problem has been tackled in a number of ways. The laws of most developing countries require the application of arm's-length prices to be used for income tax purposes. However, where arm's-length prices do not exist, this can present a problem to the taxing authorities. Two options may be adopted by a developing country that wish to minimise this problem. The first option is to base affiliate transactions on the cost-based figures, or alternatively, the State can hire independent assessors to evaluate the imported goods. In such circumstances, figures arrived at by independent assessors

authority to arrive at the net income of the operating subsidiary for income tax purposes.

Apart from purchases of goods, another method which may be available to multinational mining companies for shifting accounting profits from one country to another is the use of charges for services within affiliates. These charges, which are normally made by parent companies to their operating subsidiaries, cover a wide range of services such as sales commissions on mineral exports, technical, financial and consultancy charges; and "head office" expenses (as is the standard practice with De Beers (supra)). It is submitted that this is an area where developing countries face considerable problems of verification to ensure that these services are provided at arm's-length prices. It is particularly difficult to verify the true cost of say technological information services for instance. In most cases, due to specialisation, it is difficult independently to verify certain charges offered by the parent company or an affiliate. The diamond industry provides a good example. De Beers' services (or at least some of them) are not matched by other companies outside its group of companies. Under such circumstances, it would be difficult to approximate what would constitute reasonable charges for diamond sorting for example. The arm's-length charges may either be too low or too high since there is no way in which the taxing authority may verify the true value of these charges.

As already noted above, if no action is taken by the State to control these charges, they are likely to be used by the

companies as a method of shifting income of the operating subsidiaries. In a situation where there is comparable charges, legislation (or mining project provision) may be adopted to require affiliate charges not to be higher than those that would be provided by third parties. On the other hand, where there are no comparable charges, the host State may protect its interest by placing a burden on the operating subsidiary to submit calculations to determine what constitutes fair charges for income tax purposes.

6.2 Monitoring Activities of Multinationals

Problems that are associated with a vertically integrated industry cannot be minimised without an effective monitoring mechanism. However, due to the structure of multinational mining companies, most developing countries would find it very difficult effectively to monitor their activities. In most cases, these countries have adopted laws and regulations which enable State officials to inspect the books of account and records of the operating subsidiaries. Inspection rights enable the State to inspect the books in order, for instance, to verify the shipment and sale of the operating company's mineral resources. This may be necessary for determining the f.o.b. revenue from the sale of such minerals.

In theory, inspection rights may be a useful tool possessed by the host State in its effort to monitor activities of operating subsidiaries. In practice, however, this may not necessarily prove to be effective. It has been stated by Studholme that "where inspection of company books takes

place, the Multinational Mining Company keeps separate records for government inspection and its own record."[65] However, this problem may be minimised by requiring the operating subsidiary to adopt a standard method of accounting.

Perhaps the biggest problem which most developing countries face is not so much that of compliance with their laws and regulations but lack of qualified personnel. It is an obvious fact that lack of qualified personnel can hinder effective regulation and monitoring. This can also have a direct bearing on the mineral rent due to the State. The administrative staff should be in a position to comprehend most of the complex issues raised above so as to minimise the adverse effect of affiliate transactions on the amount of tax that is due to the State. The personnel must be capable of interpreting and processing the information that is supplied to them by operating subsidiaries. If the information obtained through the monitoring system is to be useful to the State, its personnel must be in a position to make a more accurate evaluation of such information. It goes without saying that most host countries, Namibia included, lack such personnel. it is for these reasons that even a voluntarily supplied information by a vertically integrated company may prove to be of no value to the host State. At the end of the

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[65]See Studholme, Caroline, (1981), The Legal Regulation of Mineral Exploitation in Developing Countries: A Study in Dependent Development, LL.M. dissertation submitted to the University of Warwick, Coventry, UK, p.200.

day, the purported monitoring mechanism may turn out to be more costly and worthless if those entrusted with the job are not capable of even understanding the most elementary issues involved with problems associated with controlling a vertically integrated mining industry. Indeed, it is submitted that due to considerable experience which multinational mining companies gain from their global operations, they are likely to be several steps ahead of any attempt aimed at limiting their privileged position.

7 CONCLUSION

Although theoretically tax concessions are a form of subsidy which could be granted to foreign investors in order to promote a certain industry, tax concessions can only be effective if they bring about economic benefits to the host country. Clearly, it is insufficient to grant a subsidy to the companies who would have invested even without it. The higher the number of beneficiaries of the subsidy although they do not contribute to the economic development of the territory, the lower its efficiency.

In the preceding sections, the current taxation legislation affecting the mining industry has been examined. We have seen that the legislation puts more emphasis on the essential needs of the mining rights holders at the expense of the needs of the Territory. In addition, the legislation has not kept pace with developments in tax laws in other countries. The small increase in the rate of taxation (see the appendix) has nothing to do with improving the social and

material conditions of the indigenous population but to finance the costly state repressive machinery.

Therefore, the lesson which can be drawn from this study is that open-ended concessions in themselves do not constitute a satisfactory solution to mineral development which can benefit the host country. Practical problems (such as controlling the accounting principles in order to minimise tax evasion and avoidance) remain to be solved especially when the industry is dominated by foreign companies motivated solely by an urge for profits. Although the inflow of foreign capital may partly be facilitated through the mechanism of tax concessions, it nevertheless remains uncertain as to how far that inflow is secured by direct provision of incentives. While it is true that to some extent tax incentives may have a bearing on the flow of foreign capital in the mining industry, the investment decision will, to a large extent, depend upon the requirements of world markets and the estimate of the annual growth of world consumption. The result is that even where special concessions may not greatly affect the total flow of foreign investment, these latter factors do often have important bearing on the allocation of that investment.

There are four disadvantages in exempting investors from taxation until capital investment has been recovered. First, the demand for minerals (and the price) may drop before liability for tax arises. Secondly, it encourages companies to cream off the richer parts of the mineral deposit during the early stage of mining operations, thus, running a risk of

minerals being exhausted before tax liability arises. Thirdly, the exemption can only be beneficial to the private foreign investor if there is a double taxation treaty with a tax sparing provision between the host country and the State of the investor. Finally, during the exemption period, the host State continues to incur enormous amounts on infrastructure services for the benefit of the investor.

Having regard to the above discussion, we are compelled to come to the same conclusion as that of the Thirion Commission, namely Namibia "should not wait for independence before realising that its mineral resources are a blessing and have to be exploited with care and circumspection if the highest possible return is to be obtained from them".[66]

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[66] op.cit., Thirion Commission, p.62

CHAPTER V - MINERAL DEVELOPMENT AND ENVIRONMENT PROTECTION

1 INTRODUCTION

This chapter discusses the effect of mining operations on the environment in Namibia and the role played by mining laws and regulations in protecting the environment. Before we discuss these issues in detail, it is important to note a few points. It is submitted that the analytical discussion on environmental protection in Namibia has some limitations. It has not been possible to gain access to the information relating to how government authorities, notably the Chief Inspector of Mines, exercise their official duties. The difficulty in obtaining information was highlighted by the Windhoek Observer during the Thirion Commission inquiry in 1985. According to the newspaper, the Chief Inspector of Mines compiles annual reports "for statistical purposes. These reports [are] submitted to the Secretary of Economic Affairs, the Department of Geological Survey and the Mineral Board in Johannesburg. The [reports are] not published for general information".[1] It is for these reasons that environmental discussion on Namibia has limitations since it is not possible to adequately evaluate the effectiveness of environmental and safety controls in Namibia's mines.

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[1]See Windhoek Observer, Namibia, 6 July, 1985, p. 27, col. a. Emphasis added.

Because of the importance of environmental protection to the future of Namibia, it has become necessary to include a chapter on environmental protection. In order to evaluate effectively and objectively the adequacy of the laws and regulations relating to environmental protection in Namibia, it is necessary to briefly discuss the experience of other developing countries. It is also necessary to discuss the experience of countries, notably Australia, which produce similar source materials such as uranium. However, our objective is to put more emphasis on Namibia.

It has already been discussed in the preceding chapters that the economic exploitation of Namibia's mineral resources has been encouraged and supported by colonial governments from the first years of German colonization. During the early days of the mining industry, concern over the impact of mining operations on the natural environment and on the health of the employees was either neglected or took a secondary role. The reasons for this are many, mineral resources were in high demand, especially during the industrial revolution; minerals were regarded by the colonial authorities as a source of wealth and prosperity to the large white settler population; the mining industry was regarded as a major source of employment; and many adverse effects on the environment and on the health of the community which have come to be recognised today were not yet known to science. All, or at least some, of these factors had important implications on the manner and degree of environmental protection. Given the fact

that capital was still scarce those days, mining companies could not be overburdened by stringent environmental controls. However, this attitude is gradually changing due to the realisation of the impact of mining operations on the environment and on the safety and health of the employees and the community.

2 ENVIRONMENTAL PROBLEMS ASSOCIATED WITH MINING OPERATIONS

The spread of multinational mining companies and the introduction of new mining techniques have forced mineral producing countries to reassess their priorities in mineral resource management. New techniques have brought the introduction of toxic chemicals in mineral processing. Furthermore, technological advancement has made the exploitation of minerals such as uranium commercially viable. As a result, uranium mining has brought a number of environmental and health hazards such as exposure to radiation. All these factors have forced responsible mineral producing countries in developing countries to introduce extensive controls over mineral development. As a result, mining legislation and regulations have begun to acknowledge the environmental significance of mining operations. These factors have also led government authorities to assume environmental responsibilities for mining projects by undertaking consultations and consider environmental matters before making decisions.

A common form of pollution of land and water resulting from mining operations is that caused by the escape of acid-bearing

water flowing from slimes dams. This water may percolate or flow from the beds and walls of slimes dams on to adjoining land and into streams, thus, polluting the land and the water. It is obvious therefore that damage caused by water pollution resulting from mining operations include contamination of soil, surface water, and underground water supplies. Other forms of pollution such as air pollution (or atmosphere pollution) may occur as a result of chemicals released in a form of fumes, or as a result of wind blowing dust and vapour containing chemical products.

Therefore, the main objective of environmental regulation is to prevent and deal with any disturbance resulting from mining operations or at least restrict such activities to a tolerable level. Mining operations - prospecting and mining - involve the introduction of new types of activity and often disrupt the existing patterns of land use and land values. This has led mineral producing countries to take steps to ensure safe mining operations, to protect employees and the community from the adverse effects of mining operations, to provide effective conservation measures and to minimise risks of pollution. Furthermore, government authorities have taken measures to protect and accommodate established residential, farming, recreation and other land uses. Finally, the objective of environmental control is to see that those who cause pollution or likely to endanger the health of others through mining operations pay to safeguard the interests of third parties and to protect the environment. These objectives are reflected in the mining

legislation, regulations, and administrative practices in most established mineral producing countries.

Laws and regulations governing environmental and safety controls derive from two principal sources - the common law and statutory provisions. For the purpose of our discussion, common law should be understood to mean a body of judge-made law. It is submitted that common law principles are only appropriate to the protection of individual interests and to the award of compensation. Common law gives individuals defined rights enforceable by civil actions such as nuisance and compensation claims resulting from physical injury caused by mining operations. In addition to monetary compensation, a plaintiff in a common law civil action can apply for an injunction which will be granted at the discretion of the court. As instruments of environmental control, however, common law principles have little general application.

Although common law grants rights to individuals for the protection of personal property and other interests in cases of pollution, these rights are often quite limited. A person's standing to sue (locus standi) depends on whether or not his legal right has been transgressed. Where mining operations cause a serious pollution or damage, a civil action can be brought only if such mining operations constitute an infringement of someone's rights. As a consequence, standing to sue, apart from cases of personal injury or damage to health, depends on the ownership,

occupation or other interest in the property that the law is prepared to protect.

More effective environmental control is provided by statutory provisions. In the case of Namibia, these provisions are mainly found in the Mines, Works and Minerals Ordinance No. 20 of 1968 and in various forms of delegated legislation such as regulations made by the Chief Inspector of Mines. The most important factor is that these provisions are, in most cases, backed by criminal sanctions. Therefore, the common law protects individual rights, awards compensation and is backed, in some cases, by the supplementary remedy of injunction. On the other hand, statutory provisions provide controls backed by criminal penalties. It is also important to note that these two principal forms of laws operate almost entirely independent of each other, and according to different standards.

It is important to note that the statute does not provide express definition of terms relating to the control and protection of the environment from pollution. However, it is necessary to define some of the concepts used in this Chapter. The word pollution should generally be understood to include any mining activity which involves the discharge of solid, liquid or gaseous substances, noise, vibrations, or radiation which can interfere with the ecological processes or upset the living conditions of the mine's employees and those who may be directly or indirectly affected by mining operations. Environmental control includes

measures taken by the State for the prevention of pollution of the soil, air, water-courses, and rivers by mining operations. It also includes measures relating to the protection of the environment and to the health and general welfare of the employees in the mines and the community.

Although it is generally difficult to obtain official information relating to the conditions of the mines in Namibia, it is generally believed by both African mine employees and a number of consultants that prevailing conditions in at least some of the mines are not satisfactory. A number of environmental problems have been experienced. For instance, it was revealed in 1985 during the Thirion Commission inquiry that there is "unsatisfactory conditions at certain mines" in Namibia.[2] The most serious condition at the time was at Uis Tin Mine where "a problem of dust appeared to be a pronounced one at [the] mine's crushers." In 1984, it was reported that Oamites Mine experienced "a surface subsidence and as a result, 110 employees were laid off."[3] Finally, it was reported during the seminar organised by the United Nations Council for Namibia in 1984 that "Tsumeb mine has developed an unsavoury reputation for both a very high rate of industrial injuries and a high incidence of

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[2]ibid.

[3]See Windhoek Advertiser, Namibia, 2nd February 1984.

arsenic poisoning."[4] Environmental problems caused by Rossing uranium operations are discussed in detail elsewhere in this chapter. Given this state of affairs, how effective are the laws and regulations relating to environmental safeguards in Namibia? This is the subject of our discussion in the section which follows.

3 MINERAL RESOURCES DEVELOPMENT AND ENVIRONMENTAL SAFEGUARDS IN NAMIBIA

The purpose of this section is to examine the legal regulation of environmental control in the mining industry. Issues covered include the role played by both common law and statute law in environmental safeguards. Due to the environmental effect of uranium operations in Namibia, we have specifically included a section on the environmental problems caused by uranium mining. We hope that this is appropriate due to the concern that has been raised both in Namibia and at the United Nations regarding environmental problems caused by Rossing operations. Furthermore, a detailed discussion on the subject may also help, it is hoped, a future lawful government of Namibia to promulgate

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[4]See Brian Bolton, (1985), "The Condition of the Namibian Workers", in United Nations, Seminar on the Activities of Foreign Economic Interests in the Exploitation of Namibia's Natural and Human Resources, Ljubljana, Yugoslavia, 16-20 April 1984, New York, p. 34. For industrial injuries, see Windhoek Observer, Namibia, 23 December 1983; and for arsenic poisoning, see Windhoek Advertiser, 2nd February, 1984.

laws designed to minimise pollution caused by Rossing and to protect the health and safety of the employees of the mine and communities in the surrounding area.

3.1 Environmental safeguards and the role played by common law

Before we discuss the role which common law can play in environmental safeguards, we would like to point out that we have been unable to find cases decided by the courts on the subject in Namibia. Therefore, most of the cases cited below were decided in South Africa. Our objective in this section is to show how common law can play a role in pollution control and environmental safeguards. Indeed, it is submitted that South African cases are directly relevant to Namibia insofar as they establish common law principles. Moreover, section 7 and section 52(3) of the Mines, Works and Minerals Ordinance No. 20 of 1968 state that the provisions of the Ordinance do not exempt any person from prosecution for an offence under common law or deprive any person of his common law rights.

Upon the severance of minerals from the surface, working powers and liberties are expressly granted to the mineral licence holder. The mining licence holder has a right to get and carry away minerals. An express liberty to dig pits implies *prima facie* a right to fix on the surface machinery necessary for draining the mines and raising the minerals. An express right to mine is incidental the right to deposit minerals and spoil on the

surface and an express right to mine implies a power, so far as it is necessary for winning and getting minerals, to remove overlying strata. Most of these mining activities have an impact on the environment, health and safety of the miners and the community, and poses a danger to surrounding areas. How does common law regulate environmental effects of mining operations? As already noted, an express right to prospect and to mine may include the right to deposit slimes, effluent or other acidic-bearing water, and to deposit and store materials necessary for mining purposes. In law, the rights granted to the mining companies raise a number of legal questions. For instance, is the depositing of slimes, effluent or other acid-bearing water or material constitute mining operations carried out under statutory authority? If so, would statutory authority be a good defence to any civil claim arising from the escape of injurious matter from slimes dams or from mineral, tailings and waste-rock dumps or from mine workings generally? Would it be a good defence for mining companies to prove that the damage or pollution was caused in the course of or as a result of the normal or natural user of land? Some of the cases cited below will provide answers to these questions.

Under the common law, the mine owner owes a duty of care to every person who is employed by him as well as to the members of the general public. He is under a duty to take all reasonable care to make sure that his activities (mining operations) do not pose a danger to any person or property. However, in certain

instances, private common law rights may severely be restricted by statute. Therefore, private common law rights are subject to statutory limitations. In most cases, the rights will depend on how the Courts construe the provisions of the statute. However, notwithstanding statutory intervention, common law can still play a significant role in environmental safeguards.

At common law, the pollution of water in a natural stream flowing past the land of a riparian owner constitutes an infringement of his right of property, whether or not he is the owner of any part of the river bed. Such owner is entitled to the flow of the water past his land in its natural state of purity. The same principle is applicable to the mining industry. For instance, it was held in the South African case of Rivas v. The Premier (Transvaal) Diamond Mining Co. Ltd.[5] that a riparian owner is entitled to have the water of the stream transmitted to him "without ... alteration in its character or quality."[6] The legal consequence of this principle is that unless it is expressly empowered by statute, a mining company has no greater power to take away or prejudice the rights of third parties than has a private individual or undertaking. Therefore, should a mining company cause a nuisance by pollution through contamination of water, for instance, it will be liable to an action just as any

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[5](1929) WLD 1.

[6]ibid per Barry J.

other person would be. In the absence of any express provision conferring immunity from liability, mining companies, as a general rule, cannot plead statutory power as a defence against civil claims. It was held in R.V. Marshall and Another[7] that the company having acquired a mining title under the Mines and Works Act 43 of 1899, did not exercise statutory powers any more than did a person who sold liquor under the Liquor Act. Each of them exercised statutory rights but neither acquired any immunity from the general law.

Therefore, it is important to note that the question whether mining operations which interfere with private rights are justified by statute is always a matter of construing the particular statute in question. The general principle is that where the powers conferred in the statute are directory, their exercise in the manner authorised cannot create liability at the suit of the injured party, for the implication is clear that the legislature intended to legalise an infringement. This principle was established in earlier cases such as Metropolitan Asylum District Managers v. Hill and Others.[8] Where, however, statutory powers are permissive, the legislature is presumed not to have intended an interference with private rights without

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[7]((1950) 1 PHK 24(N)

[8](1881) 6 App. Cas 193 at 203.

compensation.[9] However, this presumption may be negatived by other considerations. For instance, it was held by the Court of Appeal in the leading case of Johannesburg Municipality v. African Realty Trust Ltd. that the "work authorised to be done may be defined and localised, so as to leave no doubt that the legislature intended to sanction a specific operation. In such a case, ... an intention that it should be duly constructed in spite of interference with common law rights might fairly be inferred ... Or gain, if an act which a statute definitely authorises to be done is one which must necessarily interfere with common law rights, the court will infer a legislative intention that they should be infringed."[10]

Even in cases where there is nothing in the statute to 'localise' the operations and where permissive powers are expressed in general terms, a liability may not necessarily result if such operations interfere with common law rights. For example, it is a defence to show that under the circumstances of the case, it is impossible to carry out the work without interfering with common law rights. The courts in such circumstances will infer that an infringement of common law rights was sanctioned, for otherwise

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[9]See Canadian Pacific Railway v. Parke (1899) App. Cas 535 at 544-545.

[10]Per Innes CJ, (1927) AD 163 at 172-173.

the grant of statutory authority would be negatory.[11] As for the natural user of land defence, the approach of the Courts have been generally in favour of the plaintiff. The leading South African case is Levin v. Vogelstruis Estates and Gold Mining Co. Ltd.[12] In this case, damages were awarded against the mining company for permitting sand from a dump to encroach upon the property of a neighbouring landowner. The company raised two main defences, both rejected by the Court, namely that (1) the encroachment was the result of the natural use of its land, and (2) it had statutory right to put the dump where it was. The Court in rejecting both defences, expressly stated that "the legislature must be held to have intended that the use sanctioned [was] not to be in prejudice of the common law right of others."[13]

The common law principle of natural user of land was first stated in the earlier case of Reed v. De Beers Consolidated Mines[14] in these terms: "Every man may use his own property in a natural way, and taking out minerals is a natural use of mining property. If in the course, or in consequence, of such use, water which 'following the stratification of the country' ... would or might

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[11]See Tobiansky v. Johannesburg Town Council (1907) TS 134 at 144.

[12](1921) WLD 66

[13]ibid at 192

[14](1897) 9 SC 333

otherwise have remained or gone elsewhere, finds its way by gravitation or percolation into the property ... of another, there is no cause of action because there is no injuria. If, however, water is collected by artificial constructions, or excavations, or diverted by an artificial channel, or by artificial means, such as pumping, or sinking a shaft and boring a hole, ... and damage ensues which would not otherwise have occurred, then, at all events in the absence of vismajor, an action lies."[15] The legal consequence of this principle is, therefore, that any erection of artificial structures such as tailings dam or the application of artificial chemical processes to the water which flows or percolates into the property of another, the mining company can be liable to a civil action.

In addition, certain conducts which are liable to cause damage to property or pollution may fall under the common law principle of strict liability. This principle was developed in the well known case of Rylands v. Fletcher.[16] The Court stated the principle as follows: "The person who for his own purposes brings on his land collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do, is prima facie answerable for all the damage which is the natural

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[15] ibid 350.

[16] (1866) L.R. 1EX 265

consequence of its escape."[17] It must be noted that the rule is one of absolute liability. In the case of mining operations, the principle is applicable to cases of explosions, vibrations, damage or injury done by mining operations, and escape of noxious gas.

It is submitted that statutory regulation is the most appropriate in environmental controls since resort to common law involves protracted litigation which may be costly for the claimant. Moreover, only those whose rights have been directly affected by mining operations are able to sue. This is a serious limitation which makes common law inadequate. Notwithstanding these limitations, however, the cases which we have discussed above show that common law has a role to play in environmental controls and regulations.

3.2 State Regulation

Before we discuss the provisions of the statute in detail, it is necessary to discuss briefly the administrative structure. Questions relating to the regulation and protection of the environment, safety and health of the miners and the community from mining operations are dealt with by the Mines Inspectorate Division. The Division deals with a broad spectrum of duties.

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[17] ibid at 279

Through legislation, wide powers have been assigned to the Minister for Mines. He is empowered to issue general rules of different kinds which include far-reaching powers to control mining operations generally, and operations which are likely to cause pollution or endanger the health and safety of the community. The legislation, therefore, makes it possible for the Minister to delegate some of his powers to other authorities or to obtain assistance from them. In this connection, s.4(2) of the Mines, Works and Minerals Ordinance No. 20 of 1968 empowers the Minister to "(a) appoint a Chief Inspectorate of Mines who shall exercise the powers and perform functions and duties conferred ... by [the] ordinance," and to "exercise general supervision of mines, works and machinery; (b) appoint properly qualified persons as inspectors of mines or of machinery who shall assist the Chief Inspector."

The main functions of the Chief Inspector and his staff are to protect the environment from pollution, ensure that mining operations do not endanger health and safety of mine workers and those who are likely to be affected by such operations, inspection of mining premises and compilation of reports on accidents. These powers enable the Chief Inspector and his team to take all necessary action to ensure that mining companies comply with environmental protection conditions contained in their licences. Mining companies are required to ensure that mining operations are conducted safely. This is meant to ensure that mining operations are conducted in such a way that the

maximum economic recovery of mineral resources is combined with sound conservation practices.

3.2.1 Substantive Provisions

The depositing of material in the course of mining operations is generally authorised in terms of prospecting and mining licences granted to the mining companies under the terms of the Mines, Works and Minerals Ordinance No. 20 of 1968. The terms and conditions of these licences have already been discussed in Chapter II. Under the provisions of the Ordinance, the mining commissioner as well as the minister have general powers to grant permission to the mining companies to use surface land for purposes of mining or for any purpose incidental to mining operations. At the same time, the Ordinance contains substantive provisions designed to prevent or minimise pollution resulting from mining operations. It must be noted that most of these provisions do not set precise standards describing permissible levels of pollutants nor do they set targets of environmental quality to be attained. However, it is submitted that these general provisions serve a useful purpose in that they set basic behavioural criteria which may easily be translated into environmental protection measures in the course of project planning.

The most useful provision contained in the Ordinance is section 34(1) which provides that every "prospector shall ... maintain

his workings in a safe condition and shall repair or make safe ... the surface of any land which has been rendered unsafe by prospecting." During the mining phase, every mine owner is required to "maintain in a safe condition any working place or the surface of any land during ... mining operations." General clauses or provisions offer certain advantages to the State. They are easy to formulate, and they can also be applied uniformly. Furthermore, uniform application of general clauses is desirable because they do not overburden the State's administrative resources. Finally, they confer a wide discretion to the mining companies in the sense that they do not specify in exact terms how pollution prevention measures may be achieved.

However, their advantages may sometimes be outweighed by the economic inefficiencies that can result. Uniformly applied provisions do not take advantage of individual mining project variations in the costs of pollution at different sites. Moreover, they do not provide differentiation between strict minimum standards such as those in the area of accident prevention, and less rigorous standards in which economic consideration are allowed a primary role. Therefore, there is an imperative need to supplement general provisions with specific clauses in order to take individual mining projects, such as Rossing for instance, into account.

3.3.2 Monitoring Instruments

In order to assess the effectiveness or failures of environmental laws and regulations, the State must be in a position to monitor the activities of the mining companies. Monitoring mechanisms consist of two main areas, namely reporting requirements and inspection rights. These are discussed in detail below.

The requirement that mining companies should submit periodic reports on their mining operations forms part of the State's environmental regulations. It also occupies a central part of the State's administrative functions. However, it must be noted that the requirements of the mining companies to submit reports is limited to the submission of a general report on the mining operations which may include some aspects of environmental measures taken. These requirements are primarily regulated under section 82(1)(a) of the Mines, Works and Minerals Ordinance No. 20 of 1968.

Reporting requirements offer considerable advantages to the State. They can considerably reduce the country's supervisory burden, especially if its administrative machinery is not sufficiently developed. Mining companies, through reporting, can provide useful information to the State on the mining project's compliance with environmental standards. In addition, reporting requirements are likely to induce mining companies to adhere to established environmental standards especially if such standards are coached in precise numerical terms. However, the effectiveness of reporting requirements is determined by a number

of factors. The State should be in a position independently to verify the information it receives from the mining companies. This will necessitate intermittent spot checks and the capacity of the administrative authorities to process the data to establish whether it is compatible with minimum environmental standards.

Monitoring instruments cannot be effective if mining laws and regulations do not provide for inspection rights. Inspection rights represent an important supplement to reporting requirements. The Mines, Works and Minerals Ordinance contain provisions which provide for inspection rights. The colonial administration is accorded sufficient statutory powers to enforce the provisions of the Ordinance relating to environmental control. Section 5(1) provides that the Chief Inspector or any inspector of mines, machinery or explosives has power to enter any mine at any time of the "day or night" to inspect the conditions of the mine. It is clear from the foregoing discussion that inspection rights can serve two main purposes. First, they enable the State to inspect mining projects to independently monitor the attainment of minimum environmental standards. Second, the State has an option to limit its inspection right to mere verification of the information obtained from mining companies. It is for these reasons that inspection rights provide a useful tool to the State to monitor mining operations of the companies.

3.2.3 Coercive Measures

State supervision and control over mineral resource development proceeds from the principle of State ownership of such resources. As owner, the State possesses the power necessary for the grant and proper enjoyment of rights to mines and mineral products, for prescribing the prerequisite qualifications, and for setting the operating conditions and obligations to be observed by mining companies. The legal consequences of the theory of State ownership is that in the event of violations by the mining companies of the laws and regulations, or non-fulfilment of their obligations, penalties are normally provided in the legislation. These may range from fines to suspension of operations or even cancellation of mining rights depending upon the nature and gravity of the offence or omission made.

It is generally recognised that even the most effective environmental monitoring system is likely to remain ineffective if, in the event of non-compliance by mining companies, the State does not have legal means of compelling the companies to adhere to environmental standards. It is for these reasons that mining laws and regulations contain criminal penalties and coercive measures.

In the case of Namibia, coercive measures are contained under the Mines, Works and Minerals Ordinance No. 20 of 1968. The Ordinance adopts two modes of sanctions for ensuring that mining

companies comply with the provisions of the ordinance. Sanctions may take the form of administrative action, for instance, the Chief Inspector of Mines can, by the exercise of his administrative powers compel mining companies to observe the provisions of the ordinance.[18] Any failure to comply with the Chief Inspector's orders may result into committing a criminal offence.[19] In addition, the ordinance contains provisions for the payment of compensation to those whose interests may be injured by the non-observance of the provisions.[20] Any person who attempts to obstruct the inspector commits an offence and is liable on conviction to a maximum fine of four hundred rand or in default of payment, to one year's imprisonment.[21] Finally, the ordinance provides that if death is caused as a result of contravening the provisions of the ordinance, the person responsible is liable to a maximum penalty of two thousand rand or five years imprisonment in default of payment "or such imprisonment without the option of a fine."[22]

3.3 Rossing Uranium Operations and Environmental Issues

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[18] S.5(2)

[19] S.6

[20] S.53(3)

[21] S.6

[22] S.8(c)

Due to the concern that has been expressed in Namibia and by the international community regarding environmental, health and safety issues resulting from uranium mining in Namibia, we have found it necessary to devote a section on the subject. However, for reasons stated below, it has not been possible to gain access to official information regarding uranium operations. Therefore, the discussion in this section must be considered in the light of the absence of official information.

It is an established fact that uranium mining presents considerable environmental and health problems. It is also a well known fact that uranium mining can also have an adverse effect on ground and surface water, air, and on animal and plant life. Moreover, uranium mining has the effect of degrading the quality of ground and surface water, and thus have negative repercussions on the health of the inhabitants of the mining area. The most common adverse effects on water quality result from the contamination of streams and rivers. This can pose a serious risk to the inhabitants who live near the mining operations since their water is likely to be affected by the discharge of wastes. Since the wastes contain radiation and harmful chemicals, these are likely to leach out and contaminate the underlying water table.

Furthermore, mine employees at the mine are exposed to a number of radiation risks, in addition to mine related accidents. The employees are exposed to in-plant radiation contaminants, gases,

dust, fumes, vapours and toxic liquids which are released during uranium mining and milling operations. It should be noted that if adequate safety measures are not taken, these dangers are likely to have a major economic effect on the mining project's productivity and profitability. The long term effects of radiation exposure may result into many employees being affected. This is likely to result in the mining project's costs to increase because there will be an urgent need to provide medical care, disability payments and disruption of work schedules. The unsatisfactory environmental and health conditions at the mine is likely to result into unstable relationship between the employees and the management.

Some of these factors may be minimised by comprehensive provisions in the mining legislation and regulations requiring uranium mining companies to promote safety measures. These may include close supervision of safety procedures, provision of radiation protection facilities, requirement to provide adequately staffed safety unit, and training and supervision of employees in safety on the job.

It has already been discussed in the first three Chapters that the uranium industry is the most secretive in Namibia. Laws as well as political factors have made it difficult to obtain official information relating to Rossing's, operations. Most of the information has come to light through consultants, mine employees and newspaper reports at considerable risk.

Like the diamond industry, there has been a trend towards an open cast system of uranium mining. This can be attributed to several factors. Firstly, open cast mining yields a higher recovery rate than underground mining and does so more economically. Secondly, the unsuitability of underground mining to certain areas of the country such as uranium mining at Rossing leaves open cast mining as the only alternative. Although it could be said that open cast system of mining eliminates many safety and health hazards such as cave-ins, the extraction of uranium through open cast mining generates many environmental problems. However, in spite of the gravity of environmental problems, effective regulation can reduce the adverse impact of uranium mining by providing a mechanism for balancing mineral extraction with the needs of the environment.

In the case of Namibia, the colonial administration seem to have put more emphasis on the mining companies' profitability at the expense of environmental control. Although the provisions aimed at environmental pollution prevention and regulation are not comprehensive enough, they can still play an important role if they are enforced. It was reported by the Mining Engineer during the Thirion Commission inquiry that mining companies "always attempted to comply with safety regulations, but this was not always possible."[23] This statement seem to suggest that

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[23]The Mining Engineer's testimony before the Thirion (Footnote Continued)

coercive measures provided for in the legislation are either not enforced or are so inadequate that they are being ignored by the mining companies.

3.3.1 Water Pollution

Since Rossing started commercial operation, there has been a serious problem of water pollution. Acid discharge is a major source of the economic damage resulting from mine-related water pollution. In 1982, it was reported that serious surface pollution was taking place at the triangle area where the Kahn and Swakopmund rivers meet.[24] During the rainfall season, the radioactive top-soil blown from the mine by the wind is washed into these rivers where it sinks down possibly as far as the ground water level. The Swakopmund water reservoir which serves the town of Swakopmund is dependent on water from the two rivers.

Another source of surface pollution is that which is caused by the tailings at the mine. The company built a dam by blocking off a few valleys leading to the Khan River. The dam receives about 80,000 cubic metres of waste per day. Some of this uranium-enriched water seeps through the tailings dam wall, and it is possible that it contaminates the underground water. This

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(Footnote Continued)
Commission, see Windhoek Observer, Namibia, 6 July, 1985, p. 27, col. a.

[24]See Windhoek Observer, Namibia, 16 October, 1982, p. 25

means that the water in the surrounding areas is measurably influenced by the operation of the mine.

3.3.2 Air Pollution

The Rossing mine and mill area including the tailings dam and waste rock dump, are a major source of air pollution, affecting the surrounding area. Four types of pollutant in any uranium mining are identified. These are sulphur dioxide, which is emitted from the acid plant; radon, which escapes from the pit, ore dumps, tailings dam and mill; radioactive ore dust, which escapes from the pit, ore dumps and the ore crushing area in the mill; and radioactive yellowcake dust, which is emitted from the part of the mill where dried yellowcake is handled. Dust is also raised from bare ground and sulphur dust comes from the sulphur stockpile (see Appendix V:1).

It is also important to note that the concentration of a pollutant at any point depends on its rate of emission and the way it is dispersed in the atmosphere. Since Rossing is situated in a desert, any pollutant released into the air is carried along by the wind. In a steady wind, the pollutant is moved in a plume from the mine and gradually falls out onto the ground under the plume. When the wind is gusty or turbulent - changing quickly in speed and direction - the pollutant is spread over a wide area. Information about wind conditions at Rossing shows that wind from

the east predominates.[25] Therefore, taking the year as a whole, the western part, towards the town of Swakopmund, is the most common wind direction. This means that towns situated in the western part of the mine are directly downwind from the source of air pollution. It is submitted that Arandis, and to a less extent Swakopmund are in the worst possible position.

The extent of Rossing's uranium operation is revealed in the company's monthly publication. It is reported that for "production purposes maximum fragmentation of the rock is desirable <u>but this often results in excessive movement of the rock</u>."[26] It is not surprising why there is excessive rock movement because blast holes "are either 310 mm in diameter with a spacing of 7 m x 7 m or 380 mm in diameter with a spacing of 8.5 m x 8.5 m, and are drilled to a depth of 18 m, to establish benches of 15 m high ... each hole is charged with bout 850 kg of explosive."[27] A total of about 360 tonnes of explosive is used each week.

The employees at the mine work around the clock seven days a week and more than 1 milling tonnes of ore and waste is blasted every

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[25] ibid

[26] See <u>Rossing</u>, June 1979, p. 14. Emphasis added.

[27] ibid.

week.[28] The effect of the operation on the environment is enormous. The Windhoek Observer reported in 1982 that at times there could be a huge dust cloud about 100 km from the mine to the town of Swakopmund. It was further reported that a cloud "of a few hundred metres and quite a few kilometres in length stretches along the inversion line where hot and cold air meets, when the wind blows." The cloud "looks like an atomic mushroom and apparently it is derived from excessive dynamite action to loosen the formation at the mine ... The dust rising from this, obviously comes from material which contains uranium, causing a continuous dust emission laden with radioactive particles."[29]

3.3.3 Health Hazards

Uranium mining at Rossing poses a serious risk not only to the miners but to the local population near the mine. Specific diseases which may affect employees at the mine are usually lung diseases. They include silicosis, T.B., bronchitis, emphysema and fibrosis of the lungs (see Table V:1). One of the major sources of danger is ore dust. This poses a serious hazard because it contains silica. It also contains the long-lived alpha-emitting elements of uranium, thorium and radium. If

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[28]See An Introduction to Rossing the largest Uranium Mine in the World, p. 4.

[29]See Windhoek Observer, Namibia, 16 October 1982, p. 25. Emphasis added.

Table V:1. Health Hazards Associated with Minerals and Mining

Mineral	Place	Health Hazard
Uranium	Rossing	Kidney and liver diseases, cancer and lukaemia, chemical pneumonia
Lead	Tsumeb, Kombat, Berg Aukas, Rosh Pinah	Acute poisoning symptoms, including headaches, weakness, loss of appetite, nausea, anaemia, joint pains, fertility problems
Silver	Tsumeb	Chronic bronchitis, loss of night vision, and kidney and lung diseases
Copper	Tsumeb, Kombat, Klein Aub, Oamites	Skin problems, cataracts, and possible kidney and liver diseases and anaemia
Zinc	Tsumeb, Berg Aukas, Rosh Pinah	Skin inflammation, lung disease
Vanadium	Berg Aukas	Chronic bronchitis, lung cancer, anaemia, damage to nervous system and kidneys, asthma, hives, intestinal problems
Lithium	Karibib	Dust highly irritant to nose, eyes, lungs and skin and is toxic to kidneys
Tungsten	Kranzberg, Brandberg West	Severe lung fibrosis
Tin	Uis, Brandberg West	Skin sensitization, dermatitis, hives, kidney and lung diseases.

Sources: UNIN, (1986), Namibia: Perspectives for National Reconstruction and Development, Lusaka, p. 948; Mary Elliott (ed.), (1977), Ground for Concern: Australia's Uranium and Human Survival, Penguin Books, pp. 7-18; and James A. Lee, (1985), The Environment, Public Health, and Human Ecology: Considerations for Economic Development, the World Bank, published by The Johns Hopkins University Press, London, pp. 54-85.

inhaled in large quantities, it may cause silicosis and could also increase the risk of lung cancer. There is also a high risk that people who are exposed to radiation may develop some genetic effects of radiation.[30]

It is also important to note that African employees are not provided with adequate health checks. According to the Major Findings of the Hearings on Namibian Uranium held by the United Nations Council for Namibia in 1980, it was reported that Namibian workers "mine the uranium ... in a constant cloud of radioactive dust."[31] It was further reported that "concern was expressed over the unusually limited and racially discriminatory health care given at Rossing. White workers receive regular health checks; black workers do not. Membership in the Rossing medical aid plan is automatic for whites; blacks are allowed to join only after a year of employment. In addition there is no monitoring of exposure to radiation."[32] Another source of hazard is radioactive from the tailings. It is also reported

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[30]For further details, see Mary Elliott (ed.) (1977), Ground for Concern: Australia's Uranium and Human Survival, Penguin Books, see particularly Chapter I.

[31]See United Nations, (1982), Plunder of Namibian Uranium: Major Findings of the Hearings on Namibian Uranium Held by the United Nations Council for Namibia in July 1980, New York, p. 6. See also SWAPO of Namibia, (1982), Trade Union Action on Namibian Uranium, London.

[32]Op. cit, United Nations, (1982), Plunder of Namibian Uranium: Major Findings Held by the United Nations Council for Namibia in July 1980, p. 8.

that these "heaps of dangerously radioactive materials are eroded by wind and rain, spreading radiation over a wide area. The mining company has made no plans for coping with these tailings, which could remain a threat to the environment for 100,000 years."[33]

Concern about exposure to radiation was also expressed by one Namibian newspaper in 1982. It reported that "when storing heaps of uranium ore for the crusher plants, called stockpiles, ... RADON is produced. This is a short lived, highly radio-active gas-like waste product and its extreme dangers are internationally known. It can be breathed in easily and it passes any filter without a problem. ... So fare scientific studies of the RADON dust danger, led to the closing down of open cast mines in Canada and Australia by responsible official bodies. Here the question arises about the fate of the brown and black workers of the mine, especially those living in the mining area or the Arandis township nearby."[34] African employees are mostly at risk since those from the "homelands" under contract labour are accommodated at "A Camp" only one mile from the mine. Those non-white employees who live with their families, live at a township called Arandis, 10 miles from the mine, while all whites

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[33] ibid.

[34] See Windhoek Observer, Namibia, 22 January, 1983.

live at specially built seaside resort of Swakopmund 70 kilometres away.

The excessive use of explosives also poses a serious danger to the employees. In 1983, an African employee died in a rock avalanche.[35] Finally, it is important to note that there is no independent study of health risks and safety measures associated with Rossing's operations. Moreover, the information which the company provides is inadequate, misleading, and contradicted by the testimony of the African workers, newspapers reports, and consultants. The situation is made more complicated by the fact that the company chooses to shelter under the Atomic Energy Act of 1967 which prohibits any disclosure of information relating to uranium mining.

In conclusion, it is noteworthy to state that the concern of the Namibian population on Rossing's operations was eloquently expressed by Cde. Theo-Ben Gurirab in these terms: "I cannot help but express the concern of the Namibian people ... who are suffering. It normally takes years, if not generations, for the ill-effects of radioactivity and chemical poisoning to be established, so that by the time we become independent not only will we have been left with a country depleted of its natural resources; we will have been left with a population that will

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[35]See Windhoek Observer, Namibia, 22 January, 1983.

suffer permanent ill health because of the exploitation that is going on in Namibia."[36]

It is clear from the foregoing discussion that in some cases, statutory regulations (though not comprehensive enough) could play a major role if they could be enforced by the colonial administration. In some cases such as uranium mining, the standards fall far short of minimum international standards. Therefore, in order to improve the laws and regulations designed to protect the environment in independent Namibia, it is necessary to discuss briefly the experience of other mineral producing countries.

4 ENVIRONMENTAL SAFEGUARDS AND INTERNATIONAL MINIMUM STANDARDS

It has been realised by a number of mineral producing countries that mining operations present a number of environmental and health problems. The realisation of this fact has compelled responsible authorities to take effective environmental and safety measures designed to minimise these problems. In these countries, mining legislation and regulations contain appropriate provisions for the requisite preventative measures. Given the

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[36] From the testimony of Cde. Theo-Ben Guriab at the hearings on Namibian Uranium. See op. cit., United Nations, (1982), Plunder of Namibian Uranium: Major Findings of the Hearings on Namibian Uranium Held by the United Nations Council for Namibia in July 1980, p. 8.

fact that measures adopted by these countries are too comprehensive, not all of them will be discussed in this section. However, those which may be of immediate relevance to Namibia will be discussed briefly.

4.1 Environmental Impact Study

In contrast to Namibia, before mineral development is allowed to proceed, a number of mineral producing countries require mining companies to submit studies and research results concerning the effects of the mining project on the environment and on the general safety and health of the community. It is a recognised fact that in order to prevent or control effectively the adverse effects of a mining development project on human health, there must be sound and comprehensive advance planning. The environmental impact study normally covers two main issues namely, the effects of a mining project on the physical environment, and the effects on the work force. The information required includes preliminary assessment of area ecology; effluent controls; prevention of the release of toxic effluent into air or water; and monitoring of air, water, and vegetation. On the other hand, information regarding the effects of mining operations on the work force include the assessment of industrial risks; engineering design of plants to prevent job hazards; control of in-plant ventilation, periodic monitoring of employees exposed to chemical hazards, and the provision of work safety training.

The requirement for an environmental impact study is widely practiced in many mineral producing countries. Two examples will suffice to illustrate this point. In Australia, the Environmental Planning and Assessment Act 1979 (New South Wales) requires the authorities to encourage "proper management, development and conservation of natural ... resources, including ... minerals ... for the purpose of promoting the social and economic welfare of the community and a better environment."[37] The Act requires an "increased opportunity for public involvement and participation in environmental planning and assessment."[38] Before such plans are made, the Act requires that an environmental impact study must be carried out.[39] Under s.117 of the Mining Act 1973 (New South Wales), the minister or governor, before deciding whether or not to issue a mining licence or a mining lease, he is empowered to require environmental impact studies to be made. Once such studies have been undertaken, any mining licence or mining lease granted may contain conditions relating to the protection of the environment during mining operations.[40] The mining licence holder or the

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[37] S.5.

[38] S.5(c).

[39] SS. 41 and 57.

[40] S.118.

mining lease holder is also required to rehabilitate areas damaged by mining operations.[41]

In contrast, Papua New Guinea incorporates the requirement for environmental impact study in individual mining project agreements. The Ok Tedi Agreement of 1976 provides in Schedule II Part A that there should be an environmental impact study to cover the following aspects: "(i) an analysis of the existing environment ... (ii) an assessment of the environmental impact of the project by considering the effects of each of the component phases of mine and ancillary developments on the basic environmental studies detailed in item (i) ...; (iii) identification of the safeguards to be incorporated into the project in order to avoid or minimise the adverse environmental effects of each of the component phases of the mine and ancillary developments ...; (v) the impact of the project on the resident population ... the population's reactions to the project and the long and short term community benefits; (vi) follow up action required and planned for monitoring and assessment after final project decisions are made."[42]

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[41] S.119. For further details on environmental regulation in Australia see Bates S.M., (1983), Environmental Law in Australia, Butterworths, Sydney.

[42] For further details see Schanze et al, (1981), Mining Ventures in Developing Countries Part 2 : Analysis of Project Agreements, Kluwer-Deventer - The Netherlands, p. 224.

Environmental impact studies offer a number of advantages. They enable both the State and mining companies to systematically and comprehensively consider all environmental needs before a final decision is reached. For States, the gathering of information from individual mining projects is potentially useful because it could be used as a basis to formulate universal environmental regulations. In addition, the procedure enables third parties who may be adversely affected by the mining project to voice their concerns and ultimately have a redress. Finally, the emphasis which such studies put on community participation may be useful because it has a potential of enlarging the information base upon which both the State and mining companies are dependent. It also establishes confidence in the mining project and minimises suspicion and opposition from the community since it can be reassured that environmental problems are being minimised.

Notwithstanding the advantages of an environmental impact study, it also has a number of drawbacks. The requirement for an environmental impact study before the commencement of mining operations is likely to increase costs to the mining project. It is also likely to result in a delay since mining operations may not commence before such a study has been commissioned. Moreover, notwithstanding a commissioning of a comprehensive and well studied environmental impact study, there may be no guarantee that it can contribute to solutions of environmental

problems which may subsequently be experienced once mining operations begin.

4.2 Individual Standards

There has been a realisation in most mineral producing countries that the scope, content and form of the environmental protection measures should be tailored to the needs of individual mining projects. The advantages of this approach are that the parties (the State and mining companies) in devising environmental control measures, will take into account factors which are unique to each mining project. This enables the State to appraise each mining project and issue regulations specific to the particular mining project. The parties will be influenced by such factors as the size of the mining project, its location, the type of mineral mined, mining techniques employed, the cost involved, and the role such a project plays to the national economy.

Individual standards are usually found in supplementary agreements concluded between the State and mining companies. These standard are usually formulated in two ways. Some of them establish "numerical maximum emission levels for pollutants. Other standards merely set verbally circumscribed guidelines of behaviour."[43] The Letseng-La-Terai 1974 mining project

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[43]ibid, p. 230.

agreement in Lesotho sets out minimum standards for emissions. It provides that the "effluent from slimes ponds upon the specified area shall be sampled regularly and the following determinations shall not be exceeded: (i) suspended solids - 1000 mg/l, (ii) total dissolved solids - 500 mg/l, (iii) sulphates as S04-250 mg/l, (iv) the pH shall lie between 5.5 and 9.5."[44] On the other hand, the 1971 Bougainville Agreement in Papua New Guinea relating to the disposal of over-burden and tailings provides in part that the company "shall use all practical measures to ensure that the tailings contain no more than such a sufficiently low level of copper readily soluble in natural waters as to ensure that no serious damage could result therefrom to vegetation or animal life."[45]

Individual mining project standards, such as those used in Lesotho, which define in precise numerical terms the minimum environmental standards allowed, offer a number of advantages to the parties. They contribute to setting up guidelines of behaviour, to be followed by the mining companies, which are technically measurable. They can also help to estimate the actual cost of such measures by utilising actual costs obtaining elsewhere in the mining industry. Moreover, precise numerical

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[44] ibid. See also Annexure D. Clause 4(a) of the agreement.

[45] "Bougainville", Agreement relating to the Disposal of Overburden and Tailings, 1971. See also op. cit. Schanze et. al, (1981) Mining Ventures in Developing Countries Part 2: Analysis of Project Agreements, p. 230.

standards may help to reduce potential disputes between the State and mining companies over the attainment of environmental policy objectives of mineral resource development.

However, the formulation of precise numerical standards have a limitation. At the time of negotiating these standards, it may be possible that the parties may not have access to all relevant information necessary for the formulation of precise standards. Furthermore, even if such information may be available, it may not be possible for the parties to formulate numerical standards for every aspect of mining operations that may require environmental regulation. As with specific clauses already discussed above, the fixing of precise numerical standards is likely to present a number of disadvantages. It may happen that there may be a need for fixed term modification in the event information concerning the environmental impact of the mining operations becomes available. In addition, it may be possible that additional sources of environmental pollution may be experienced during the mining operations. In all these cases, it may prove difficult to renegotiate original standards, especially when such negotiations are likely to result in additional cost to the mining companies. These potential problems may be minimised by deploying a combination of technical and descriptive standards which are flexible and revisable by the parties.

4.3 Specific Countries

In order to evaluate the regulations and laws regulating pollution in Namibia, it is also necessary to refer briefly to environmental control in South Africa, and also evaluate the experience of Australia in regulating uranium operations.

It is submitted that environmental control regulations - standards and procedures - in South Africa have no instructive and practical application to the regulatory system in Namibia. Notwithstanding the fact that South Africa has no uranium mines (uranium is produced as a by-product of gold), it has developed comprehensive anti-pollution regulations (though admittedly they still fall short of international standards). Few examples will suffice to illustrate this point. Under the 1976 regulations made under the Water Act, mining companies are required to prevent pollution caused not only by actual mining operations but also as a result of run-off due to rain. These include the following: (1) to prevent the pollution of any water by taking measures to prevent effluent; (2) prevent run-off from eroding slimes dams and minerals, tailings and waste-rock dumps caused by rain; (3) to fence waterways to prevent the pollution of any water; (4) to take effective measures to prevent liquid from entering any evaporation dam or waterway; and (5) to design slimes dams, tailings and waste-rock dumps so that they can retain rainwater precipitated in them.

Furthermore, s.187 of the Mining Rights Act No. 20 of 1967 empowers the President of the Republic to make special

regulations to prevent pollution and to prevent or abate nuisances relating to prospecting and mining. Under s.27(1) of the Atmospheric Pollution Prevention Act No. 45 of 1965, the Minister of Mineral and Energy Affairs is empowered to declare any area a dust control area. The Minister is also empowered to take steps to prevent mining operations likely to cause a nuisance to persons in the vicinity from dust.

In 1980, numerous regulations were promulgated under s.12 of the Mines and Works Act 27 of 1956. The regulations cover a wide area, including the prohibition to dumping or impounding of solid and other discards of any description in any place other than at the site or sites demarcated for the purpose by the mine manager with the approval of the Inspector of Mines.[46] They require strict control of dumps and dams to ensure that the environment is, so far as is practicable, not polluted. The disposal of waste material from reduction works, beneficiation plants, screening and washing installations at a mine must be disposed of under written authority of the Inspector of Mines after consultation with the Department of Water Affairs.[47] Sand dumps or slimes dams may not be established on the bank of any stream, river, dam, pan or lake without the written permission of the

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[46]Reg. 5.13.1.

[47]Reg. 5.13.4.

Inspector of Mines and upon such conditions as he may prescribe after obtaining approval from the Government Mining Engineer.[48]

It is clear from these laws and regulations that South Africa is showing increasing concern for the protection of the environment from the effects of pollution caused by mining operations. Furthermore, the stringent precautionary measures prescribed in these laws and regulations envisage a system of close cooperation between the Inspector of Mines and the Government Mining Engineer on the one hand, and the Department of Water Affairs on the other.

In contrast to Namibia, uranium mining in Australia is mainly regulated under the provisions of the Atomic Energy Act 1953 (Commonwealth). The main purpose of the statute is primarily to encourage and regulate the development of prescribed substances. Most Government functions are exercised by the Australian Atomic Energy Commission. The Commission is empowered to encourage exploration for uranium and to supervise the activities of persons who are mining, treating or selling uranium.[49] Part III of the Act empowers the authorities to make regulations relating

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[48]Reg. 5.13.3.

[49]S.17. For further details see op. cit. Bates S.M., (1983) Environmental Law in Australia.

to the working of minerals, production, transportation, treatment, storage, use and disposal of prescribed substances.[50]

With regard to environmental issues, there are other numerous laws and regulations which directly regulate uranium mining operations. Issues covered include the following: (1) contaminants in water from mine sites (these include uranium, thorium, radium, arsenic, sulphate, ammonia and phosphate), (2) procedures to limit suspended solids in run-off during construction periods and to control erosion during operations, (3) external ionising radiation, (4) radon, (5) ore dust, (6) yellowcake dust, (7) ground vibration during construction and operation, (8) air blast vibration during construction and operation, and (9) noise during construction and operation.

During the mid 1970s, there was a proposal to mine uranium in the Alligator Rivers Region of the Northern Territory.[51] The proposal became a subject of a full-scale inquiry under S.11 of the Environment Protection (Impact of Proposals) Act 1974. The inquiry resulted into two reports, Ranger Uranium Environmental Inquiry First Report,[52] 1976 and Ranger Uranium Environmental

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[50] S.38.

[51] See op. cit. Bates S.M., (1983) Environmental Law in Australia, p. 138.

[52] Parl. Paper No. 309, 1976.

Inquiry Second Report,[53] 1977. The Second Report recommended against using the terms of the Atomic Energy Act 1953 to control uranium operations because, there was a need, inter alia, to introduce strong environmental conditions before uranium operations could be allowed to proceed. It proposed that a Standards and Monitoring Committee, independent of the companies and the Australian Atomic Energy Commission should be established.[54] Finally, The Report recommended the use of an impervious blanket to prevent seepage from the tailings dam and that eventually all tailings should be returned to the mine pits. This recommendation was based "on the evidence pointing to possible long-term adverse ecological effects due to continuing seepage losses from the dam, to doubts about the integrity of the dam over centuries and to the problem of radon emission from the tailings if they were not submerged."[55]

The Government authorised uranium operations under s.41 of the Atomic Energy Act 1953. However, additional environmental control legislation was introduced. The Statutes include Environment Protection (Alligator Rivers Region) Act 1978, Environment Protection (Northern Territory Supreme Court) Act

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[53]Parl. Paper No. 117, 1977.

[54]See Ranger Uranium Environmental Inquiry, Second Report, 1977, pp. 350.

[55]ibid. pp. 159-60.

1978, Environment Protection (Nuclear Codes) Act 1978, and Atomic Energy (Amendment) Act 1978.

Under s.5 of the Environment Protection (Alligator Rivers Region) Act 1978, the government supervising scientist, appointed under the Act, is empowered to investigate the effects of uranium mining on the environment. He is also empowered to develop standards, practices and procedures to be observed by uranium mining companies. Furthermore, under s.3 of the Environment Protection (Northern Territory Supreme Court) Act 1978, the Supreme Court of the Northern Territory is empowered to enforce all legislative and regulatory requirements relating to uranium operations. It is also empowered to enforce environmental protection conditions contained in the licence and lease rights.

Specific environmental provisions relating to the Ranger Project are provided in the Appendix I of Schedule 2 of the Atomic Energy Act 1953. It empowers the minister to establish the post of Environment Protection Officer. Other requirements include the rehabilitation and re-vegetation of the mining site, carry out a monitoring programme and requirement to use the "best practicable technology" in controlling emissions. The use of the phrase "best practicable technology" calls for standards which may be higher than minimum international standards. In addition, the minister has reserved powers to introduce further conditions relating to the protection of the environment. The Northern Territory has also passed legislation designed to control the

environmental effects of uranium mining in the State. In 1979, it passed Uranium Mining (Environment Control) Act 1979. Under s.5, the owner or manager of a mine is prohibited to commence uranium mining operations unless an environment protection officer has been appointed. Furthermore, there is a requirement that employees should be conversant with the need to protect the environment, and mining companies are required to undertake environmental monitoring programmes. Finally, the minister is empowered to order rehabilitation works.[56]

5. CONCLUSION

The foregoing discussion shows that environmental and safety issues have come to be recognised by most mineral producing countries as important elements in mineral resource development. Mining legislation and regulations have enabled government authorities to examine the condition of mines to ensure that the safety and health of persons employed in such mines is not unnecessarily endangered. During the enforcement of laws and regulations relating to environmental control, a number of factors have come to influence the degree of control. These include the need to achieve a balance between mineral resource development and the needs of the environment, preservation of health and safety of the community, protection of other land

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[56] S.11.

uses, and the economic and social costs involved. It has also been made clear that some of the prerogative powers of the government authorities cannot be bargained away, such as the need to maintain minimum international environmental standards.

It is important that Namibia should learn from the experience of other mineral producing countries. There is an urgent need for mining operations to meet minimum international environmental standards, especially Rossing and Tsumeb. This will necessarily mean that existing environmental provisions should be enforced and additional regulations which would take individual mining projects into account should be introduced. Individual standards discussed above would provide a useful guide.

Chapter VI Namibia's Mineral Resources and International Law.

1. Introduction

For centuries, capitalism has remained a system of private property par excellence. This is reflected in a number of bills of rights and constitutions of the eighteenth century. For instance, it was stated in 1780 Massachusetts Bill of Rights that all "men... have certain natural, essential and inalienable rights; among which may be reckoned the right... of acquiring, possessing, and protecting property." (1) The Declaration of the Rights of Man and Citizen in France in 1789 stated that the "aim of every political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property..." (2) The concept of private property was consolidated by legal protection. In the US, Justice Patterson set as precedent, in 1795, for the Supreme Court decisions by declaring that "it is evident that the rights of acquiring and possessing property, and having it protected, is one of the natural, inherent, and inalienable rights of man." (3)

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1. Quoted from Richard Schlatter, (1951), Private Property; The History of An Idea, George Allen and Unwin Ltd. London, p. 187

2. ibid, p. 205

3. ibid, p. 194

Given the fact that capitalism was the dominant force in the world, the theory of private property was extended by classical international law to cover private foreign investment. (4)

The emergence of new states and alternative political systems to capitalism had implications for the relationship between the state and private property, and for the role of foreign private investment. Since the Second World War, the right of all peoples to self-determination has received recognition as jus cogens in contemporary international law. (5) The right to self-determination has also been interpreted to mean the right of a State to economic self-determination. As a result, the collapse of the colonial system and the struggle of the developing countries to achieve economic self-determination introduced substantial changes in the conditions under which foreign private capital is regulated in developing countries. Furthermore, UN General Assembly resolutions now recognise the right of States to permanent sovereignty over their natural resources. The basic principle is that their exploitation must serve the national interest and well-being of their nationals.

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4. See the International Law Association, Report of the 34th Conference of Vienna, London, 1927, pp.248-249; see also Konstantin Kalzarov, (1964), The Theory of Nationalisation, Martinns Nijhoff, The Hague p. 290
5. See Article 53 of the Vienna Convention on the Law of Treaties, 22 May, 1969. See also Tang An, (1987). "The Law Applicable to a Transnational Economic Development Contract", Journal of World Trade Law vol. 21, Aug. No.4, pp. 95-146 at 127

The principle also means that host States have the right to decide the manner and form of natural resource exploitation in the public interest. The host State can exercise this right through laws and regulations governing natural resource exploitation. Naturally, the host State's laws and regulations will form the basis upon which private foreign investors engage in the exploitation of natural resources. Developing countries have also demanded that protection of private property should take their legitimate needs to undertake fundamental social and economic reforms into account. Finally, the development of contemporary international law has enabled developing countries to revise or even terminate natural resource concessions awarded during the colonial period. (6) It has also enabled them to undertake large-scale economic organisation and restructuring. (7)

These developments will have a direct impact in post-colonial Namibia. The right of a State to effect fundamental social, political and economic reforms has been acknowledged as one of the basic principles of contemporary international law. It is for these reasons that after independence and in line with experiences in other developing countries, mining concessions

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6. For instance, Asante states that "It is now generally recognised that "Colonial 'concessions or agreements' may be rearranged." See Samuel K.B. Asante, (1980), "The Concept of Stability of Contractural Relations in the Transnational Investment Process," in Kamal Hossain (ed.) (1980) Legal Aspects of the New International Economic Order, Frances Pinter (publishers) Ltd, London, p. 244
7. ibid

will become subject to many influences and will therefore, not escape an unavoidable evolutionary process. In addition, the revocation of the mandate by the United Nations will have important legal consequences to a number of mining concessions granted to private foreign investors by the South African regime. The legal validity of these concessions will raise a number of legal questions, namely: (1) whether the illegal South African colonial administration was entitled to grant concessions which extend beyond the period of the mandate; (2) whether a future lawful Namibian government will be bound by such concessions; (3) what practical guarantees, if any, could be given to foreign investors whose mining concessions extend beyond the termination of the mandate; and (4) what claims will an independent Namibia have against the racist South African regime for continuing to allow the exploitation of the territory's mineral resources in violation of international law.

2. Colonialism, decolonisation and the protection of private foreign investment.

Under international law, a rule remains valid until it is superseded by a countervailing practice of States. As already noted in the introduction, the rules of classical international law regarding the protection of private foreign investment were formulated when most Third World Countries were still colonial domains of Western powers. These principles failed to take

into account the historical development which led to the colonization of Third World Countries. Not surprisingly, these principles came under attack as soon as these countries achieved their political independence. Before we look at the impact of decolonisation, it is necessary briefly to discuss these principles.

2.1 Classical international law and the protection of private foreign investment.

The rules governing the protection of private foreign investment were formulated in Europe during the eighteenth and nineteenth centuries. Four main principles governed the international protection of foreign private investment. These were subsequently reaffirmed by the International Law Association Congress held in Vienna in 1926. (8) The four fundamental principles were: "(1) private property may not be expropriated without compensation; (2) this principle is applicable on the international plane; (3) international law gives to every State the power to intervene against another to protect its nationals, whenever this principle is violated; (4) the expropriation of the property of foreigners... by indirect means which in fact allow their property to be disposed of without compensation, is not allowed." (9)

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8. Op. Cit, Konstantin Katzarov, (1964), The Theory of Nationalisation, p. 290. See also International Law Association, Report of the 34th Conference, 1927, London p. 227
9. Op. Cit, Konstantin Katzarov, (1964), The Theory of Nationalisation, p. 290

In addition, a number of other restrictions were imposed upon the host State before expropriation or nationalisation could be effected. These included: (1) the property must be required for public purposes; (2) the expropriation measure must not discriminate against the alien owner; and (3) the owner must be given "prompt, adequate and effective compensation."

2.2 Erosion of the traditional rules.

The principles listed above have been radically undermined due to the emergence of new political systems some of which posed a direct challenge to capitalism. The first attack came from the Soviet Union during the 1917 Revolution. For the first time in the political history of the world, a new political philosophy developed which challenged the western capitalist system.

It has been eloquently stated by Konstantin Katzarov that the communist philosophy "derives its raison d'etre from the radical and rigorous application of socialist principles of the economic life of the country. The system is based on a complete transformation of property, the most important result of which is to ... give overriding priority to the socialist property of the State. The land, natural resources ... all wealth of economic importance are the property of the State. The whole economic system is based on the socialist ownership

of the means of production, determined and directed by the State economic plan." (10) It is clear that the Communist system has a revolutionary and radical character. It is also the least equivocal and the most rigorous system in opposing the western concept of private property. (11) It introduced a new stage in the evolution of law and the protection of private foreign investment.

Classical international law became subjected to further strain when Mexico decided to carry out economic reforms during the 1930s. (12) After realising that the country was seriously exposed to foreign economic domination, particularly American capital, political and social pressures impelled the government to undertake economic reforms. Naturally, these reforms had a direct effect on private foreign investment and resulted in significant weakening of classical international law. Notwithstanding these developments, however, most of the fundamental principles of classical international law survived, albeit, with minor modifications.

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10. ibid, p.77
11. For a general discussion see Konstantinov F.V. et al, (1982), The Fundamentals of Marxist-Leninst Philosophy, Progress Publishers, Moscow.
12. See The Times, London, 5 August, 1938, p.11 col e.

2.3 Colonialism, classical international law and the role of mining companies.

During the colonial period, the indigenous population of developing countries fell victim of classical international law which made it "legal" for European powers to colonise them. When colonization was being undertaken by competing European powers, the acquisition of territory under classical international law enabled capital exporting countries to regard as "terra nullius" territories inhabited by populations whose civilisation in the sense of the public law of Europe, was backward and whose political organisation was not conceived according to Western norms. (13) This thesis propounded the view that organised nationalities or peoples of non-European lands had no sovereign right over their territories and thus no sovereign title which could be used to bar acquisition of title by means of effective occupation. (14) The inhabitants, therefore, were merely factually and not legally in occupation of the territories, which could be treated "terra nullius" and acquired by any State in accordance with the requirements of classical international law.

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13. See Okere B.O., (1979), "The Western Sahara Case," I.C.L.Q. vol. 28, pp 296-312 at 305
14. See the comments of Judge Ammoun in the Western Sahara Case, (1975), I.C.J. Rep., 86

Therefore, the concept of terra nullius was used as a legal spearhead of European colonization and exploitation. In many countries of Africa, including Namibia, the indigenous inhabitants experienced "company rule", the most prominent in southern Africa being the British South Africa Company ("Chartered"). This company administered a number of countries including Zambia. (15) In the case of Zambia, before the company ceased to administer the territory in 1924, it passed a mining ordinance which was very favourable to its private interests. It has been stated that "A private commercial enterprise thus acquired an effective veto over the legal regime governing the exploitation of what was shortly to be revealed as Northern Rhodesia's [as the country was then called] one valuable national asset - the mineral wealth of the Copperbelt." (16) This privileged position enabled the company to have "exclusive authority in the matter of the issue of licences to mine and work minerals. The powers given to the Company could hardly have been wider: the Company could, if it so wished make a grant over an unlimited area in perpetuity." (17)

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15. See generally Peter Slinn, (1979), "The Mining Ordinance of Northern Rhodesia: A Legislative History 1924-1958" Journal of African Law, vol. 23 pp. 84-106
16. ibid, p. 85. In 1924, the British Crown took over the administration of the country from the Company.
17. ibid, p. 86

In contrast to the extremely advantageous position of the private foreign investors, the indigenous inhabitants of the colonies were, in most cases, excluded from acquiring exploitation rights. Their role was to offer their labour power to the mines owned by the companies with unfavourable conditions and terms of employment. Given these conditions, for how long could classical international law regard property rights of private foreign investors, acquired during the colonial period as sacrosanct and irevocably intended for their sole use? It was under these conditions that after gaining their political independence, developing countries demanded a just and equitable system which could balance the interests of private foreign investors with the legitimate needs of these countries to effect a comprehensive economic and social reforms. This could not be done by individual States without retaliation from capital exporting countries, hence, there was a need to formulate common policy through the United Nations.

2.4 Theory of Permanent Sovereignty over Natural Resources.

Decolonization and the establishment of the United Nations dealt a severe blow to some of the old fashioned principles of classical international law. After the Second World War, major changes in the economic and legal sphere have taken place. Most developing countries achieved their independence at a time when effective control over their natural resources was in the hands of private foreign investors. They soon realised that

the right to self-determination would be largely negated if they did not carry out comprehensive economic and social reforms. They experienced considerable pressure to develop their economy and to improve the social conditions of their citizens. Economic conditions prevailing at independence convinced the population that mere civil and political rights remain sterile without social and economic rights.

Notwithstanding political differences among developing countries, they have all supported the principle of permanent sovereignty over their natural resources. Their objective is to ensure a just and equitable distribution of wealth between themselves and private foreign investors. There is general agreement that classical international law presents the main obstacle in achieving just and equitable terms with private foreign investors. As a result, an attempt has been made to subject mineral concessions to domestic laws of host countries. This is manifested in numerous United Nations resolutions discussed below.

2.4.1. The role of the United Nations.

In 1952, the UN General Assembly adopted a resolution on the exploitation of natural resources. This resolution recommended that all member States should "refrain from acts, direct or indirect, designed to impede the exercise of the sovereignty of any State over its natural resources" (18) It was followed by another resolution adopted in 1962. (19) Unlike the 1952 resolution, the 1962 resolution clearly defined the meaning of permanent sovereignty over natural resources by stating that the "right of peoples and nations to permanent sovereignty over their natural resources must be exercised in the interest of their national development and the well-being of the people of the State concerned."

It is important to note four additions introduced by the resolution namely: "peoples", "nations", "national development" and "well-being of the people." The most important factor is that the resolution was adopted with the support of the overwhelming majority of capital exporting countries. Finally, two more resolutions were adopted in 1974. One is entitled the United Nations Declaration on the Establishment of a New International Economic Order (20), and the other is entitled the Charter of Economic Rights and Duties of States (21)

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18. Res. 626 (VII) of 21 December 1952, U.N. Yearbook (1952)
19. Res. 1803 (XVII) of December 1962 on Permanent Sovereignty over Natural Resources.

20. General Assembly Res. 3201 (S-VI) of 1 May 1974 reproduced in 13 I.L.M. (1974) 715, and 68 A.J.I.L. (1974), 799
21. General Assembly Res.3281 (XXIX) of 12 Dec 1974, reproduced in 14 I.L.M. (1974), 716 and 68 A.J.I.L. (1974), 799.

(herein after referred to as C.E.R.O.S.). It is clear from the terms of these resolutions that their essence is to enable every State a right to exploit its natural resources. Finally, their aim is to enable the host State to adopt economic measures which include nationalisation of foreign enterprises in accordance with its domestic law and to settle foreign private investment disputes in the national courts according to domestic law. These issues are discussed in detail below.

2.4.2 Nationalization.

In this section, the terms nationalisation and expropriation are used to describe the taking of private foreign enterprises by host States in developing countries. Although the terms have different connotations, these have become blurred in domestic legislation, legal writings, etc. However, the term expropriation is described by Leslie Rood to mean "early takings of individual pieces of property" by the State, but as "used in the legal literature it often has the connotation of being a somehow wrongful act which can only be justified if it meets certain requirements, such as a public purpose and adequate compensation. (22) On the other hand, nationalisation is a term which came into use in this century to describe broad-scale takings which are a part of a social

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22. See Leslie L. Rood, (1976), "Nationalisation and indigenisation in Africa", Journal of Modern African Studies, vol. 14, p. 429.

and economic reform for the betterment of the people." (23) In addition, another term which has come into common usage is indigenisation. It has been described as a "process by which a government limits participation in a particular industry to citizens of the country, thus forcing alien owners to sell." (24) Although the term does not fall within the terms of nationalisation, (25) it has a close relationship to it in that in both cases, the object of the host State is to recover control of the economy from foreign ownership.

Developments within the UN enabled world attitude towards nationalisation to change. Indeed, it has been stated that today, nationalisation measures "resemble modern business deals." (26) It is clear that due to post-Second World War developements, any State which wishes to nationalise its natural resources for the well-being of its citizens can do so provided it complies with some basic rules. The "public purpose" requirement developed by classical international law has been given a wider meaning. In addition to nationalisation, host States have a right to "indigenise" thier natural resources by requiring private foreign investors to sell their assests to the indigenous inhabitants. It is expressly provided for under Article 2(2)(C) of the C.E.R.O.S. The article contains the phrase "transfer of ownership" which has been interpreted to mean that "the property ... passes from one private individual to another." (27) It has also been asked "whether a transfer of ownership is for a public purpose." (28)

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23. ibid.
24. ibid p. 430
25. Because the State does not take the property into public ownership.
26. Op.Cit. Leslie L. Rood, (1976), "Nationalisation and Indigenisation in Africa", p. 435
27. For details see Fath El Rahaman Abdalla El Sheikh, (1984), The Legal Regime of Foreign Private Investment in the Sudan and Saudi Arabia, Cambridge University Press, London p. 330
28. ibid.

Furthemore, the principle of permanent sovereignty over natural resources has important implications for the host State. It has been stated by eminent jurists such as Eduardo Jimenez Arechaga that "contemporary international law recognises the right of every State to nationalise foreign owned property, even if a predecessor State or a previous government engaged itself, by treaty or by a contract not to do so." (29) According to him, the description of the State's sovereignty as "permanent signifies that the territorial State can never lose its legal capacity of exploitation of those resources, whatever arrangements have been made for the exploitation and administration." (30)

As illustrated in Table VI:I, developing countries have actually demanded renegotiation and modification of economic agreement contracts regardless of whether they contain what came to be referred to as "stabilization clauses" i.e.

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29. See Eduardo Jimenez Arechaga, (1980), "Application of the Rules of State Responsibility to the Nationalisation of Foreign-Owned Property", as Chapter 17 of Kamal Hossain (ed.), (1980), Legal Aspects of the New International Economic Order Frances Pinter (publishers) Ltd. London, p. 220•Emphasis added.
30. ibid.

contractural clauses prohibiting the host State to undertake unilateral modification of economic development contract to the detriment of the private foreign investor partner without his consent. In addition, modification has taken place regardless of whether the economic development contract was entered into with the same government or not.

It is submitted that of all nationalizations which took place from 1960-74, Africa took the lead. According to Leslie Rood, out of 875 cases of nationalization "in 62 countries of the world, 340 (or 39 per cent) were in black Africa". (31) Large petroleum and mineral extraction industries were nationalised in countries such as Ghana, (32) Mauritania, (33) Nigeria, (34) Sierra Leone, (35) Guinea, (36) Senegal, (37) Gabon, (38) Zaire, (39) and Zambia (40). The situation described above is hardly suprising given the fact that in contrast with other colonised peoples of the world, the people of Africa bore the brunt of colonialism and racial discrimination. Private capital was most visible and most dominant in all aspects of the economic sphere than in any

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31. Op. cit. Leslie L. Rood, (1976), "Nationalisation and indigenisation in Africa", p. 431 See also UN Secretary-General, Permanent Sovereignty Over Natural Resources, A/9716 (Supplement to E/5425), 20 September 1974
32. 1974 33. 1974 34. 1973 35. 1970 36. 1961 37. 1974 38. 1974
39. 1967 See Lanning G. with Mueller M., (1979), Africa Undermined, p. 248
40. 1969

Table VI:I Changes in relationship between some selected host States and private foreign investors in developing countries.

Country	Mineral	Multinational Co.	Year	Result (1)
1.Botswana	Diamonds	DeBeers Botswana Mining Co. Ltd.	1975	50% plus tax
2.Gabon	Iron Ore	Miferma	1974	Partial takeover marketing arrangements
3.Ghana	Gold	Lonrho	1973	55% equity 6% royalty & 50% tax
	Diamonds	CAST	1973	"
4.Guinea	Bauxite	Alcan	1961	100% equity
5.Mauritania	Iron Ore	Somifer	1974	100% Mrkt arrangements
6.Nigeria	Petroleum	Shell/BP	1973/6	35% in 1973 55% in 1974 60% in 1976
7. Papua New Guinea	Copper	Rio Tinto Zinc	1974	APT, review of agreement every 7 yrs.
8. Senegal	Phosphates	Taiba	1974	50% Govt. part., increase in tax
9. Sierra Leone	Diamonds	S.L.S.T.	1970	51% Govt. part
10.Togo	Phosphates	Benin	-	100% "
11.Zaire	Copper	Union Miniere	1967	100% "
	Diamonds	M.I.B.A.	-	100% "
12.Zambia	Copper	Roan/Amax	1969	51% control over markt. up to 1974.

Notes: 1 = % refers to Government Participation.

Source: Leslie L. Rood, (1976), "Nationalisation and Indigenisation in Africa," Journal of Modern African Studies, vol. 14, pp. 432-434; Asante K.B. (1980), "The Concept of Stability of Contractual Relations in the Transnational Investment Process" as chapter 18 of Kamal Hossain (ed.), 1980, Legal Aspects of the New International Economic Order (1980), Frances Pinter (publishers) Ltd, London , pp. 256-257; Colclough Christopher and McCarthy Stephen, (1980), The Political Economy of Botswana, Oxford University Press, p. 153; and Lanning Greg with Mueller Marti, (1979), Africa Undermined - Mining Companies and the Underdevelopment of Africa, Penguin Books, p 248.

other part of the world which experienced colonialism. It has been stated that the "petroleum, copper, iron, bauxite, phosphate, gold and diamond operations are natural targets, not only because the pattern for their seizure has been established on other continents, but because they are highly visible, rich, and ... profiting at the expense of the local inhabitants. The people are deeply disturbed that a foreign corporation is taking from... their soil - a natural resource which can never be replaced." (41)

It has also been stated that this attitude has been taken because in most cases, mining concessions were "concluded as incidents of the colonial system in which metropolitan companies were offered privileged investment interests in the colonies and accordingly given such grotesquely favourable terms as could hardly survive the collapse of colonialism ... in

41. Op cit. Leslie L. Rood, (1976), "Nationalisation and indigenisation in Africa", p. 435

these circumstances, host governments of newly independent countries consider renegotiation or restructuring of these arrangements as a legitimate part of the de-colonisation process. It is now generally recognized that 'colonial concessions or agreements' may be rearranged." (42) The period 1960-73 experienced extensive world-wide nationalisation of the assets of the private foreign investors. It is stated that about $4 billion worth of property belonging to the U.S. nationals were nationalised. (43)

We now turn to discussing some specific cases of retrospect changes of economic development contracts. Papua New Guinea is one of the developing countries which achieved independence with a negotiated "colonial concession". In 1967, an agreement was entered into between the Australian Government, in its capacity as the legal administering authority of Papua New Guinea, and Rio tinto -Zinc to exploit the Bougainville Copper Mine. (44) The Australian Government paid a 20 per cent equity

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42. See Samuel K. B. Asante, (1980), "The Concept of Stability Contractural Relations in the Transnational Investment Process", as Chapter 18 of Kamal Hossain (ed.), (1980), Legal Aspects of the New International Economic Order, Frances Pinter (publishers) Ltd. London, p. 224 43. Op.cit. Leslie L. Rood, (1976), "Nationalisation and indigenisation in Africa", p. 431
44. See United Nations Department of Techinical Co-operation for Developement, (1980) The Nickel Industry and The Developing Countries, New York p. 76. For a detailed discussion see Studholme Caroline, (1981), The Legal Regulation of Mineral Exploitation in Developing Countries; A Study In Dependent Development, unpublished LLM dissertation submitted at the University of Warwick, Coventry, U.K.

share at par value and imposed a graduated tax system on the mining operations. According to Studholme, the 1967 Bougainville Agreement had four main fiscal provisions. "Firstly, a fixed royalty of one and a quarter per cent of the sale price of the ore was applied, secondly a normal company tax of thirty three and a third applied to the mine, thirdly a dividend witholding tax of fifteen per cent and finally the mine was given a three year tax holiday." (45) After independence, the Government of Papua New Guinea decided to modify the agreement. After a long negotiation, the Bougainville Amendment Agreement was finally reached between the Government and Rio Tinto - Zinc in 1974. It abolished the automatic twenty per cent exemption of the company's income from taxation, abolished the three year tax holiday, and most important of all, the company became subject to additional profits tax (APT). (46)

Finally, Botswana, which did not inherit a colonial mining concession agreement or contract, has also undertaken substantial changes in its original contract agreement with De Beers. (47) In 1970, the Government entered into an agreement with De Beers to exploit the Orapa diamond mine. (48) The Government acquired 15 per cent free equity share in the

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45. Op.cit. Studholme Caroline, (1981), The Legal Regulation of Mineral Exploitation in Developing Countires: A Study in Dependent Development, p. 224
46. ibid, taxation provisions are discussed in detail in Ch. 7
47. For details see Colclough Christopher and McCarthy Stephen, (1980), The Political Economy of Botswana, Oxford University Press.
48. ibid, p. 151

project but soon realised that it was more profitable than anticipated. In 1974, encouraged "by international trends in the negotiation of mineral concessions, the Government expected that a greater proportion of the financial benefits of mining should flow to the public sector rather than to private captial." (49) The Government initiated negotiations with De Beers. Four main aspects were involved; "the shareholding of the company and in particular what equity the Government should have; the royalty payable; the tax structure; and what would happen in the event of the project being more or less profitable than anticipated." (50) An agreement was reached in 1975 whereby De Beers agreed to let the Government acquire 50 per cent of the equity in the operating company "free of consideration." (51) In addition, the royalty system was changed though not specified but could be varied by the Government in order" to share in any excess profit, above the target rate of return, which the company might make." (52) Finally, the tax rate was also not specified and De Beers was subject to normal tax legislations as "it applies from time to time." (53)

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49. ibid
50. ibid, p. 152
51. ibid, p. 153
52. ibib, p. 154
53. ibid

In addition to the renegotiation examples discussed above, some host States have even gone further to unilaterally terminate contracts granted to private foreign investors. One example will suffice to illustrate this point. In 1958, Argentina entered into oil contracts with a number of oil companies, mainly from the US. (54) The contracts covered a wide range of issues including the supply of machinery and equipment; development, extraction and transportation of petroleum; pipelines construction; and drilling of wells. Due to political pressure, it soon became clear that the contracts were more advantageous to the companies than to Argentina. As a result, politicians were forced to act. In 1963, the President of Argentina was able to state that "In the matter of petroleum policy we shall do what we have repeatedly promised to do: the contracts which were signed... against the country's economic interests will be annulled." (55) the annulment Decree No. 724/63 was promulgated in the same year and revoked the contracts. (56)

It is clear from the above discussion that developing countries are able to modify economic development contracts with private foreign investors without raising an international dispute. This has been made possible by contemporary

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54. For details see Chayes Abram, et. al. (1969), International Legal Process Little, Brown and Company, pp.811-814
55. Ibid, p 831
56. Ibid, p 838

international law and the desire of private foreign investors to continue their operations in developing countries. More and more developing countries have shown a desire to be more direct participants in the exploitation of their natural resources. Mining concessions by their very nature cannot realistically be seen to be immutable. Practice through the use of renegotiation point to the fact that these agreements can be varied. What then is the legal status of private foreign investors? This is the subject of our next discussion.

2.5 Legal Status of Private Foreign Investment

Having discussed the impact of de-colonialization on the mining concessions, questions may be posed: what is the role of international law in the protection of private foreign investment? Are the General Assembly resolutions cited above binding on capital exporting countries? Have these resolutions changed the basic outlook of international law in this area? Some of these issues are considered in detail below.

After realising the precarious nature of their investments,most private foreign investors included stabilization clauses in the economic development contracts restricting host countries from unilateral modification of the agreements. Since most of these countries lacked technical and legal expertise, private foreign investors managed to include

contractual provisions which were favourable to them. (57) Private foreign investors had veto powers over the future of the mining industry because host countries could not modify certain contractual provisions (through administrative or legislative action such as increased taxation rates and government participation) without mutual agreement. We find these contractual provisions in a number of countries such as Botswana, (58) Zambia, (59) Libya (60) and Iran. (61)

An attempt was made to internationalise these agreements i.e. it was said by capital exporting countries that concession agreements have unique characteristics which distinguish them from ordinary contracts governed by domestic law of the host State. Some of these characteristics include the following: "(i) They are concluded between the government on one side and a foreign private contractor on the other; (ii) They... establish a long term relationship between the parties which implies a certain degree of confidence and co-operation, and (iii) They often contain provision for the settlement of

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57. The other reason is that stabilization clauses were used as an attempt to lure foreign investors.
58. See Macbul Rahim and Juliet Broad, The Legislative Framework, Agreements and Financial Impositions Affecting the Mining Industry in African Commonwealth Countries, Commonwealth Secretariat, p.35. See particularly Arts. 41 (b) (i) and 42 (b).
59. ibid, p. 7.3
60. See 17 ILM pp 1-37
61. For a detailed discussion see Rainer Geiger, (1974), "The Unilateral Change of Economic Development Agreements", ICLQ vol. 23, pp. 73-104 at p. 76

disputes by means of arbitration." (62) Arbitrators in famous cases such as Aramco and the Government of Saudi Arabia (63) even went as far as holding that by "reason of its very sovereignty within its territorial domain, the State possesses the legal power to grant rights which it forbids itself to withdraw before the end of the Concession with the reservation of the clauses of the Concession Agreement relating to its revocation. Nothing can prevent a State, in the exercise of its sovereignty, from binding itself irrevocably by the provisions of a concession and from granting to the Concessionaire irretractable rights. Such rights have the character of acquired rights." (64)

Notwithstanding these arbitral decisions, developing countries have undertaken unilateral modifications of concession agreements. They have rejected any attempt to internationalise economic development agreements on the grounds that any restrictions by international law on the disposition of investment by the host State contradicts their right to economic self-determination. In addition, they argue that economic development agreements should not be distinguished from public law contracts which operate in developed countries. In public law contracts, the principle governing their

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62. ibid, p. 75
63. See 17 ILM p.24
64. ibid, p. 24, para 67; see also ILR 117 (1963); tescaco, 17 ILM pp. 15-17, paras 40-45

application were laid down in a famous British case of Amphitrite v. The King where it was held that "the Crown cannot by contract hamper its freedom of action in matters which concern the welfare of the State." (65) In the US, a contract between a private person and the government does not prevent the government from overriding its contractual obligations in the exercise of its police powers widely construed to include "the health, safety, good order, comfort or general welfare of the community." (66)

Finally, the same principle applies in France where the government retains the power, without any default," by means of legislation administrative action or general character or individual measures directly interfering with the contract to suspend , vary or rescind the contract transfer it to another party or take it over itself." (67) It is argued that State practice is not supported by the arbitral decisions cited above nor are they supported by State practice of capital exporting countries. Furthermore, it is argued that since public law contracts have existed longer than economic development contracts, there is no reason why they should not be regarded

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65. (1921) 3 K.B. 599; see also Op. cit Rainer Geiger, (1974), "The Unilateral Change of Economic Development Agreements, " p.88
66. Op. cit. Rainer Geiger (1974), "The Unilateral Change of Economic Development Agreements", p. 90; see also Chicago Alton R.R.V. Tanberger (1915) 238 US 67
67. Op cit, Rainer Geiger, (1974), "The Unilateral Change of Economic Development Agreements," pp. 95-96

as guiding principles in the performance of the economic development contracts. It is said that private foreign investors should not be entitled to a preferential treatment they could obtain neither under their own "nor any other developed legal system." To do so could "be nothing else than a more subtle form of colonialism." (68)

As it happened in most of the arbitral cases, tribunals had no authority to reverse governmental measures and their attempt to order specific performance proved futile. At the end, the best safeguard for private foreign investors became compensation. Indeed, it is less controversial for private foreign investors to claim compensation than to seek specific performance or restitution. The issue of compensation caused considerable debate between capital exporting countries and developing countries. Some developed countries insisted on the orthodox view on compensation. This view was articulated by the US Secretary of State, Hull during the Mexican nationalisations of 1938. He stated that "the right to expropriate is coupled with and conditioned on the obligation to make adequate, effective and prompt compensation. The legality of an expropriation is in fact dependent upon the observance of this requirement." (69) The principle requires

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68. ibid, p. 102.
69. See The Times, London, 25 August, 1938, p. 7 col. a.

that in order to be prompt, compensation must be paid either before or within a short time after nationalisation. Furthermore, adequate compensation should correspond fully to the value of the foreign investment affected by the nationalisation.

It is submitted that the orthodox principle is no longer applicable in practice. This has been confirmed by several jurists and court decisions. Indeed, even the US Supreme Court in Sabbatino case held that traditional rules of international law imposing a duty upon an expropriating State to pay "prompt, adequate and effective" compensation were no longer supported by a consensus of States. The Court held that the validity of such rules are in sufficient doubt as to make them inapplicable to the dispute between the host State and the private foreign investor. (70) It must also be noted that several developed countries supported Resolution 1803 (XVII). It could be argued that since the resolution omitted the words "prompt, adequate and effective compensation" in favour of the term "appropriate", they can be held to have waived their insistence on traditional rules. However, the crucial question in

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70. See 376 US 298: American Journal of International Law, vol. 60, (1966) p. 782 at 785; and Subrata Roy Chowdhury, (1980) "Legal Status of the Charter of Economic Rights and Duties of States," p. 89, as Chapter 3 of Kamal Hossain (ed.) (1980), Legal Aspects of the New International Economic Order, Frances Pinter (publishers) Ltd, London

international law has been how is the appropriateness of compensation to be determined? Are there any guiding principles and if so what are they?

There is no clear guidance from the terms of the resolution except that appropriate compensation should be made "in accordance with the rules in force in the State taking such measures... and in accordance with international law." This does not resolve the problem because apart from the generality of the provision, there could be a conflict between the domestic law of the nationalising State and the international law rules governing the appropriateness of compensation. (71) This uncertainty is resolved by paragraph 2(C) of Article 2 of C.E.R.O.S. and State practice. The Charter does not provide for compensation for nationalised foreign investments under international law. Under the Charter, the nationalising State is required to pay compensation "taking into account its relevant laws and regulations and all circumstances that the State considers pertinent... where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalising State and by its tribunals." (72) Article 2 (2) (C) of the Charter has been

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71. The defeated US amendment to Res. 1803 attempted to define appropriate compensation... in accordance with international law to mean prompt, adequate and effective compensation, see UN Doc. A/C 2/SR 835, p. 5 and UN Doc AC/2/L, 668
72. Article 2 (2) (C)

described as a classic restatement of the Calvo doctrine designed to have a "global extension ... particularly for the benefit of the entire developing countries." (73) It has also been emphasized that though developed countries may regard the Charter as devoid of any legal force and not binding, a consensus of 120 States in favour of the new standard on compensation with only 6 against establishes an overwhelming support of the global extension of the Calvo doctrine. (74)

State practice consolidates the majority view. In post-Second World War nationalisation measures, the payment of compensation has been by instalments spread over a number of years. Several factors such as the extent of the nationalised property, the amount of compensation and the expectation of future commercial relations have come to influence this trend. For example, the duration of compensation payments in Zambia was eight years for Roan Selection Trust and twelve for Anglo-American Corporation although in both cases, Government bonds were later redeemed much earlier when the Zambian Government terminated the marketing and other agreements. (75)

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73. Op.cit. Subrata Roy Chowdhury, (1980), "Legal Status of the Charter of Economic Rights and Duties of States," p.88
74. ibid p.80. The Calvo doctrine as developed in Latin America requires private foreign investors not to seek diplomatic protection from their home States so that they are only subject to the domestic laws of the countries in which they operate.
75. See United Nations Centre on Transnational Corporations, (1981), Transnational Corporations in the Copper Industry, New York p. 59

It has also been stated by jurists of great eminence that the Charter provision of "appropriate compensation" to be determined by taking into account "all circumstances that the State considers pertinent" provides a useful guidance as to "which of the pertinent circumstances are to be taken into account. One is the time during which the expropriated undertaking has exploited... the nationalised resources, another is whether it has recovered or not the initial capital investment, if there has been undue enrichment as a result of a colonial situation; if the profits obtained have been excessive; the contribution of the enterprise to the economic and social development of the country; its respect for labour laws; its reinvestment policies... For this reason or similar ones, there may be cases where, in fact, the indemnity is minimal, none or even negative. But this does not signify, legally, the non-payment of compensation." (76)

This interpretation of contemporary international law has major implications on the so called acquired rights principle developed by classical international law. The same author states the legal position of contemporary international law in these terms: "The traditional doctrine considered that since

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76. Op.cit. Eduardo Jimenez Arechaga, (1980), "Application of the Rules of State Responsibility to the Nationalisation of Foreign owned property," p. 222, as Chapter 17 of Kamal Hossain (ed.), (1980), Legal Aspects of the New International economic Order. Emphasis added.

the act of nationalization or expropriation was in violation of acquired rights, the normal principles of State responsibility for unlawful acts should apply. the very basis of this traditional doctrine... is removed once it is realized that acquired right to private property... is no longer protected by contemporary international law... Once the measures of nationalization are not per se unlawful, but on the contrary, constitute the exercise of the sovereign right, the general rules of State responsibility in respect of unlawful acts can no longer apply." (77)

It is clear from the foregoing discussion that compensation is now regulated by the new criteria of "pertinent circumstances". Privileges enjoyed by private foreign investors during the colonial period constitute pertinent circumstances to be taken into account. It is no longer a defence to hold that these privileges were accorded to the companies by a sovereign State, albeit, a colonial State and therefore it wasn't their fault. What seems to be material is the fact that past profits gained by private foreign investors under privileged colonial period (which enabled them to achieve a high rate of return) constitute a material consideration. Whether these privileges were accorded by the companies themselves when they were "sovereigns" or were simply accorded the privileges by a colonial regime seems to be irrelevant under contemporary international law. Indeed, the contemporary

77. ibid, p. 221. Emphasis added.

view taken by most developing countries regarding the protection of private foreign investment is in line with Mexico's arguments of 1938 namely, "the future of the nation [can] not be halted by the impossibility of immediate payment of the value of properties belonging to a small number of foreigners who seek only lucrative ends." (78) It is for these reasons that today, equity is a determining factor in determining the protection of private foreign investors. Finally, equity does not ignore the privileges enjoyed by private foreign investors and their conduct during the colonial period. We now turn to discussing the relevance of contemporary international law to Namibia and the status of private foreign investment in the territory.

3. The Relevance of International Law to Namibia and the Status of Private Foreign Investment.

Before we discuss the relevance of the issues raised above to Namibia, a number of issues need to be clarified. First, the future lawful government of Namibia will have an utmost discretion to decide, in accordance with the wishes of the people, the future of the mining industry. We are not in a position, nor are we entitled to do so, to decide what the future lawful government should do or should not do. Indeed, we would like to stress in no uncertain terms that to do so

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78. See The Times, London, 5 August 1938, p.11 col.e

would amount to writing a political manifesto for the future lawful government and would be unacceptable. However, we believe that the prevailing political, social, legal and economic factors would guide the future lawful government in deciding the future of the mining industry. Secondly, our only objective here, without in any way prescribing what should or should not happen, is to undertake a systematic exposition of legal issues regarding the exploitation of Namibia's mineral resources in the hope that it may assist the future lawful Namibian government in deciding the future of the mining industry. Therefore, the examination of the legal issues in this section may form part of the wider option open to it.

We have seen that the practice of States and the evolution of International law over the past forty years have clearly established that States have a right to nationalise foreign-owned property. Therefore, the future lawful government of Namibia will have the right to nationalise foreign property in accordance with State practice. In addition to the relevance of contemporary international law to Namibia, the termination of the Mandate and numerous United Nations resolutions on Namibia will have important legal implications on the concessions held by a number of mining companies in the territory. The major question which may be asked is: what is the legal position of the mining concessions given the fact that South Africa's right to administer the territory has been terminated? Before we discuss the legal implications of this

question, it is necessary to briefly discuss the legal status of Namibia from the colonial period to the present, and assess South Africa's duties and obligations towards the territory. In order to do this, we shall start from the Mandate period.

3.1 The Mandate System and Natural Resources.

The concept of self-determination was developed long before Namibia became a mandate territory. The principle was clarified in 1917 by President Wilson of the US. He stated the principle in these terms: "no nation should seek to extend its policy over any other nation or people, but that every people should be left to determine its own polity, its own way of development, unhindered, unthreatened, unafraid, the little along with the great and the powerful." (79) It should be noted that apart from the word "development" which could be construed to mean political as well as economic development, no specific reference to economic development as part of self-determination was made. Furthermore, during this period, the concept of self-determination was still regarded as only a political principle since classical international law had not yet fully accepted it as a right.

It has already been discussed in Chapter I that after the First

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79. See Digest of International Law, (1965), Whiteman, vol. 5, Department of State, Washington, June, p.41. See also S. Doc 685 64th Conference 2nd Sess. pp. 7-8

World War, the Mandate System was established in order to administer former German colonial territories. The objective of the Mandate System was to ensure the well-being and development of the indigenous population. It must be noted that according to Article 22 of the Covenant of the League of Nations, the "well-being and development" of the indigenous inhabitants of the mandated territories formed a "sacred trust of civilisation". The acceptance by the mandatory of this duty carried with it certain obligations and responsibilities established by international law. What are the legal consequences of the words "well being and development" of the indigenous population? "Well-being and development" can be construed to mean a number of things. The words may mean economic, social, moral and political well-being or development. The objective was to promote the well-being of the inhabitants, this meant not to exploit them or their natural resources. Ironically, General Smuts of South Africa stated the obligations of the Mandatory power as not "to look upon its position as an office of profit or position of private advantage for it or its nationals." (80)

It is also clear that the phrase "sacred trust" intended to incorporate the idea of trust in the international mandate system. The characteristics of a trust in domestic law are

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80. See General Smuts, (1918), The League of Nations: A Practical Suggestion, London; see also Digest of International Law (1963), Whiteman, vol. 2, Department of State publication 7553, December, p. 607

that " (a) it recognizes only obligations on the part of the trustee, and rights on the part of the beneficiary; (b) the trustee may not derive from his trust any personal profit." (81) Two other important points regarding the international Mandate System should be noted. First, the "Mandatory power to which the government of a territory is delegated by the League of Nations holds the territory on a dual mandate... (a) on behalf of the inhabitants of the territory; and (b) on behalf of the International Society," (82) Secondly, the "rights granted to the Mandatory are for the purpose only of the better fulfilment of its obligations towards the country under tutelage." (83) Furthermore, an international Mandate System was to be regarded as a legal institution whereby international law affords primary protection to the interests of the indigenous inhabitants. Finally, the foregoing shows that the international Mandate System created a new species of rights and obligations which was contrasted with that of colonies.

It is clear that the Mandate System was not intended to benefit Mandatory Powers. In order effectively to discharge their international obligations, all property and possessions of the German Empire situated in the mandated territories were transferred, with the territories, to the Mandatory Powers

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81. For a detailed discussion see Isaak I. Dore, (1985), The International Mandate System and Namibia, Westview Press, London p.18
82. ibid
83. ibid

without any consideration. (84) This goes to show that the Mandatory could not hold any of the property of the mandated territory in full dominion. Indeed, it was under a legal duty to use all the revenue and profits from the natural resources of the mandated territories for the benefit of the indigenous population. In awarding mineral rights, it was under a legal international obligation to ensure that their exploitation benefited the indigenous inhabitants and not to use these territories as instruments of profit and exploitation in collaboration with international capital.

Furthermore, one of the most important factors is that Mandatory Powers could not dispose of natural resources of the mandated territories in any way they liked since they did not possess sovereignty over the mandated territories. This view was expressed by Judge McNair in his Separate Opinion in the 1950 Advisory Opinion of the International Court of Justice. He stated that "Sovereignty over a Mandated Territory is in abeyance; if and when the inhabitants of the territory obtain recognition as an independent State, as has already happened in the case of some of the Mandates, sovereignty will revive and rest in the new State." (85) How did South Africa perform its international obligations? This is examined in detail in the next section.

84. Article 257 of the Treaty of Versailles. See Redmond Treaties (1923) 3331
85. See separate Opinion of Sir Arnold McNair, International Status of South West Africa, Advisory Opinion July 11 1950 ICJ Reports (1950) 150

3.2 South Africa's Behaviour

South Africa is the most privileged State in the sense that it has managed to defy international public opinion with impunity and contempt for more than sixty years. Its imposed system of apartheid had been declared a crime against humanity by the United Nations. The racist regime consistently ignored all resolutions adopted by the United Nations over Namibia, and has also ignored the ruling of the International Court of Justice that its presence in Namibia is illegal. As stated by Julio Faundez, "South Africa's right to administer Namibia was derived exclusively from the Mandate... this right was dependent upon South Africa fulfilling its obligation under [the] Mandate." (86) What is the regime's record in the exploitation of Namibia's natural resources? The findings of many writers of great eminence and economic experts on Namibia have been consistent. For example, Professor Reginald H. Green states that "the colonial political economy of Namibia has always been a political economy of theft. Land... mineral rights... were taken away by force," (87) while Brian Hackland, Anne Murray-Hudson and Brian Wood state that "Namibia's extractive colonial economy [was] developed for the benefit of foreign companies and white settlers." (88)

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86. See Dr. Julio Faundez, (1987), "International Law and Policy Making Process: The Case for Compliance" in Conference Papers on Namibia, Oxfam, 11 May, p.4
87. See Professor Reginald Green, (1987), "Dependence, Destablisation and Development", in Conference Papers on Namibia Oxfam 11 May p. 61
88. See Brian Hackland, Anne Murray-Hudson and Brian Wood, (1986), "Behind the Diplomacy: Namibia 1983-5" Third World Quarterly, vol. 8 pp. 51-77, at 53.

South Africa's contempt is illustrated by the following statement: "the blacks (90-95 per cent of the population) hold one third of the land while the whites (5-10 per cent of the population) hold two thirds. Moreover: the white area covers some 50.6 million hectares of the best farming and government land... It contains virtually all Namibia's known base-mineral deposits, diamond reserves: This inequitable distribution of resources was backed by legislation and social policy which discriminated against Namibians and which generously aided foreign companies and white settlers." (89) It is against this background that the international community has taken a concerted effort to force South Africa to comply with international law.

Since the Mandate period, South Africa's method of administering Namibia has been challenged by the international community on numerous occasions. The main issue of contention has been the application of apartheid in the territory. (90)

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89. See Jim Gale, (1985), "The Nature of Co-operation Between Foreign Economic Interests and the illegal South African Regime", in United Nations (1985) Seminar on the Activities of Foreign Economic Interests in the Exploitation of Namibia's Natural and Human Resources, Ljubljana, Yugoslavia, 16-20 April 1984, New York p. 50
90. See United Nations, (1974), A Trust Betrayed Namibia, New York p.1

The apartheid system has a direct effect on the welfare of the indigenous inhabitants, especially in the spheres of education, economic development, and the right to self-determination. Even before the establishment of the Mandate System, Prime Minister Smuts did not favour the idea of including Germany's ex-colonies in Africa as mandated territories. In his view, these territories were "inhabited by barbarians who not only cannot possibly govern themselves but to whom it would be impracticable to apply any idea of political self-determination." (91) This clearly indicates how Namibia was to be administered later on. Indeed, it did not take long before the international community held that South Africa's administration was "in contradiction to the principles and purposes of the Mandate, the Charter of the United Nations and the enlightened conscience of mankind." (92) This was followed by a number of futile attempts to persuade South Africa that it must recognise its legal obligations towards the people of Namibia.

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91. See UNIN, (1987), Namibia: A Direct United Nations Responsibility, Lusaka, p.80
92. Op.cit. United Nations (1974) A Trust Betrayed Namibia, p.2

3.2.1 Background to the Termination of the Mandate.

Upon the termination of the League of Nations, a resolution was adopted on 18th April 1946. It noted that Chapters XI, XII and XIII of the Charter of the United Nations embody principles corresponding to those declared in Article 22 of the Covenant of the League. (93) When the League of Nations was dissolved, its supervisory authority for Namibia was inherited by the United Nations. This view was at least implicitly recognised by South Africa when, in 1946, it requested the United Nations General Assembly's permission to annex the territory. (94) Therefore, the approach made to the United Nations indicated recognition of the body as the competent organ and was estopped from denying it later. Instead of observing the terms of the Mandate, South Africa continued to violate its international obligations. Several requests by the UN to place Namibia under the Trusteeship System were ignored. South Africa contended, in 1947, that it was under no obligation to place the territory under the Trusteeship System but agreed to submit reports to the United Nations concerning Namibia. However, even this undertaking was withdrawn in 1949. (95)

The developments discussed above forced the UN to seek an

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93. Chapter XI Declaration Regarding Non-Self Governing Territories; Chapter XII International Trusteeship System, and Chapter XIII The Trusteeship Council
94. Op.cit. United Nations, (1974) A Trust Betrayed Namibia, p.6.
95. ibid p.9

advisory opinion from the International Court of Justice. The Court was requested to clarity four main issues namely: the international status of the territory; South Africa's obligations under the Mandate; whether the Trusteeship System was applicable to Namibia; and whether South Africa had competence to change the territory's international status. The Advisory Opinion was delivered in 1950. (96) The Court held that South Africa continued to have the international obligations contained in the League Covenant and the Mandate; the supervisory functions formerly exercised by the League were to be exercised by the United Nations; South africa was not under a legal obligation to place Namibia under the Trusteeship System; and South africa acting alone was not competent to modify the international status of the territory. After another period of futile negotiations, the Governments of Ethiopia and Liberia instituted proceedings against South Africa. (97) In their capacity as former members of the League

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96. See International Status of South West Africa, ICJ Reports, 1950, p.128
97. See South West Africa case (Ethiopia v. Union of South Africa Order of 13th January 1961 ICJ Reports 1961, p.6. Note in addition to the cases cited, there were other cases decided by the ICJ such as the 1955 Advisiory Opinion dealing with the legal competence of the General Assembly to grant oral hearings to petitioners which the Court decided it had. For a detailed discussion, see UNIN, (1987) Namibia: A Direct United Nations Responsibility, Lusaka, particularly Chapter 6

of Nations, they requested the International Court of Justice to require South Africa to carry out its obligations and in particular, to "cease violations of the Mandate; to end apartheid in [Namibia]; and to report to the United Nations concerning its administration."

In July 1966, the International Court of Justice gave judgment by stating that it could not rule on the substance of the case because the Applicant's claims had not established any legal right or interest in the matter. (98) The Court declared that the League Covenant made no provision for individual League members to institute actions in regard to the administration of a Mandate. This was in contrast to the 1962 judgment where the Court affirmed the applicability of Article 7 of the Mandate providing for legal action by League Members.

3.2.2. Termination of the Mandate

The 1966 I.C.J. judgment was a turning point in the struggle between South Africa on the one hand, and the international community on the other. By its Resolution 2145 of 1966, the UN General Assembly terminated South Africa's mandate and placed Namibia under United Nations control. The

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98. See South West Africa Second Phase, Judgment, ICJ Reports 1966, p.6 The First Phase decided in 1962 dealt with South Africa's preliminary objections mainly that Ethiopia and Liberia had no right to institute legal proceedings aganist South Africa but was overuled by the court.

the resolution was adopted by an overwhelming majority of the UN members, 114 votes in favour to 2 against with 3 abstentions (France, Malawi and the United Kingdom). However, South Africa was not concerned, the then Prime Minister Vorster stated that the "Government does not want to create even an impression that it considers itself bound by that unlawful resolution." (99) After the termination of the Mandate, the UN established the United Nations Council for Namibia to administer the territory but was refused permission by South Africa to enter Namibia. The termination of the Mandate was reaffirmed by the Security Council Resolution 276 (1970).

Security Council Resolution 276 (1970) declared that "the continued presence of the South African authorities in Namibia is illegal and that... all acts taken by South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid." (100) In addition, by Resolution 283 (1970), the Security Council called upon all States "to ensure that companies and other commercial and industrial enterprises owned by, or under direct control of, the State cease all dealings with respect to... concessions in Namibia; to withhold from their nationals, or companies of their nationality not

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99. Op.cit. United Nations (1974) A Trust Betrayed Namibia p.27
100. For a detailed discussion see Op.cit. UNIN (1987) Namibia: A Direct United Nations Resposibility p.200

under direct governmental control, government loans, credit guarantees and other forms of financial support that would be used to facilitate trade or commerce with Namibia; and to discourage their nationals or companies of their nationality... from investing or obtaining concessions in Namibia; and to withhold protection of such investment against claims of a future lawful government of Namibia." (101)

Realising that their economic interests were at stake, certain Members of the UN began to question (together with South Africa) the General Assembly's legal competence to terminate the Mandate. For example, when the Security Council by Resolution 284 (1970) requested an advisory opinion on the legal consequences for States of the continued presence of South Africa in Namibia, the United Kingdom delegate objected to the phrase "notwithstanding Security Council Resolution 276 (1970)" on the ground that it was "based on certain assumptions about the legal status of Namibia which ought themselves to be examined by the Court." (102) The phrase "assumptions" referred to the General Assembly's competence to terminate the mandate and the right it assumed "to vest in the United Nations responsibility for the Territory." (103)

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101. The resolution was adopted on 29th July 1970
102. See Solomon Slonim, (1973), South West Africa and the United Nations: An International Mandate In Dispute, The John Hopkins University Press, London p.331
103. ibid

The Security Council Resolution 284 (1970) asked the Court to express itself on the legality of Security Council resolution endorsing termination of the Mandate by the General Assembly. The main aim was to decide once and for all whether the two resolutions were adopted beyond the legal competence of the two organs. The Court handed down its Advisory Opinion on 21 June 1971. (104) It held that the continued presence of South Africa in Namibia was illegal; that the United Nations members were obliged to recognise this illegality, and to refrain from dealing with the Government of South Africa that would imply recognition of the legality of its presence in the territory; and United Nations non-member States should give assistance in any action taken by the United Nations with regard to Namibia.

In addition, the Court discussed the substantive issues in detail. As to whether the General Assembly acted ultra-vires in terminating the Mandate, the Court held that the rules governing the operation, modification and termination were the ordinary principles governing the law of treaties. This was incorporated in the 1969 Vienna Convention on the Law of Treaties. Under the Convention, a treaty justifies termination upon a material breach if (1) the breach amounts to a repudiation of the treaty,or (2) the breach involves the

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104. See Legal Consequences for States and the Continued presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) Advisory Opinion, ICJ Reports 1971, p. 16

violation of a provision essential to the accomplishment of the object or purpose of the treaty.

A "right of termination on account of breach must be presumed to exist in respect of all other treaties." (105) The Court went further to state that the "resolution in question is therefore to be viewed as the exercise of the right to terminate a relationship in case of the deliberate and persistent violation of obligations which destroys the very object and purpose of that relationship." (106) Furthermore, it was not necessary to make a judicial determination before the Mandate could be terminated because to do so could have denied the General Assembly, which was a successor to the League "the right to act, on the argument that it lacks competence to render what is described as a judicial decision, would not only be inconsistent but would amount to a complete denial of the remedies available against fundamental breaches of an international undertaking." (107) Finally, as to the legal nature of the General Assembly resolutions, the Court held that "it would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design." (108)

105. ibid, paras. 46-48
106. ibid, para 47
107 ibid, para 49
108. ibid, para 50

The legal consequences of the Court's Advisory Opinion is that since the resolutions of the Security Council were adopted "in conformity with the purposes and principles of the Charter and in accordance with its Articles 24 and 25, [the] decisions are consequently binding on all States Members of the United Nations which are thus under obligation to accept and carry them out." (109) Thus, the termination of the mandate is valid according not only to the general principles of international law and treaty law, but also the charter of the United Nations. Indeed, Prime Minister Smuts himself considered that the League had power to terminate the mandate if it was persistently violated by the mandatory "in case of flagrant and prolonged abuse of this trust the population concerned should be able to appeal for the redress to the League, who should in a proper case assert its authority to the full, <u>even to the extent of removing the mandate</u> and entrusting it to some other State if necessary." (110) Therefore, if the League had power to "remove" i.e. terminate the mandate, then the General Assembly has also the power since it inherited in full all the rights of the League. Finally, it has already been noted that South Africa sought permission from the United Nations to incorporate the territory. This could have been done only if the mandate was <u>first</u> terminated by the General Assembly itself.

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109. ibid, para 53
110. Op.cit, Smuts J. (1918), <u>The League of Nations: A Practical Suggestion</u> pp. 21-22 Emphasis added.

3.3. Legal Status of Mining Concessions

This section examines the legal status of the mining concessions held by a number of mining companies in Namibia. In order to determine legal consequences of these concessions, it is necessary to make a distinction between mining concessions granted before the revocation of the mandate, and those granted after the termination. Given the fact that these concessions raise a number of legal questions, it is also necessary to discuss the rights and obligations of the parties involved, namely: mining companies, South Africa, and a future lawful government of Namibia.

3.3.1. Pre-Revocation Concession

For the purposes of our discussion, this section is limited to discussing mining concessions which continued to be in force at the time of the revocation of the mandate. Therefore, those which were fully executed at the time of the revocation are not discussed in detail mainly because we have been unable to obtain information regarding their existence. In the absence of any evidence to suggest that concessionaires of such concessions did not observe their terms and conditions, they should be regarded as lawfully acquired and fully executed. Moreover, it may be argued that if there were irregularities in their terms and conditions, the responsibility lies with the South African regime. Indeed, the companies could not require

South Africa to comply with the terms of the mandate by ensuring that mining concessions were granted to the companies for the benefit of the indigenous population. As long as they observed their terms and conditions, and did not actively do something that would suggest a conspiracy with the South African regime to defraud Namibia of its mineral resources, they cannot be held responsible. Furthermore, the concessions were acquired from a de jure administering authority and became fully executed at a time when South Africa was still a de jure administering authority in Namibia.

As for the mining concessions which continued to be in force at the time of the revocation, they raise a number of interesting legal questions. What is the legal status of the current mining concessions acquired at a time when South Africa was still a de jure administering authority? Are the mining companies legally entitled to continue their mining operations in Namibia? Are they legally entitled to continue paying taxes and other charges to the South African regime? Are they legally obliged to cease their mining operations until a de jure administration is installed? These questions are considered in detail below.

A number of major mining companies such as CMD, Tsumeb and the South West Africa Company acquired mineral concessions at a time when South Africa was still a de jure administering authority. The duration of these concessions extend beyond the

termination of the mandate until 1990 in most cases. If South Africa withdrew from the territory immediately after the termination of the mandate, the legal position would have been straightforward. Their validity could not have been called into question by the successor administration because at the time of their grant, South Africa was still a de jure administering authority. However, the current legal situation is more complicated than what has been stated above. In order to come to a conclusion whether or not the concessions are valid, a number of preliminary issues need to be clarified. A distinction needs to be made between those mining companies which suspended their mining operations when it became clear that South Africa was intent to defy international law and continued its illegal presence in the territory, and those companies which continued their operations.

To those companies which suspended their operations, it is respectfully submitted that their mining concessions are still valid as long as they have not yet lapsed. These companies acquired the concessions from a de jure administering authority, and suspended their mining operations within a reasonable time after the termination of the mandate. The obvious legal consequence is that the enjoyment of the rights derived from the concessions have been frustrated by the presence of an illegal regime. They have respectfully heeded calls from the international community to suspend their operations while South Africa still illegally occupies the

territory. Therefore, as long as South Africa continues to occupy Namibia, it is impossible for these companies to continue their mining operations without lending support or implying recognition to South Africa's presence. However, once South Africa's withdrawal is secured, their rights will revive and will bind a future de jure administering authority.

However, it must be noted that the rights of the companies to enforce mining concessions will entirely depend on the attitude of a future lawful government of Namibia. In the exercise of its right to permanent sovereignty over its natural resources and in accordance with the current State practice, the government will have a discretion to determine whether these concessions are equitable. Contemporary international law entitles States to terminate mining concessions, revoke certain advantages, or indeed impose additional duties on the companies. In most cases, concessions granted during a colonial period have been modified or terminated. This has already been discussed above. The principle of permanent sovereignty over natural resources entitles a future lawful government of Namibia to take into account privileges enjoyed by the companies during the colonial period. Therefore, should a future lawful government decided to modify, amend, or abrogate these mining concessions, privileges enjoyed by the mining companies when South Africa was still a de jure administering authority will constitute pertinent circumstances within the meaning of Article 2 of C.E.R.D.S. discussed above.

These will include such factors as whether there has been undue enrichment as a result of a colonial situation; whether the companies involved recovered their investment; whether they obtained excessive profits; and whether they made any contribution to the economic and social development of the territory. All these factors will influence the government to decided one way or the other.

The defence that these privileges were lawfully granted by a de jure, albeit, colonial administration and therefore should be preserved is irrelevant under contemporary international law. It will not limit the legal capacity of a future lawful government of Namibia from modifying or indeed even to revoke them should it decide to do so. The remedies of the companies will be compensation taking into account pertinent circumstances discussed above. Moreover, Namibia should be distinguished from a colony proper, South Africa's rights and obligations were clearly spelt out in an international instrument. The legal consequence of this state of affairs is that the rights of third parties are subject to South Africa's compliance with international obligations. As will be seen below, it is precisely this failure on the part of South Africa to comply with international obligations that has called into question the validity of mining concessions notwithstanding the fact that South Africa's failure to comply is beyond the control of the concessionaires. Furthermore, it is submitted that the companies should be assumed to have been aware of

South Africa's international obligations. It is usually a standard practice among private foreign investors that before they decide to commit their capital in a foreign country, they undertake a comprehensive study of the country's political, social, and economic background. Therefore, we are not here dealing with an issue of the bona fide investor without notice. This means that although the concessions cannot be annulled on the basis of their knowledge of South Africa's international obligations, this fact will constitute a material fact in deciding the fate of these concessions.

In addition, it must be noted that contemporary international law has come to recognise the right of every State to decide the rights and obligations of private foreign investors regardless of whether a predecessor State or a previous government engaged itself, either by treaty or contract, not to revoke or modify mining concessions. Indeed, it has been stated by Dr. Julio Faundez that "Under the rules of international customary law, independent Namibia will have no obligation to maintain in force any treaty applied to its territory prior to independence. These rules are now embodied in the Vienna Convention on Succession to Treaties." (111) The basis of this statement is derived from Article 16 of the Vienna Convention on Succession to treaties. It states that a

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111. See Dr. Julio Faundez, (1987), Independent Namibia: Succession To Treaty Rights and Obligations Report prepared for the United Nations Institute for Namibia, p. 83, para 1

"newly independent State is not bound to maintain in force, or to become a party to, any treaty by reasons only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates." It is important here to note that a future lawful government of Namibia will succeed the UN Council for Namibia since it is a de jure administering authority not South Africa. (112) The legal consequence of this principle is that in deciding the future of these mining concessions, a future lawful government of Namibia will not be bound by any treaty that purports to protect the concessions to the extent of binding the new government. However, for reasons already discussed, this does not mean that the concessions were not lawfully acquired nor that they are not valid. What it means is that a future lawful government will have a wider discretion than hitherto was available to States in a similar situation.

As regarding mining companies which continued to operate in the territory notwithstanding the revocation of the Mandate, the validity of their mining concessions depends on whether they are legally entitled to continue their mining operations notwithstanding South Africa's illegal occupation. Our view is that the companies are not entitled to continue their mining operations while the South African regime continues to occupy Namibia. It is an established fact that under the general

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112. For a detailed discussion see Dr. Julio Faundez, ibid

principle of law, rights acquired lawfully may not continue to be valid if the person enjoying such rights continues to deal with an outlaw State. It does not matter whether or not such an outlaw State was once a lawful and de jure administering authority. When the principle is applied to the mining concessions in question, it is obvious that they are void or voidable at the discretion of a future lawful government of Namibia. However, our view is that by continuing their mining operations in Namibia, the companies have forfeited their rights and a future lawful government of Namibia will not be bound to recognise the validity of their concessions.

It has already been discussed that the ICJ has clarified the rights and obligations of the parties regarding Namibia. Any conduct which lends support or imply recognition of South Africa's presence in Namibia is illegal. Notwithstanding this state of affairs, the companies continue to pay taxes to the illegal South African regime, they continue to operate under the laws and regulations passed by South Africa notwithstanding the fact that these laws and regulations have been declared null and void by all the principle organs of the United Nations. Given these facts, it is impossible to hold that the conduct of these companies does not lend support or imply recognition of South Africa's presence in Namibia. Indeed, the attitude and conduct of some of the mining companies consolidates this view. For instance, in 1983, RTZ publicly stated that "As a company we are subject to the laws of the

countries in which we operate... The directors for their part believe that it is right and proper to continue in Namibia." (113) This attitude is also adopted by Newmont Mining Corporation which has 29.5 per cent stake of Tsumeb Corporation in Namibia. It argues that "normal business operations should not be prohibited on account of unresolved 'political claims'." (114) It is for these reasons that a future lawful government of Namibia will be entitled to revoke these concessions. The proper course for the companies was to suspend their mining operations until that time that South Africa complies with international law and withdraws from the territory. The fact that South Africa's presence is beyond the control of the companies is irrelevant. This cannot be used as a defence to deal with an outlaw administration and continue to pay taxes to an illegal regime which is not entitled to receive any benefits from an illegal occupation.

Furthermore, it is submitted that contemporary international law does not recognise private rights to override the jus cogens principle of self-determination. There is no doubt that the operations of these companies in Namibia and the taxes they pay to an illegal regime encourages the South African regime to defy international law. All these factors

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113. See RTZ Annual Report and Accounts 1981, p. 7.
114. See Richard L. Sklar, (1975) Corporate Power in An African State: The political Impact of Mining Companies in Zambia, Univeristy of California Press, p.175; See also The Wall Street Journal 24 March 1972.

render the concessions null and void. Another important factor which needs to be taken into account is that a future lawful government of Namibia will be entitled to terminate some of these concessions on the grounds of a fundamental breach of the terms contained in the concessions. If one applies the general principle of law regarding fundamental breach of the contract to the mining concessions, they can legally be terminated on this basis alone. It has already been discussed that the Thirion Commission found that some of the mining companies operating in Namibia failed to comply with the terms and conditions of their mining concessions. The general principle of law is that if one party in a contract fails to observe a fundamental provision of a contract or agreement, the other party is free to regard the contract or agreement as repudiated. Indeed, it was on the basis of the principle of fundamental breach that the mandate was terminated, therefore, there is no reason why the principle should not be applied to the mining companies.

In spite of the criticisms that has been said about the Thirion Commission, we are of the view that some of its findings will form a basis on which a future lawful government of Namibia will decide the legal status of these mining concessions. Indeed, even the Financial Times (of London) has expressed the same view by stating that "the report [i.e. the Thirion report] has a potentially far reaching significance which goes beyond reforms to the [mining] industry. Should

SWAPO eventually win power in the territory, the findings of the Thirion Commission could well provide the basis for punitive action against companies allegedly involved in malpractice." (115) This point is certainly not missed by SWAPO. In commenting on the findings of the Thirion Commission, SWAPO expressly stated that "only with the achievement of genuine independence could the super-exploitation and gross plundering of the Namibian people's heritage... be checked and eliminated... transnational corporate monopolies that are engaged in the theft of these assets will have to be called upon to account for their crimes." (116)

3.3.2 Post-Revocational Concessions and Other Purported Rights.

This section discusses the legal validity of mining concessions and other rights which South Africa purported to create after the termination of the mandate. It also discusses briefly the attitude of some of the capital exporting countries, notably the UK and the US, regarding the competence of the United Nations in terminating the mandate and in establishing the UN Council for Namibia and declaring it as a de jure administering authority in Namibia. The issues that are discussed relate to the role played by the United Nations towards Namibia insofar

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115. See Jim Jone, (1986) "Diamond Companies angered by critisms in Namibian Report," in Financial Times, London, 18 March, p. 36, col. d.
116. See SWAPO Information Bulletin July, 1986, pp. 5-8 at 8

as they affect the legality of the mining concessions.

In determining the legal basis of the mining concessions and other rights which South Africa purported to create, a general question which arises is whether South Africa (or her agents) is legally competent to create property rights after the termination of the Mandate. The general principle of law is that an illegal entity is legally incapable of creating any rights which can be enforced against third parties. In the case of Namibia, it was expressly stated by the ICJ in its 1971 Advisory Opinion that South Africa's illegal presence in Namibia "cannot remain without consequences." One of these legal consequences is that the regime is legally incapable of creating a legal title which can bind the future lawful government of Namibia. Before we discuss the legal status of the post-revocation concessions, it is important to discuss the legal status of concession extensions and additional investments.

(A) Legal Status of Concession Extensions and Additional Investment.

South Africa granted concession extensions to a number of mining companies that acquired their mining concessions when South Africa was still a *de jure* administering authority. The important factor which is worth noting is that these extensions were granted *after* the revocation of the Mandate. For

instance, CDM initially obtained a fifty year mining concession from 1st January 1921 to 30th December 1990. (117) The duration of the concession was later extended in 1967 after the revocation of the Mandate to 2010. (118) The question that arises is that are concession extensions granted after the termination of the Mandate to be considered legal? As already noted above, the legal position regarding South Africa's conduct after the termination of the mandate is straightforward. All the laws passed by the South African regime were declared null and void when the Mandate was terminated. The only South African acts which are recognised under international law are those of a personal nature such as "the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the territory." (119) Therefore, the extensions have no legal basis and as such, they are null and void and of no effect in law. Should Namibia gain independence after 1990 when mining concessions granted by South Africa while it was still a de jure administering authority expire, a future lawful government of Namibia will have a free hand in the mining industry.

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117. See Goldblatt, (1971), History of South West Africa From The Beginning of The Nineteenth Century, Juta and Company Ltd. Cape Town, p. 240
118. See Windhoek Observer. Namibia, 28th June 1985
119. See 1971 ICJ Reports 56

As to the question of additional investment, most of the mining companies which continued their operations after the termination of the mandate have made additional capital investment. One of the most significant additional capital investments is that made by Tsumeb Corporation Ltd. In 1980, the company purchased a 70 per cent share of Otjhase mining property for R32 million. (120) It is submitted that after the termination of the mandate, any additional capital investment that is made (whether or not the company which makes such an investment obtained a mining concession before the termination of the mandate) is null and void, and will not bind a future lawful government of Namibia. It has been made clear by the Security Council in its Res. 283 (1970) that investments made after the termination of the mandate are not subject to protection against claims of a future lawful government of Namibia. Moreover, additional investment implies lending support and recognition to South Africa's occupation of Namibia. The more the investment, the more the South African regime receives revenue in the form of taxes and other charges which help the regime to consolidate its illegal presence in Namibia. It is for these reasons that additional capital investments after the revocation of the mandate are illegal.

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120. See the Thirion Commission Report, 1985, p. 147.

(B) Concessions.

Before we discuss the legal status of the concessions granted by the South African regime after the termination of the Mandate, a number of issues need to be clarified. The term mining concession is given its wider meaning. It includes prospecting as well as mining licences. Both prospecting and mining constitute legal rights which entitles the South African regime to receive rental fees, taxes and other dues provided by law. In both cases, they are capable of creating property rights which enables the South African regime to acquire shares in operating companies once they are established. Moreover, prospecting mining licences are covered by the terms of the Security Council Resolution 301 (1971) by the use of such phrases as "franchises, rights, titles or contracts." Therefore, the only difference in terms of legal consequences is that the holder of a mining licence will be liable for all the minerals removed and taxes paid to the South African regime. On the other hand, the holder of a prospecting licence will be liable for minerals removed for sampling purposes and for rental fees paid to the South African regime. These issues are discussed in detail in the next section.

The other important issue worth noting is that it has not been possible to obtain information relating to all mining and prospecting licences issued by the South African regime after the termination of the Mandate. Indeed, even if we had access

to these licences, it would not have been possible to list them all. For instance, it is reported that they were 36 in 1969 but by 1974, the "number had risen to 569." (121) However, an effort has been made to compile a few mining concessions in a form of a table see (Table VI:2).

A number of mining companies obtained mining concessions from the South African regime after the termination of the mandate. These included companies such as Oamites Mining Company; Rossing Uranium Ltd; South West Africa Company; Tsumeb Corporation Ltd; and Imcor (pty) Ltd. (122) It must be noted that some of the companies listed above obtained additional prospecting and mining areas in addition to those already held before the termination of the mandate. A good example of these is the Tsumeb Corporation Ltd. which acquired the Otjihase mine in addition to the mining concession obtained in 1947 when it bought the assets from the Custodian of Enemy Property. This has already been discussed in Chapter I. On the other hand, companies such as Rossing Uranium Ltd. obtained mining rights after the termination of the mandate. It is stated that

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121 See the Labour Party, (1981), Statement by the National Executive Committee, Namibia, p. 5.

122. See op.cit., Thirion Commission Report (1985), Appendix 7.

Table VI.2 Prospecting and Mining Rights held by some of the Mining Companies in Namibia.
A Pre-Mandate Termination Mining Rights.

Deed No.	Date	Company	Description of Grant	Area in Ha	Date of Commencement
		CDM	Diamond Area 1	2,829,000	1/1/1921
			Diamond Area 2	3,066,250	1954
Exclusive Right to Mine precious stones until the year 2010 (2)					
		RTZ	State land, Swakopmund		Sept 1966
Propecting Rights (3)					
4/47	26/8/47	TCL	Bobos, Uris, Tsumeb, Tsumeb W. Guchab, Asis, Gross Otavi, Uageib, Karawatu & Peter	1539	
No rental, to mine all base minerals only.					
20/60	21/10/60	Imcor (Pty) Ltd.(1)	Okombahe Reserve		21/101960
No rental, to mine all minerals					
10/964	8/6/64	Precious Minerals (pty) Ltd.	Along the Coast between Unjab and Ugab rivers		15/5/64
12/ 1958	12/5/58	Ind. Minerals Mining Corp (1) (pty)Ltd	Okorusu - Grootfontein, Outgo, & Otjwarongo Districts	1566	1/1/1958
Exculsive right to mine fluorite until 2008					

Notes: 1= Subsidiaries of Iron and Steel Corporation (ISCOR) 100% Govt. owned.
2= The extention from 1990 to 2010 was made in 1967 after the termination of the Mandate.
3= See Alun Roberts, the Rossing File, CANUC p. 63

Source: Thorion Commission Report, (1985), Appendix 7, Windhoek Advertiser, Nambia, 28 June 1985; I Goldblatt, (1971), History of South West Africa, Juta and Company Ltd, Cape Town, p.80, Rossing, (1979), June p. 13, and Alun Roberts, The Rossing File, CANUC, p.63.

B Post Mandate Termination Mining Rights

Deed No.	Date	Company	Description of Grant	Area in Ha	Date of Commencement
30/ 1970	5/6/72	Oamites Mining Co.(pty) Ltd.	Farm Oamites 53 Rehoboth District	590	14/2/1970
To mine all minerals, rights to endure until minerals have been exhausted. (1)					
39/ 1970	25/11/70	Rossing Uranium Ltd	State Land Swakopmund	2980	29/4/1969
Mining rights to endure until minerals have been exhausted. (2)					
27/ 1967	10/4/67	The SWA Co. Ltd.	Berg Aukas 593	447	18/5/1967
34/ 1976	16/7/76	" "	Block VI Farm 596	45	2/3/1976
15/ 1978	10/3/78	" "	Kombat Mining Site	51	3/8/1977
26/ 1980	23/7/80	" "	Farm Harasib 317	272	24/4/1980
Mining rights to endure until minerals have been exhausted. (3)					
42/68	29/9/68	TCL	Friedenau No. 16	509	6/2/1968
31/80	-	"	Otjihase Von Francois, Ost 60	351,3	15/12/1980
63/ 1982	4/1082		Portions of Von Francois West and Ost & remainder of Hoffnung 66	502	16/7/1982
Mining rights to endure until minerals have been exhuasted. (4)					
26/ 1977	12/10/77	Langer Heinrich	Namib Desert Park	3750	8/8/1977
To mine all source minerals, mining rights to endure until minerals have been exhausted. (5)					
36/ 1970	2/9/70	Imcor Zinc (pty) Ltd.	State Land, Luderitz District, part of prospecting Grant M4/4/70	205	8/5/1969
Grant to endure until the minerals which can be profitably mined have been exhausted. (6)					

Notes: 1 to mine all minerals except natural oil, salt, gypsum, limestone, marble and source material

2 to mine all minerals except natural oil, salt gypsum and marble
3 to mine all minerals except natural oil, salt, gypsum, limestone, marble and source material
4 to mine all minerals except natural oil, salt, gypsum, limestone, marble and prescribed material
5 to mine all source materials as defined in Act 90/1967
6 to mine all minerals except precious stones and source material as defined in terms of Act 90 of 1967.

Source: Thirion Commission Report, (1985), Appendix 7.

"Rossing operation is illegal... the authorization of Rossing Uranium Ltd. was given by South Africa in 1970, four years after the United Nations General Assembly had revoked South Africa's mandate to administer the territory." (123) However, RTZ obtained what is referred to as "rights to Rossing Uranium deposit" in July 1966 before the termination of the mandate. (124) It is not clear whether these "rights" are of prospecting nature or mining. The official information from the Thirion Commission seem to support the earlier view that Rossing obtained a mining grant in 1970. (125) It is possible that these rights may have been transferred from RTZ to Rossing.

For reasons already discussed above, these mining concessions are null and void and of no effect in law. The invalidity of these concessions has been confirmed, albeit

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122. See op.cit., Thirion Commission Report (1985), Appendix 7.
123. See United Nations, (1982), Plunder of Namibian Uranium: Major Findings of the Hearings on Nambian Uranium Held by the United Nations Council for Nambia In July 1980. New York p. 6
124. See Alun Roberts, The Rossing File: The Inside Story of Britain's Secret Contract for Namibian Uranium, The Campaign Against the Namibian Uranium Contracts (CANUC) p. 63
125. Op.cit. Thirion Commission Report, Appendix 7.

implicitly, by the Security Council Res. 301 (1971) which provides that all "franchises, rights, titles or contracts" granted to individuals or companies after the termination of the mandate "are not subject to protection or espousal... against claims of a future lawful governement of Namibia." Another Security Council resolution which specifically discourages companies from obtaining concessions in Namibia after the termination of the mandate is Res. 283 (1970). In addition, the United Nations Council for Namibia, established by the United Nations in 1967 to administer Namibia, promulgated Decree No. I for the Protection of the Natural Resources of Namibia. The decree was promulgated in 1974. It states in part that "No person or entity... may search for, prospect for, explore for, take, extract, mine, process, refine, use, sell, export or distribute any natural resource... within Namibia without the consent and permission of the United Nations Council for Namibia."

It must be noted that being the de jure administering authority, the UN Council is legally competent to legislate on matters affecting Namibia. Therefore, insofar as the decree is part of the domestic law of Namibia, its recognition and acceptance by a future lawful government of Namibia will be significant. Its enforcement by a future lawful government of Namibia against the assets of the companies (or indeed against

the assets of the companies situated in friendly countries recognised by the government) will render irrelevant all current objections regarding the legal status of the decree or the UN Council for Namibia. It will also render irrelevant all current procedural difficulties such as recognising the UN Council for Namibia before the decree can be enforced in national courts of other countries. Therefore, as soon as Namibia gains independence and a future lawful government is recognised by other countries, the full force of the decree against the assets of the companies will be realised. There is nothing in law that will prevent a future lawful Namibian government from enforcing the decree inside Namibia as well as taking legal action in the courts of friendly countries against the assets of the companies.

It is important to point out that some of the capital exporting countries, notably the US, recognise the illegality of the mining concessions granted to companies by the South African regime after the termination of the mandate. The US has taken steps to discourage its nationals and companies from investing in Namibia. Even before the Security Council Res. 283 (1970) was passed, the US government announced that US nationals and companies who invest in Namibia after the adoption of General Assembly Res. 2145 shall not receive assistance from the government against claims of a future

lawful government of Namibia. (126) On the other hand, there are states, notably the UK, which hold the view that companies may legally operate in Namibia even though they do not accept South Africa's presence in Namibia as legal. Countries such as Britain have not unequivocally accepted the ICJ Advisory Opinion. It was stated by Britain that "the World Court had delivered an advisory opinion, not a judgment. Its opinion deserves the highest respect, but it is not binding upon States and does not absolve governments from making their own assessments of the complex legal questions involved." (127) The Labour Government even went to the extent of arguing that South Africa's presence in Namibia "was not 'illegal' but was 'unlawful' and as the occupation was unlawful, [the Government did] not accept an obligation to take active measures of pressure to limit or stop commercial or industrial relations with the South African administration of Namibia." (128)

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126. See Department of State Airgram from American Consul, Johannesburg, December 23, 1977, Ref Pretoria, A-49, A-52 and A-56,p.6. See also The Times London,7 October, 1974, p.6, col. e.
127. See The Times London, 7 October, 1974, p.6, col. f.
128. See Op.cit, The Labour Party, (1981) Statement by the National Executive Committee, Namibia, April, p. 3

The distinction between "illegal" and "unlawful" seem very strange because in strict legal terms, the distinction does not exist. Furthermore, Britain does not recognise the UN Council for Namibia and Decree No. I. The legal consequence of this state of affairs is that the Decree will face procedural difficulties if an action is brought against the companies before the British Courts. The British policy on Namibia is based on economic considerations. This was confirmed by the Labour Party National Executive in 1981. It was expressly stated that the main reason for not supporting UN resolutions on Namibia was "to protect British business interests involved with Namibia, especially the Rossing Uranium deal." (129) This has encouraged RTZ to continue its illegal operations in Namibia. The company has repeatedly used the UK government policy on Namibia as a defence for its illegal mining operations. For instance, in 1983, it stated that successive British administration (both Labour and Conservative in spite of Labour's attack on the Conservative Government's policy towards South Africa) "have refused to accept [the validity of UN-resolutions] and... have made it clear that our activities in relation to Rossing are not illegal." (130)

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129. ibid.
130. See RTZ Annual Report and Accounts (1983), p. 7. Emphasis added.

It is submitted that not withstanding the attitude of these States, the legal position is straightforward. All member States of the UN are obliged to recognize South Africa's illegal presence in Namibia. They are also obliged to refrain from acts which might imply recognition of South Africa's illegal presence. This includes abstaining from, inter alia, entering into economic relations with South Africa where it purports to act on behalf of Namibia. (131) Whatever "assessments" which other States may be entitled to make on the question of the legality of UN resolutions on Namibia, it does not affect Namibia's international legal status under international law. Furthermore, it does not affect the legal capacity of a future lawful government of Namibia to take punitive measures against the assets of the mining companies situated in Namibia as well as in friendly countries. Indeed, even if one was to adopt the British position that South Africa's presence is "not" illegal but "unlawful", the obvious legal consequences are still the same under the general principle of law. An unlawful administration is not legally competent to create property rights that can bind a future lawful government of Namibia.

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131. 1971 ICJ Reports, 54-56

3.3.3 Legal Consequences for South Africa and the Companies.

Any discussion on the legal status of the mining concessions cannot be complete without discussing legal consequences for South Africa and the mining companies. Furthermore, it is also important to discuss the remedies open to a future lawful government of Namibia. In any illegal situation, the primary and obvious result is that consequences should follow. Therefore, the illegal conduct of the companies and the South African regime have rendered other legal consequences to follow. These are discussed in detail below.

(A) South Africa's Accountabilty.

Over the years, South Africa has considerably benefited from the exploitation of Namibia's mineral resources. It has been stated by Waclaw Klimas that Namibian metal minerals such as lead, tin, zinc, vanadium and tungsten enormously benefit South Africa. He goes on to state that "during the 1970s, Namibian zinc reduced South Africa's dependence on external sources of supply by more than 80 per cent." (132) In addition to South Africa's direct plunder of Namibia's mineral

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132. See Klimas (1985), "South Africa's Occupation of Namibia: the Exploitative Policies of South Africa and other Foreign Economic Interests, " in United Nations, Seminar on the Activities of Foreign Economic Interests in the Exploitation of Namibia's Natural and Human Resources, Ljubljana, Yugoslavia, 16-20 April 1984 New York p.13

resources, the regime introduced "a whole gamut of instruments ensuring the privileged treatment of the transnational's economic operations. A tax system has been introduced... economic operations in Namibia are taxed at a lower rate than in South Africa proper; the South African regime has allowed tax write-offs of capital expenditure, has further permitted the unrestricted outflow of minerals and exerted no pressure on the mining corporations to encourage them to process minerals locally. Furthermore, in keeping with its policy of exploitation, South Africa has not required transnational corporations operating in Namibia to reinvest any part of their huge profits in Namibia itself... Indeed, to the contrary, the bulk of the profits is regularly repatriated." (133)

Furthermore, the South African regime, through State owned and associate companies, has indirectly involved itself in the exploitation of Namibia's mineral resources. State owned companies such as Iron and Steel Corporation have subsidiary companies which own and operate a number of mines in Namibia. Namibian operating subsidiaries such as Uis Mining Company and the Industrial Mining Corporation of South West Africa (IMCOR) "are linked with Iron and Steel Corporation of South Africa (ISOR)... it is company policy to treat the Namibian mines merely as sources for minerals and not as a base for any

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133. ibid, p.12. Emphasis added.

industrial investment." (134) The involvement of State mining companies has important implications in the exploitation of Namibia's mineral resources. Far from competing with private mining companies, they provide encouragement and direct risk reduction in prospecting. It is for this reason that Rossing came into being as a result of Co-opertation between the Industrial Development Corporation and RTZ.

It is also important to note that State mining companies function as instruments of the South African government policy in relation to the mining industry. The knowledge, skill and information they acquire as a result of their involvement in the mining industry help in the formulation of government policy. It is for these reasons that the functions of the State corporations are not different from governmental functions; they hold their assets on behalf of the State; some of their activities require the approval of the government; their capital budgets require cabinet approval; and more generally, they take direction from their shareholder - the South African government.

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134. See Brian bolton (1985) "The Condition of the Namibian Workers," in Unitied Nations, (1985), Seminar on the Activities of Foreign Economic Interests in the Exploitation of Namibia's Natural and Human Resources, L jubljana, Yugoslavia, 16-20 April 1984. New York p.33

The foregoing discussion suggests that South Africa has undoubtedly benefited at the expense of the indigenous inhabitants of Namibia. Given this state of affairs, what are the remedies of a future lawful government of Namibia against the South African government? South Africa is no longer a de jure administering authority in Namibia. It follows from this that it has no legal right to exploit Namibia's mineral resources, it has no legal capacity to confer a valid title or right to any person to exploit mineral resources, and it has no legal right to receive in a form of taxes or dividend any income resulting from the exploitation of Namibia's mineral resources. Although some may argue that South Africa is a de facto administering authority and as such may have a legal capacity to create a valid title, it must be noted that the exploitation of the territory's natural resources under an illegal colonial situation for its exclusive benefit has legal consequences. Contemporary international law does not recognise any right whose enforcement or enjoyment constitutes an impediment to exercise a right of self-determination. Indeed, the jus cogens status of the right to self-determination has important legal consequences on economic or any other rights in international law. Any right which impedes the right to self-determination is null and void since under the jus cogens principle of self-determination, it cannot be legalised either by contract or treaty. Therefore, it is submitted that the rights of a de facto administration which

constitutes an impediment to self-determination must be distinguished from all others.

Furthermore, there are certain marked differences between South Africa's presence in Namibia and the de facto administrations in other countries. The powers of the South African regime in Namibia originated from the Mandate, which has been officially terminated. Moreover, all principal organs of the UN including the ICJ have held that all States are obliged to recognise South Africa's illegal presence in Namibia and the invalidity of its acts on behalf of the territory. Therefore, we submit that under contemporary international law, such an administration incurs only obligations without, in any way, creating rights. It is incapable of creating a valid title which could be claimed by a third party against the lawful successor government. We may even go further to state that such a de facto administration does not create nor does it preserve "acquired rights" which could be claimed from a successor and legitimate administration or government especially if the person who claims such rights collaborated with the illegal administration. Finally, it is important to note that even during the period of de jure administration, South Africa was only legally competent to create rights which could enable it to fulfil its international obligations.

It is against this background that a future lawful Namibian government will have a right under international law to claim

reparation from the South African Government for all the taxes and dividends it has received from the companies after the termination of the Mandate.

(B) Legal Consequences for Companies Operating in Namibia.

South Africa's illegal occupation of Namibia is a condition for the mining companies' operations and the extraordinary profits they reap from the territory. They have also continued to pay taxes to the South African regime. As a result, this has enabled South Africa to entrench its occupation. The companies have also ignored repeated calls from the international community to cease their mining operations while a colonial situation continues. Their conduct has lent support to the South African regime and has implied recognition of South Africa's presence in Namibia. Their attitude towards the international community and international law regarding the international status of Namibia will have profound consequences. They will be estopped to plead "good faith" against claims of a future lawful government of Namibia. A future lawful Namibian government will be entitled to claim from them all the taxes which they have paid to the South African regime since the termination of the Mandate. They will also be liable for all the minerals which they have illegally removed from Namibia without the permission of a de jure administering authority, the UN Council for Namibia. the effectiveness of enforcing these measures against the

companies' assets after independence has already been discussed, it will be unnecessary to repeat the discussion here. Another important point worth noting is that the companies will not use Decree No. I passed in 1974 as a defence for minerals removed before this date. The termination of the Mandate in 1966 has legal consequences independent of Decree No.I. The termination, according to the general principle of law or by implication, rendered null and void all transactions carried out after that date.

Furthermore, it is also important to note that some of the activities of the mining companies have gone beyond a mere exploitation of Namibia's natural resources. According to Brian Wood and to some of the companies' uncovered confidential documents, notably Rossing, they have established their own commando forces which closely co-operate and co-ordinate their activities with South Africa's repressive security forces. Indeed, it has been asked by the same author that "the question arises about the liability of those companies operating in Namibia which have materially supported South Africa's military campaign... It will be important for a future lawful government of Namibia to consider the liability of such companies." (135) This provides a clear example of lending support to South Africa's criminal acts against the Namibian population contrary

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135. See Brian Wood (1984), "The Militarisation of Namibia's Economy", Review of African Political Economy, no, 29, pp. 138-143 at 140-143

to international law.

Finally, the legal capacity of a future lawful government to expropriate mining concessions has clearly been established under contemporary international law. We have already noted in Chapter I that some of the companies acquired mining concessions confiscated from German mining companies by the illegal South African regime supposedly for national "interest"! Indeed, a question may be posed, if South Africa had a legal capacity to confiscate mining concessions in 1920, what will prevent a future lawful Namibian government to do the same in 1988 and beyond given the development of international law over the years?

4. Conclusion

Under contemporary international law, the strict theory of acquired rights has lost its meaning. To argue that a sovereign State can be bound in perpetuity by granting property right guarantees to a foreign private investor would be futile, especially under the current State practice. Were there such a rule, future action consistent with national interest would be fettered indefinitely. Consistent with State practice, host States have a right to abrogate, modify, review, nationalise, or even to require private foreign investors to transfer their assets to the nationals of the host State in order to effect indigenisation. The only remedy which private foreign

investors can hope for is compensation. Furthermore, the host State is legally entitled to take into account privileges which private foreign investors enjoyed during the colonial period. It is no longer a defence that the privileges were granted by a colonial government.

In the case of Namibia, we submit that international law does not allow private profit to override the right of the nation to exercise its right to self determination. The rights of the Namibian people are internationally protected and should be respected. It is for these reasons that UN resolutions and Decree No.1 merely reflect international public opinion, namely, the presence of the companies in Namibia constitutes an obstacle to the territory's independence. The transition from Namibia's present status to full internationally recognised independence will have a number of major implications for the current mining concessions held by a number of mining companies. It is submitted that transfer of title to mineral rights to the future lawful government will not involve legal problems like those experienced in most developing countries during the decolonisation process. Namibia's status is unique in the sense that all South African legislative measures purportedly applied to Namibia, including mineral concessions, are null and void. This will enable a future lawful government not only with a free hand in reviewing the existing agreements in the mining sector but also to claim compensation from the mining companies.

Therefore, the so-called classical international law which purports to accord protection to a foreign investor whose property are expropriated by the host state does not extend to foreign investors in Namibia. The principle of permanent sovereignty over natural resources, emanating as it does from the jus cogens principle of self-determination, is a fundamental principle of contemporary international law. Mining companies have largely ignored this principle, indeed, an expert on Namibia and international law has excellently stated that since "the termination of the Mandate foreign economic interests have intensified the exploitation of Namibia's natural wealth in blatant violation of both the international legal principle that provided that all States and peoples have permanent sovereignty over their natural resources and Decree No.1 of the UN Council for Namibia." (136)

Finally, apart from the notion of a free hand, a future lawful government of Namibia will be greatly influenced by the development of permanent sovereignty over natural resources. This has become an established feature of State practice, and has been accepted by foreign investors compared with the early days when such participation was seen as an intrinsic threat to the security of their investments, and a violation of international law.

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136 See Dr Julio Faundez, International Law and Policy Making Process: The Case for Compliance (Conference Papers on Namibia, Oxfam, 11 May, 1987) p.3

CHAPTER VII - MINING AGREEMENTS AND THE EXPERIENCE OF OTHER DEVELOPING COUNTRIES

I INTRODUCTION

Before any comprehensive structural transformation is undertaken, Namibia should learn from the successes and failures of other developing countries in general, and of African countries in particular. Therefore, in this chapter, we have chosen to discuss the institutional and legal framework currently prevailing in some selected developing countries.

As has been noted in Chapter VI, decolonisation was followed by increasing concern by newly independent states to secure control over mining operations. This concern is reflected in the assertion of the doctrine of permanent sovereignty over natural resources and has led to the development of new types of legal arrangements. Thus, legal arrangements under which the government retains ownership of the minerals became an important objective in the new forms of agreements. However, it is important to note that experience in some developing countries shows that despite retaining public ownership, a government may be divested of effective powers of control through transferring extensive powers of management to the mining companies. In such a situation, the retention of ownership can truly be characterised as symbolic. A comparative evaluation of mineral agreements, therefore, must not only focus on provisions dealing with

ownership, but involve an examination of the provisions which provide for management and actual control of operations.

While the host government shows an interest in retaining as large a measure of control over operations as is possible (so as to be able to maximise benefits to the national economy from the development of its mineral resources), the foreign investor seeks to have as much control as possible over mining operations. Mining companies, thus, want to enjoy the maximum freedom of action to take decisions in pursuit of their worldwide corporate objectives. Thus, to evaluate mineral agreements, they must be regarded as complex mechanism designed to secure certain interests and objectives. This chapter examines the general features of mining agreements between multinational mining companies and some developing countries. Mining agreements contain provisions of varying importance and consequence to the parties. Since modern concessions (mining agreements) are a significant departure from traditional concessions, their provisions are more numerous, exacting, lengthy and complicated. Therefore, it is beyond the scope of this chapter to attempt to address all the issues and terms relevant to the mining projects in which multinational mining companies and host developing countries are involved. An attempt is made, however, to discuss the issues which could provide a useful lesson to a future lawful government of independent Namibia.

In most of the mineral agreements discussed below, ownership of minerals in the ground is firmly vested in the state. In

a number of countries, mining legislation and mining agreements, it is specified that the development and exploitation of mineral deposits are to be executed by means of a joint venture in which the state or its agent (e.g. state-owned enterprise) retains majority equity ownership. In addition, the state usually has a voice in operations, either by means of its position on the board of directors in a joint venture enterprise or by way of the requirement for prior state approval of project programmes. Furthermore, financial terms, marketing and export policies and foreign exchange regulations are expressly stipulated in the agreements. Finally, the supremacy of national law and relinquishment terms are usually incorporated in the terms of the agreement.

2 THE LEGAL FRAMEWORK AND THE CHOICE OF LEGAL MECHANISMS

Mineral producing countries generally use one of three different approaches to regulate the mining sector (a) a general legislation system (b) individually negotiated (ad hoc) agreements, and (c) hybrid system which consists of general legislation and individually negotiated agreements.[1] Under the general legislation system, legislation fixes in advance conditions under which rights to prospect for and/or mine mineral resources may be granted under standard-form licences or leases; royalty taxes and other payments to be

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[1] for a general discussion see Roland Brown and Macbul Rahim, Mining Legislation in Developing Countries (Commonwealth Secretariat) p.3

made are also determined by legislation. The general legislation system is mostly applicable in developed countries, e.g., most mining legislation of developed countries fixes financial provisions within the main legislation. Some of these countries include Belgium (corporation tax 48 percent);[2] Denmark (a share of profits 55 per cent);[3] France: (a) industrial and trading profits tax, and (b) a fixed royalty "at a low rate on exploitation rights;[4] and Netherlands (48 per cent of net income from all the companies' activities including mining).[5]

Under the individually negotiated agreements system, there is no general system of legislation (this was the case with the early concessions granted in most African mineral producing countries during the early days of the colonial period). In countries where there was legislation, it was of a very general nature, and it left it to the colonial administration to grant rights to prospect for and/or mine mineral resources on the basis of individually negotiated agreements. In most African Commonwealth countries, the legislation lays down very broad general principles and leave terms and conditions

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[2] EEC/University of Lille II Contract, Digest of the Mining Regulations of the nine Member States of the European Economic Community (CT XVII/502/78-E, First interim report, (second year) p.16

[3] ibid., p.28

[4] ibid., p.40

[5] ibid., p.63

on which companies may be employed for mineral development to be determined by negotiation.[6]

Under the hybrid system, general legislation lays down certain fundamental provisions and stipulates certain minimum standards and conditions which must be satisfied by applicants for the grant of the right to prospect for and/or mine mineral resources but provides for certain important terms and conditions to be settled by negotiation. Thus, the Zambian legislation - The Mines and Minerals Act 1969 (Cap.329) - establishes a framework in which private mining companies may obtain prospecting and mining licences (Prospecting Licence Sections 16-26; exploration licence - Section 31, and mining licence Sections 44-59). Critical issues such as the extent of state participation and the rate of taxation are included in the general legislation. In the case of joint ventures, management and control of operations are the only aspects subject to negotiations. The principal advantage, from the point of view of the state, in adopting a general legislation system is that the terms - in particular fiscal terms - can easily be varied. By contrast, individually negotiated agreements are rigid instruments which freeze financial terms for a period of time. There is increasing recognition among mineral producing developing countries that because these agreements are relatively long

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[6] see generally Roland Brown and Mike Faber, Some Policy and Legal issues affecting Mining Legislation and Agreements in African Commonwealth Countries, (Commonwealth Secretariat, 1977)

term, they should incorporate mechanisms to allow for adjustment of terms.

It must be noted that while private mining companies may concede that adjustment of terms may be justified in certain situations (which are marked by significantly changed conditions), they may be averse to general legislation regimes, under which the host government retains the power unilaterally to alter the terms or to increase the financial burden on them. They generally express a preference for individually negotiated contracts. Even if stabilisation clauses are included in the contract, it remains questionable whether in law such clauses can nullify the impact of legislation which has the effect of altering the contractual terms embodied in an agreement.

Another advantage of the general legislation approach is that it enables general policy objectives to be written into the legal framework. General legislation can lay down minimum standards and basic conditions governing rights of prospecting for and/or mining of mineral resources. For example, legislation can establish standards and conditions such as: requiring companies to furnish information on their financial resources, technical competence, and experience; local incorporation; a limit on the maximum area of mining activities; maximum duration of the agreement; relinquishment requirement; maximum work and minimum expenditure requirement

during the period of prospecting;[7] submission of information requirement during each phase of mining operations; and safety requirements.

The advantages of including the standards and conditions in the general mining legislation is that it reduces the scope for bargaining with the private foreign investors. Moreover, if mining legislation establish a general framework for mining agreements, foreign investors could not expect government negotiators to deviate from this framework. Therefore, the legislation can enable the host State to establish a standard form of concession that can be used for all private foreign investor concessionaires in the country.

The trend towards the application of the general mining legislation may be reinforced as foreign investors in most developing countries increasingly recognise that ad hoc arrangements do not provide the long-term guarantee that they purport to give. In addition, general legislation may, in practice, give more certainty than ad hoc contracts that purport to be binding for a long duration but which in

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[7] e.g., Section 24 of the Zambian Mines and Minerals Act 1969 provides, among other things, that the holder of the prospecting licence is required "to expend in direct expenditure not less than the amount which would result if a sum of 25 Kwacha per square mile or part thereof of the prospecting area were expended annually during the currency of the Licence".
Rule 18 of the General Mineral Rules, in Sierra Leone, made under the Minerals Act (Cap.196) provides that the holder of an Exclusive Prospecting Licence for alluvial minerals shall spend not less than L.100 per square mile per annum except where the Minister in his absolute discretion imposes any other obligation whether monetary or otherwise.

reality are unilaterally modified as bargaining power shifts in favour of the state. With most of the terms fixed by law, participation in ownership becomes the principal vehicle for the parties to reach an agreement.

Notwithstanding the advantages of the general legislative system, it does lack flexibility. Thus, a strong case can be made out in favour of the hybrid system.

The hybrid system sets minimum standards and conditions in the legislation and thus protects government negotiators from corruption and also strengthens the government's negotiating position. The hybrid system can also enable the government to start off negotiations with private mining companies with the advantage that the companies must accept the statutory minimum. This can also enable the government to invite companies to submit competitive bids offering terms better than the statutory minimum. Therefore, the combination of statute and contract under the hybrid system provides a useful approach for developing countries. The state can produce a mining code which can set out minimum standards leaving room for further bargaining defining the details of a mining project under the contract.

3 THE EVOLUTION OF MINING AGREEMENTS - TRADITIONAL CONCESSION AGREEMENTS

The main features of a traditional concession agreement are that the foreign private investor was the owner of the assets used in the mining project, and the concessionaire was

conferred the exclusive right to exploit and market certain minerals within the concession area. The foreign investor usually made the necessary equity investment and bore the risks and costs of exploration, development and exploitation. The host country shared in the return through royalties and later taxes. Traditional concession agreements were usually meant to remain in force for a very long time, generally 90 to 100 years.[8] This was the same pattern in Africa, for example, 99 years in Sierra Leone, 90 years in Ghana, and 100 years in Swaziland.[9]

In most cases of traditional concessions, private foreign investors were given "plenary rights to extract all minerals ... found in the concession areas... In Zaire, the Union Miniere virtually had sovereignty over the Copper concession area. There was no provision for the reversion of any portion of the concession areas to the native authorities by way of surrender, ... The consideration for these exclusive economic benefits was patently ludicrous. In many cases the companies paid a nominal rent of say, £150 for a whole concession, plus one or two bottles of rum".[10] It is clear that private foreign investors had considerable advantages.

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[8] see United Nations Centre on Transnational Corporations, Main Features and Trends in Petroleum and Mining Agreements (United Nations, New York, 1983) p.62

[9] see Samuel K B Asante, Restructuring Transnational Mineral Agreements (American Journal of International Law, vol.73, 1979) pp.335-371 at p.338

[10] op.cit., Samuel K B Asante, Restructuring Transnational Mineral Agreements, p.339

A feature common to most of the old concession agreements was that the tax obligations of the concessionaire were calculated on the basis of a fixed rate per unit of mineral output.[11] A number of examples are given by Adede, these include the Iraqi agreement with Khanaqin Oil Company in 1926 which fixed the financial obligation of the company at four gold shillings per ton of net crude oil produced; and the 1949 agreement between Saudi Arabia and Getty Oil which fixed the financial obligations of the company at US $0.55 per barrel of oil. Mining agreements in developing countries followed a similar pattern. For example, the 1945 agreement between the Government of Liberia and the Liberia Mining Company Ltd (LMC) fixed the financial obligations of the company at "five cents per ton on all iron ore that was stripped".[12]

Other weaknesses of the traditional concession agreements included the following: (a) mining project programmes were insufficiently detailed, and the mining companies were left with virtually total discretion with respect to all stages of mining development such as prospecting, exploration, mining and marketing; (b) mining agreements did not include provision for accounting and pricing procedures, these were left to the mining companies to define in the manner best suited to their needs; (c) little or no attention was paid to

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11 see A.O.Adede, "A Profile of Trends in the State Contracts for National Resources Development Between African Countries and Foreign Companies", International Law and Politics, vol.12: 479, 1980. pp.479-568.

12 ibid.

the development of forward and backward linkages; (d) the agreements did not include provisions for renegotiation or government participation in the mining projects; (e) in most cases, environmental protection and safety were totally ignored; (f) the employment and training of local labour, especially at the technical and managerial levels, were either ill provided for or were entirely left to the companies; and (g) the development of infrastructure at regional (where mining projects were located) and national level were either ignored or received very insufficient attention.

Therefore, it is clear that traditional concessions did not see the mining sector as making a contribution to overall development. Moreover, income tax generally did not exist or was negligible.

4 MODERN CONCESSION AGREEMENTS

After independence, the foreign investment climate in most developing countries changed dramatically. The major preoccupation of governments became economic development. This meant that private foreign investors were required to adapt themselves in order to be acceptable to the new post colonial environment. This in turn meant that new terms between the newly independent states and private foreign investors had to be worked out. Indeed, as will be discussed below, private foreign investors have adapted themselves to the new climate which took place after political independence in most developing countries. Most developing countries have

eagerly sought direct foreign investment and collaboration with multinational companies in spite of the spate of nationalisations which followed decolonisation in some countries.

One of the fundamental trends in most developing countries is the enactment of mining legislation and regulations designed to govern foreign investments. Most of the provisions are very comprehensive, and cover such areas as prospecting, exploration, and exploitation of the host countries' natural resources. The laws set forth goals that reflect a departure from former practice (the traditional concession regime) and provide a legal framework within which developing countries can negotiate natural resources development contracts with foreign companies. Therefore, this section attempts to profile the trends in modern state contracts for mineral resources development, and highlights the provisions which distinguish contemporary mineral agreements from the traditional concession regime. The profile focuses on modern mineral agreements with particular emphasis on African countries where this is possible, but in some cases it will be necessary to provide examples from the petroleum industry and other countries outside Africa.

It is submitted that the interest of developing countries in mineral resources is expressed in different policies in regard to minerals development. As will be seen below, some governments have adopted a policy of close control of mineral resources, treating them as public utilities, while others have limited themselves to policies that encourage and

promote the development of the mineral sector through private initiative, while others again have adopted both types of development policies. In both cases, host governments have tried to pursue mineral policy objectives that pursue optimum benefits to their countries from present and future use of minerals. It is also submitted that optimisation entails economic, political and social factors.

The objectives reflected in various modern mineral agreements include the following: (1) rapid and thorough prospecting; (2) production at rates and using methods which ensure maximum ultimate recovery; (3) to pursue best pricing and marketing opportunities; (4) to develop a viable and diversified mineral sector; (5) to encourage mineral processing; (6) to ensure national self-determination in mineral development; (7) to create employment; (8) to promote backward and forward linkages; (9) to improve a minerals conservation policy; (10) to strengthen the contribution of minerals to regional and national development; (11) to take into consideration the environmental and social impact of minerals development; and (12) to transfer technical and managerial skills to the nationals of the host country.

4.1 Structure and forms of Participation Agreements

There is a wide range of approaches adopted by host developing countries. At one extreme, there are countries where the State is still essentially a passive tax collector. In the middle are the countries where the State essentially becomes a partner with private foreign companies. Finally,

at the other extreme, the host government bears all the risk of prospecting and production. Once minerals are discovered in commercial quantities, the private foreign company is hired to perform certain tasks on behalf of the host government through service contract. Under this arrangement, the state retains full control over the mineral resources. There are three main types of mineral development agreements: equity joint ventures, service contracts, and production sharing agreements

4.1.1 Equity Joint Ventures

The term joint ventures includes a variety of forms of cooperation in which the state and the mining companies undertake joint participation at any stage of the mining process (e.g. prospecting, production, processing and marketing). This type of arrangement may be classified into several main categories, not mutually exclusive; particular agreements frequently are a blend of several of these. The simplest form encountered is the formation of an association between a private foreign mining company and the state. In countries which use this system, the acceptance of the joint venture principle by the private mining companies has become a precondition for their continuing operation in the mining industry.

A basic objective of state equity participation is to increase the host country's share of the earnings in the industry. By becoming a partner, the state normally receives in addition to royalties and taxes, a share in the dividends

in accordance with normal business practice. In addition, there are a number of other important reasons why most developing mineral producing countries require state equity participation. These include: (1) to give the governments through their state companies (where these exist) a voice in the policy decisions of the operating mining companies, and to exercise more control over their mining industry; (2) the long-term implication of state equity participation is to develop technical an managerial skills in the mining industry in order to enable the host governments to be in a strong position when the concession agreement expires or when they decide (in future) to go it alone (i.e. to operate the mining industry without the participation of the private foreign investors;) and (3) State equity participation enables the host governments to direct the utilisation of the mineral resources and to frame short-term and long-term policies for the future viability of domestic industry.

It is for these reasons that equity participation is seen not only as a means of achieving economic development, but also as a device designed to overcome obstacles to sovereign aspirations. In most cases, the ownership of mineral resources is vested in the state. The state, therefore, usually establishes an association with the foreign private investor (usually a multinational mining company). There are several ways of implementing state equity participation or a joint venture. The most attractive is for the legislation to reserve to the government a minimum percentage of equity shares on terms fixed by the government.

This approach has been adopted by Zambia and a number of other African mineral producing countries. Section 20 of the Mines and Minerals Act of 1969 states that the granting of a prospecting licence is made dependent on the private foreign investor applicant agreeing to the condition of government participation as soon as the mining phase is reached (the current minimum is 51 per cent of the total equity). This condition should expressly be included in the prospecting licence at the time of issue. The relevant part of the section reads as follows: "An applicant for a prospecting licence may be granted subject to conditions, including, in particular (a) a condition requiring the applicant to agree to the Republic or any person nominated on behalf of the Republic, having an option to acquire an interest in any mining venture which might be carried on by the applicant or by any person to whom he transfers his mining right, in the proposed prospecting area". The same condition is imposed in respect of an exploitation licence.[13]

As a result of the 1969 Mines and Minerals Act, the ownership and structure of the Zambian mining industry dramatically changed. All the large mining companies in Zambia developed from concessions granted in 1922 to two mining houses - the Anglo American Corporation and Roan Selection Trust. These companies controlled the copper mining industry until 1970 when the Zambian Government took 51 per cent interest in them. This reflected sections 20, 31(a) and 46(1)(b) of the

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13 see S.31(a)

Act which require state equity participation. As part of the widespread restructuring which subsequently took place, two new companies were formed, Nchanga Consolidated Copper Mines Ltd (NCCM) and Roan Consolidated Mines Ltd (RCM), amalgamating the companies which had constituted the original AAC and RST groups. The minority shareholding in NCCM was held by Zambia Copper Investments Ltd, a company administered by the Anglo American Corporation while the minority shareholding in RCM was divided between American Metal Climax Inc (Amax), Zambia Copper Investments Ltd and the public.[14]

In March 1982, the two copper mining companies were merged to form a single new company, Zambia Consolidated Copper Mines Ltd (ZCCM), the merger being made effective retro-actively to 1 April 1981. In 1982, all "the 'A' ordinary shares, amounting to 60.28 per cent of the issued share capital of the Company" were held by the State owned Zambia Industrial and Mining Corporation Ltd (Zimco).[15]

Botswana has adopted a different system. Before a mining licence can be issued to the holder of a prospecting or exploration licence, the holder must issue to the government a certain percentage of all equity stock free of charge. This is designed to maximise the net inflow of resources

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[14] for a detailed discussion, see generally M.L.O. Faber and J.G. Potter, Towards Economic Independence, Papers on the Nationalisation of the Copper Industry in Zambia, (Cambridge University Press, 1971)

[15] see Zambia Consolidated Copper Mines Ltd 1982 Annual Report, pages 5 and 24

resulting from mining operations. It is expressly stated that "Government equity participation in mining projects is now established policy and while the exact level may vary from case to case the appropriate level is considered to be in the range of 15 to 25 per cent with the shares granted to Government without financial charge. Such equity participation represents payment for the provision of national infrastructure and geological information".[16]

Another example of a joint venture is to be found in the agreement between the Sierra Leone Government and the Sierra Leone Ore and Metal Company Ltd (SIEROMCO), a subsidiary of Schweizerische Aluminium AG (Alusuisse). In 1972, the Government granted SIEROMCO exclusive rights to prospect for bauxite.[17] By 1977, the company proved the existence of 100 million tons of bauxite. As a result of the discovery, the Government and Alusuisse formed a joint venture company called Sierra Leone Bauxite Mining Company Ltd to develop and exploit the bauxite with each party holding 50 per cent of the share capital. In return for the joint venture company to assume SIEROMCO "responsibilities and privileges, ... the company was to issue new shares to Alusuisse in an amount equal to the costs incurred by SIEROMCO with respect to its prospecting of the deposits. A like number of shares was to

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16 see Republic of Botswana National Development Plan 1985-91, December 1985 (Ministry of Finance and Development Planning, government Printer, Gaborone) p.229

17 see op.cit. UN Centre on Transnational Corporations, Main Features and Trends in Petroleum and Mining Agreements, p.83

be issued to the Government in return for which it would pay the company their full nominal value in cash".[18]

The general policy decisions of the joint venture company was to be made by the Board of Directors comprised of six members, three from the Government's side and three from the private partner's side. In addition, the private foreign partner (Alusuisse) was to manage the company during the construction stage of the mining project "for an initial period of 10 years after production day", and automatic three year extensions were to be granted, "unless either party gives one year's prior notice". The private foreign partner was granted the following advantages, among others: "(a) Full reimbursement for all Alusuisse employees working in Sierra Leone, including direct and indirect costs; (b) For its technical know-how granted in the construction phase and the performance of duties as engineer, a fixed annual fee of 10 per cent of the actual total investment costs of the company, plus 10 per cent of the total investment costs of any expansion; (c) For its know-how and technical assistance in operations and its services as the managing partner, a fixed fee of 2.5 per cent per annum of the net invoice amount of all sales made by the company under the terms of Alusuisse management".[19]

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18 ibid.

19 ibid., p.84

Finally, another example of a joint venture involving the host state and the private foreign investor is that between Chile and Noranda Mines Ltd entered into in 1977. As a result, a partnership was established consisting of Empressa Nacional de Mineria, representing the state, and Noranda. The share ownership in the partnership is as follows: the state represented by Empressa Nacional de Mineria (49 per cent) and Noranda (51 per cent).[20] The purpose of the partnership was "to effect the programme for the exploration, development and exploitation" of the Andacollo copper deposit.

The investment by the private foreign investor (Noranda) was to include the following: "(a) Freely-convertible foreign currency; (b) Capital goods and spare parts needed for exploration, development and plant and infrastructural construction, including electric power facilities, transportation, housing, and educational and public service facilities ...; (c) Feasibility and technical studies; (d) Services rendered by Noranda to the partnership and services provided by Noranda prior to the agreement...".[21]

Finally, Noranda and the partnership are granted the right to market their copper products "directly or indirectly", however, indirect sales require the approval of the Chilean Copper Commission and should be consistent with the general

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20 ibid., p.120

21 ibid.

guidelines established by the Commission. The guidelines are designed to ensure that copper sales are "'effected at international market prices, such as those established by the London Metals Market and the US producers prices'".[22]

It is interesting to note that equity joint venture between the state and the private foreign investor is also receiving increased recognition in socialist countries. Jan Zoubek stated in 1975 that "(it) may be reliably estimated that there are over 1000 co-operation agreements presently in force between eastern and western companies".[23] Although it is reported that the first agreement was concluded in 1964, the breakthrough came in 1971 when Rumania legislated in favour of the establishment of joint ventures. The main aims of establishing joint ventures are that "the joint venture is the best guarantee for obtaining advanced technology, western manufacturing and marketing experience, managerial know-how and, in particular, easy and long-term access to competitive western markets at low personnel and monetary cost ...".[24]

The view expressed above is reflected in the Bulgarian Edict No.535 of 25 March 1980 Concerning Economic Collaboration between Bulgarian Juridical Persons and Foreign Juridical and

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22 ibid., p.104

23 see Jan Zoubek, Joint Ventures in East Europe, (Journal of World Trade Law, vol.9, 1975) pp.472-442, at p.427

24 ibid., p.429

Physical Persons.[25] Section 3 reads as follows: "The economic collaboration shall be realised through agreements for industrial cooperation and for the creation of associations. These agreements shall be concluded under conditions that would raise the scientific-technical level of production, its effectiveness and the quality of production, broaden the possibilities for export, increase the positive foreign currency result, and more fully satisfy the needs of the national economy". It is clear that the concept of joint venture between socialist countries and multinational companies or private capital represents a revolutionary process in the sense that the idea of mixed ownership may not correspond to the concept of the socialist ownership. However, it is submitted that this economic liberalisation and restructuring of decision-making and priorities does not affect the substantive concept of a socialist society.

4.1.2 Production-sharing agreements (contracts)

The production-sharing contract arrangement is a fairly new concept compared with other forms of economic development agreements. It is reported that the concept was pioneered by Indonesia in 1967 as a result of Law No.44 of 1960 "which stipulated that contracts entered into by the State with foreign companies should provide for production-sharing

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[25] for details see 19 International Legal Materials (1980) p.992

arrangements".[26] It is also reported that the first production-sharing contract was signed in 1960 between Pertamina (a state company) and Kobayashi (a Japanese consortium which showed some interest in a liquified petroleum gas project.)[27]

The production-sharing contract formula was later adopted by a number of countries, especially developing countries, and it is now widely used in the petroleum industry. It is reported that "production-sharing has been adopted in countries as diverse as Egypt, Chile, the Libyan Arab Jamahiriya, Nigeria, Angola and India".[28]

The form and substance of production-sharing contracts vary considerably according to the particular natural resource and the circumstances surrounding its development. The essential features of production-sharing contracts (with some variations) are: (a) the private foreign contractor bears the risk of prospecting and exploration, if there is no commercial discovery of minerals, he bears the loss. In the event of a commercial discovery, the contract normally provides that he is entitled to be reimbursed out of a percentage of the minerals produced, and he is also entitled to share in the remainder of the minerals. (2) The private

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26 op.cit., UN Centre on Transnational Corporations, Main Features and Trends in Petroleum and Mining Agreements, p.8

27 ibid.

28 ibid.

foreign investor, acting as a general contractor, undertakes to provide all financial and technical assistance required for the mining project. (3) It is usually the case that the private foreign investor is entrusted with responsibility for the management of the operations once the production stage is reached although, in most cases, the state retains the power to determine the overall policy of the enterprise. (4) Cost recovery by the private foreign investor of all exploration, development and production costs is taken from the 40 per cent (in the case of Indonesia) of the natural resource produced. If the expenses exceed the stipulated 40 per cent, any recoverable excess is to be regained in succeeding years.[29] (5) In the case of Indonesia, title to the private foreign investor's share of the production passes at the point of export.

It is important to note that although the operational responsibility is entrusted to the private foreign investor, the management responsibility (in the case of Indonesia) is conferred to the State company. This is a marked departure from the service contracts or management contracts where the private foreign investor is entrusted with the management of the enterprise. The practical importance of the Indonesian provision, however, is diminished by the fact that the private foreign investor is designated as the exclusive operator of the project. The important question to be asked

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[29] for a detailed formula of this arrangement, see particularly Table I Comparison of the Pertamina/Agip contract and the Pertamina/Conoco contract, ibid. p.10

is whether the contractual arrangement assures the host government effective control over the operations of the project. The most significant aspect of the Indonesian arrangement is the fact that the host government plays a more significant role in all aspects of the operation.

The provision which stipulates that title to the private foreign investor's share of the production passes at the point of export can present anomalies. There may be legal problems where the private foreign investor decides to sell some of his share within the domestic market. It could also present considerable problems in the area of taxation, it is questionable in law whether the private foreign investor can claim depletion allowance in a case where he does not own the resources as long as they are still located in the host state.

As has been already noted above, the production-sharing contract formula has spread from petroleum to the mineral industry. Two examples will suffice. In Africa, Niger has adopted the production-sharing contract arrangement in the exploitation of its uranium industry. In April 1974, the Government of the Niger in association with the Commissariat a l'Energie Atomique (CEA) and the Continental Oil Company of the Niger (Conoco) entered into the agreement with the aim of developing a joint venture for the exploration, exploitation, processing and marketing of uranium.[30]

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[30] ibid., p.106

The other example of production-sharing contract is that between the Colombian Government and the International Colombia Resources Corporation.[31] The Government's share in the contract is held by Carbones de Colombia, S.A. (Carbocol), and the other share is held by the International Colombia Resources Corporation (Intercor), a subsidiary of the Excon Corporation. The agreement provides for the creation of a 50/50 joint venture between the parties for the purpose of exploration, development and exploitation of coal. All exploration expenses and risks are to be born by the private foreign investor partner, Intercor. Once the private foreign investor establishes a commercial deposit, ownership of all operations is to be assigned to the joint account established by the equal interests of Intercor and Carbocol. The parties are free to dispose of their shares in production by separate sales contracts "in accordance with the needs of the customer and of the reserves of the field".

Production-sharing contracts offer certain advantages to the host state. They do not involve complex issues such as the determination of income for tax purposes. They also minimise transfer pricing. The determination of profit-sharing arrangements removes a potential source of conflict between the host government and private foreign investors, especially over such matters as the determination of profit, computation of tax and interaffiliate transactions involving transfer pricing. In contrast with a joint-venture arrangement,

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31 ibid., p.110

production-sharing involves arrangements whereby private foreign investors and host governments share the output of the operation in predetermined proportions. The advantages of predetermined proportions are that the sharing ratio is agreed before the commencement of production. This enables the host State to take measures to minimise transfer pricing. For instance, it can devise the sharing in such a way that the proportion held by the private foreign investor can represent net of taxes. This will prevent the private foreign investor under-pricing his share of production through sales to affiliates before the computation of taxes.

Furthermore, the host State can protect its share by marketing it independently of the private foreign investor (through a state marketing company for instance) to avoid under-pricing through inter-affiliate sales. Indeed, the host State can even take a small proportion of its share and market it independently as a means of providing a check against transfer-pricing by the private foreign investor partner. In addition, independent sales by the host State will provide an indication as to the approximate value of the other portion set aside for the recovery of costs. This seems to be the experience in Indonesia where private foreign investors are permitted to recover their costs out of the proceeds of a specified percentage usually 40 per cent. The balance is then split in the ratio of 15:85 basis in favour of the State.[32] What is more significant is the fact that

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[32]See UN Dept. of Technical Co-operation for Dev., (Footnote Continued)

the share held by the private foreign investor is "considered to be net of taxes, and no further royalties or taxes [are] imposed. To protect Pertamina against sales by the contractor to affiliates at less-than-world-market prices, there [are] provisions allowing Pertamina to take its ... share in kind and to determine a fair market value for that portion of the petroleum which [is] set aside for the recovery of costs."[33]

In addition, another important aspect which may minimise transfer pricing is the fact that the State company (Pertamina) is made responsible for the 'management of the operations' while the private foreign investor is responsible for the 'execution of the operations.'[34] The advantages of this arrangement are that by virtue of its formal management powers, the host State can insist on close supervision and inspection of documents, reports, and other data than would otherwise be under the usual reporting requirements in other types of agreements.

4.1.3 Service Contracts

A service contract is an agreement concluded between the state (or its agent) and the private foreign investor for the purpose of carrying out prospecting, exploration, production

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(Footnote Continued)
(1980), The Nickel Industry and the Developing Countries, N.Y. p.84.

[33] ibid.

[34] ibid. p.83.

and marketing of the natural resource by the private foreign investor under the close supervision and control by the host state. Asante states that there are four main features of the service contract namely: "(1) The state does not risk or invest capital in the operation, and the area is entirely the responsibility of the contractor. (2) The [natural resource] and the reserves remain at all times the property of [the host state] which does not renounce its sovereign rights, a situation that is not affected by the payment in kind the contractor receives if he is successful. (3) The State is associated with the success from the first day on which it occurs. (4) The agreement is simple, clear and straightforward to administer, and thus reduces supervisory and administrative mechanisms to a minimum".[35]

It is reported that in the petroleum industry, the service contract concept was pioneered by the Government of Venezuela when it entered into a service contract with Mobil in 1962.[36] This was later followed by other countries such as the Islamic Republic of Iran in 1966 when a service contract was entered into between Erap and Nioc, and the 1968 service contract between Inoc and Iraq.[37]

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35 Op.cit., Samuel K.B.Asante, Restructuring Transnational Mineral Agreements, p.361

36 op.cit., UN Centre on Transnational Corporations, Main Features and Trends in Petroleum and Mining Agreements, p.9

37 ibid.

The terms of the 1968 service contract between Corpoven SA (formerly Corpoacion Venezolana de Petroles (CVP)) provided the following conditions among others: "(a) The contractor should advance all funds for exploration, development and exploitation, with reimbursement only upon start of commercial production; (b) The contractor should receive up to 90 per cent of production from CVP in order to recover its investment, earn a profit and pay tax on net income, that is, the difference between the international market price and the cost. The market price would be agreed to jointly by CVP and the contractor; (c) The exploitation period should be 20 years, with an exploration period of 3 years; (d) CVP should participate in all development and exploitation programmes through committees comprised equally of representatives of both CVP and the contractors; (d) CVP retained the right to acquire equity interest in the event of commercial discovery on terms to be agreed".[38]

In the mineral industry, a notable example of the service contract is that between Sudan, represented by Ingessana Hills Corporation and the Marubeni Corporation, entered into in 1975. The agreement was for the "exploration, development and production of chrome ore deposits".[39] It was also agreed by the parties that Marubeni was periodically to send geologists and mining engineers to the chrome mine owned by Ingessana Hills Mines Corporation (IHM). The duty of the

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38 ibid., pp.9-11

39 ibid, p.109

experts is to provide "general technical advice and proposals with respect to: (a) Effective and safe mining operations; (b) Exploration and development of new deposits; (c) Quality control of chrome ore; (d) Technical training of mining engineers". The contract also provided that Marubeni was to purchase between 15,000 and 25,000 tons of chrome ore "during the period of July 1975 to June 1980".

It is also reported that India entered into a service contract with the Soviet Tsvetmetpromexport, a Soviet company.[40] The actual contract was between Balco, an Indian state-owned company and a Soviet company to build an aluminium complex. The Soviet company was to perform the following task: (a) to construct and provide technical management of a mine; and (b) to construct a processing plant in exchange for the annual delivery of 300,000 tons of alumina.[41]

As we have already noted above, service contracts are essentially variants of production-sharing contracts except in one important respect: the state remains at all times the sole owner of the natural resource.

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[40] see Erick Schanze et al., Mining Ventures in Developing Countries, (Kluver-Deventer - The Netherlands, 1981) p.31

[41] ibid.

5 THE RELEVANCE OF MODERN CONCESSIONS TO NAMIBIA

It has been discussed above that the trend in most mineral producing developing countries is towards new forms of arrangements with multinational mining companies. These arrangements have been influenced by a number of factors. On the one hand, nationalism has forced many developing countries to acquire (voluntarily or coercively) controlling interests in established foreign companies or minority interests in such companies. The objective is to secure effective national participation and control in respect of the activities of private foreign investors with regard to both their existing operations and new investment propositions. Furthermore, modern concession agreements reflect developing countries' desire to promote mining industries which tap technologies, local patterns of skills, and to promote mining industries which will develop technological and entrepreneurial skills. On the other hand, modern mining concessions have been utilised as vehicles for attracting and retaining foreign direct investment.

It is obvious from our discussion in the preceding chapters that Namibia, like other developing countries, lacks the technological component for mining projects, managerial skills and access to markets. All these factors are likely to force a future lawful Namibian government to depend upon foreign sources for these inputs. This will in turn force the government to utilise all or some of the modern concessions discussed in section 4 above. What follows is a

discussion of how Namibia could benefit from the utilisation of modern concessions. Before we discuss this in detail, we would like to state in no uncertain terms that the decision lies with the future lawful government of Namibia. The government will have a right to decide the future of the mining industry without, in any way, limiting its options to what has been discussed in this section. The options open to the future lawful government in deciding the regulatory framework of the mining industry will be dictated by the circumstances prevailing at the time of independence. The materials in this section examine the experience of Sierra Leone, Botswana and Papua New Guinea in their relations with private foreign investors. Its object is to explain the relevance of this experience to the future government of Namibia.

5.1 Management and Service Contract Options

Factors which are likely to influence the future lawful Namibian government to enter into management and service contracts, on the basis of new arrangements, would include the following: (1) the government, for ideological reasons, may prefer public ownership over foreign ownership, even if that ownership is not accompanied by control over operational activities; (2) sufficient local technical and managerial skills at the time of independence will not be available to operate the mines; and (3) the mining industry is regarded as the backbone of Namibia's economy and as such, as a valuable socio-economic cost benefit regardless of the nationality of the managers.

Management and service contracts could be utilised by the future lawful government, at least during the early days of independence, in all of Namibia's minerals. The success or failure of these contracts will depend on a number of issues. The willingness of private foreign investors to assume the role of "manager" as opposed to "owner" or "co-owner" will be one of these factors. However, as we have seen in section 4 above, the management contract arrangement has become one of the means by which private foreign investors establish a presence in some developing countries. Today, management and service contracts provide a framework within which fundamental interests of both private foreign investors and host developing countries can be reconciled. For Namibia, as in other developing countries, one of the main objectives of management and service contracts is to pass on technical expertise to Namibian nationals so that, over time, they will be in a position to run mining projects. Once this is achieved, the role of the private foreign investor will diminish.

The success or failure of management and service contracts will be determined partly by the extent to which Namibian managerial and technical capability improves. The efficacy of these management and service contracts can best be achieved by setting deadlines by which a certain number of Namibians should replace the expatriate staff. In addition, the contracts may provide that the government is periodically allowed to monitor the progress made towards such a replacement. To this end, the approach taken by Indonesia could prove useful. The agreement between the Government of

Indonesia and Rio Tinto Indonesia, illustrated in Table VII:1, indicates the minimum targets for the employment of local personnel by job classification within the first three, five and eight years of the operating phase.

Table VII:1 Training of Personnel

	3 years %	5 years %	8 years %
Unskilled Labour	100	100	100
Skilled Labour	75	75	100
Clerical	75	90	100
Technical and Supervisory	50	75	85
Managerial and Professional	50	75	85

Source: United Nations Centre on Transnational Corporations, (1983), Main Features and Trends in Petroleum and Mining Agreements, New York, p. 121.

During the implementation stage of management and service contracts, conflicts of interest between private foreign managers and the government may arise. This is mainly because training of local personnel often conflicts with the profit imperative of the multinational companies. In a situation where the mining project plays a strategic part of the multinational company's global operations, it may be possible that frequently, less emphasis may be given to training local personnel as compared with meeting production targets and deadlines which would contribute to its global operational goals. Therefore, managers' failure to meet

their training obligations in a timely manner would be the result of their reluctance to make the ultimate transfer of authority to the Namibian nationals, the importance they would attach to their profit motive, or other interests that are likely to influence foreign managers. Some of these potential conflicts could be minimised by requiring contractors to submit general development and operating plans for approval by the board, on which the government would be represented. The items subject to approval should include capital investment, production volumes, employment levels and similar major aspects of the mining operations. The contracts should also set a range of issues where government approval would specifically be required. The inclusion of these aspects in the contracts would ensure that the government has a voice in the day-to-day operations of mining enterprises. However, it is important that a realistic assessment should be made of the length of time required to complete the transfer of management to local personnel because a short period may not necessarily be the best.

5.2 Joint Ventures and Production Sharing Options

State ownership of mineral resources by the future lawful government is a political decision which may have several advantages. It will enable the government effectively to harmonise the activities of private foreign investors with broader economic development goals. This will necessitate a detailed framework of policies covering a wide range of issues including the type and nature of foreign participation in the mining industry. Therefore, it is submitted that the

future lawful Namibian government may consider joint ventures and production sharing contracts as useful mechanisms, especially to the uranium and diamond industries. The major factor which the future lawful government would take into account is that offering minority equity participation (or a proportion of mineral production in the case of production sharing contract) may be a means of ensuring that the companies will fulfil their obligations in the construction, operation, and maintenance of facilities.

Where direct foreign investment in the form of equity participation and production sharing would be permitted, the government should formulate indicative guidelines regarding levels of direct foreign investment. However, the ultimate objective (long-term objective) should be increased domestic participation over a period of time. If equity joint ventures and production sharing are to be preferred by the government, the most attractive method (especially in new projects) is that which is applicable in Papua New Guinea. The practice in Papua New Guinea is to acquire equity by way of "carried interest". Under this system, the government reserves the right, either in the general legislation or concession, "to participate in the exploitation of a deposit in the event of a commercial discovery. Only if it does participate does the Government have to meet its proportionate share of the exploration and development costs, and these costs can initially be met by the mining company,

while the Government repays the company out of the income generated by future production."[42]

Insofar as Papua New Guinea's approach applies to new projects, it seems to offer considerable advantages to the government in that it allows a decision on participation to be deferred (during the exploration phase) until the commercial value of the mining project has been established. This avoids the risk to the government because it does not become involved in unsuccessful prospecting activities. However, it would still be necessary for the government to specify at the outset the maximum private investor participation level in order to enable private foreign investors to know the terms and conditions that could apply in the case of a significant commercial discovery. In the case of diamonds, equity joint venture would be most appropriate given the complex structure of the industry internationally. It will need specialised skills which the government, at the time of independence, would not possess, especially the complex marketing aspect. The same goes with uranium as it also involves a highly complex operation right from the mining phase to marketing. As long as the government is in a position to effectively regulate and control the uses of uranium by consumers in order to meet its international obligations, a joint venture arrangement seems to be the most appropriate.

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[42]See United Nations Department of Technical Co-operation for Development, (1980), The Nickel Industry and the Developing Countries, New York, p.76.

With regard to the production sharing option, it is submitted that it would be more appropriate in the petroleum industry (should Namibia ever become a major producer). The appropriateness of the production sharing contract to the petroleum industry stems from the fact that it is relatively easy for the government to take its share in kind and dispose of it on the open market. If the production sharing arrangement is applied to non-fuel minerals, the marketing of many minerals independent of the private foreign investor-partner may not prove so easy. In the case of diamonds, this may prove particularly difficult due to vertical integration of the industry. However, with the establishment of a mineral marketing company, the production sharing contract option would become a more realistic possibility. Indeed, the Government of the Niger has concluded a production-sharing contract with the French Atomic Energy Agency for a uranium development project.[43]

5.3 Bargaining Strength and Weaknesses of the Parties

The success or failure of the possible arrangements discussed above will depend on a number of factors such as the political environment and the bargaining strength and weaknesses of the parties (see Appendix VIII:1). In any bargaining situation, all the parties have points of weakness and strength. The strength indicates the ways and means

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[43]See United Nations Centre on Transnational Corporations, (1983) Main Features and Trend in the Petroleum and Mineral Industry, p.

which, during the bargaining process, permit the party to gain more concessions from the other. The most effective way of evaluating the success or benefits of the parties from the mining project is to assess their bargaining strength and weaknesses. Private foreign investors have skills, experience, access to markets, and finance that Namibia will need to develop its mineral resources. The future lawful government of Namibia will possess mineral resources, will have control over taxation that could be devised in such a way as to produce an attractive opportunity to private foreign investors. In a situation where the mining industry is established (as is the case in Namibia), the government can easily attract as many competitors as possible. The presence of competitors can enable the government to extract more concessions from locally established private foreign investors.

It is clear that there is room for negotiation between the government and private foreign investors. During the initial period, private investors usually are in a stronger position than the host government. The investor may have an asset which only few other competitors can supply at a similar price. In most cases, the private foreign investor will set conditions before making an investment which the host State will be forced to accept. But once the investment is made and if it turns out to be more profitable than anticipated, the host country's bargaining position (knowing that the investment is sunk) improves. How is the bargaining process likely to affect the relationship between the future lawful

government of Namibia and private investors? This is examined in detail below with examples from other countries.

5.3.1 The bargaining position of the companies

It is submitted that there are a number of factors that will favour private foreign investors in the bargaining process. These include alternative sources of minerals; possibility of substitution; market power; cooperation with competitors; lack of qualified and experienced Namibians; monopoly of mining, processing and marketing; specialisation and technology. With regard to base metals such as copper, the government is likely to be vulnerable because the industry is diffused and faces a serious threat from substitutes such as aluminium and plastics.[44] This situation is likely to force the future government to offer more attractive conditions to induce private foreign investors to invest in the copper industry. With regard to the uranium industry, the picture is perhaps even worse for the future government due to the fact that the industry is firmly controlled by developed countries. For instance in 1980, developed countries accounted for about 80 per cent "of non-socialist uranium production".[45] During the same period, "74 per cent of

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[44]For a detailed general discussion on substitutes see general United Nations Centre on Transnational Corporations, (1981), Transnational Corporations in the Copper Industry, New York, and Moran H. Theodore, (1974) Multinational Corporations and the Politics of Dependence: Copper in Chile, Princeton University Press, New Jersey.

[45]See United Nations Centre on Transnational Corporations, (1983), Transnational Corporations and Contractual Relations in the World Uranium Industry: A Technical Paper, New York, p.60.

proven reserves and 87 per cent of estimated additional resources [were] held by the developed countries."[46] The consequence of this state of affairs is that "the bargaining position of the developing countries in the uranium market remains weak."[47] This situation is further complicated by popular opposition to the use of nuclear power as a source of energy. All these factors seem to favour private foreign investors in the bargaining process.

As for the diamond industry, the future lawful government of Namibia may be forced to make a deal with a specialised private foreign investor. If De Beers' claim is true, "De Beers Marine [is] the only company to have developed the technology and equipment to prospect at depths of over 100 metres" under the sea.[48] Given the fact that there has been a trend towards diamond mining from the sea in Namibia, it will require highly specialised technical skills which the future lawful government will not possess. In addition, the diamond industry, monopolised by De Beers, is one of the most vertically integrated in the world. Therefore, all these factors would make it difficult (although not necessarily impossible) for the future lawful government to operate the diamond industry independent of the existing channels. Indeed, it has been stated by Lanning that "manufacturers of synthetic diamonds, the diggers in the West African and South

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[46] ibid.

[47] ibid.

[48] See De Beers Annual Report, 1986, p. 8.

American diamond rushes, and the important gemstone mines in Tanzania and Sierra Leone have all tried to market diamonds independently in the last twenty-five years; but on each occasion De Beers moved swiftly to counter the threat."[49] All these factors are likely to strengthen private foreign investors in the bargaining process.

Furthermore, it is generally costly to maintain existing mines and to open up new ones. The experience in Papua New Guinea bears this out. In the Ok Tedi mining project (discussed in detail below), the consortium of Australian, American and West German companies spent "an estimated US $1.2 billion on opening up the jungle and establishing gold mining as the first stage."[50] With pressing social reforms immediately after independence, it is highly unlikely that the future lawful government will be in a position to invest such an amount. It is likely that it would be forced to do a deal with private foreign investors, thus strengthening their bargaining position.

In addition, the strength of the companies stems from the fact that at the time of independence, not enough Namibians would have been trained to manage and operate the mining industry. The educational system in Namibia (which is still

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[49]See Lanning Greg with Mueller Marti, (1979), Africa Undermined: Mining Companies and the Underdevelopment of Africa, Penguin Books, p. 410.

[50]See the Hongkong and Shanghai Banking Corporation, (1985), Business Profile Series: Papua New Guinea, Solomon Islands, and Vanuatua, Second edition, p. 11.

run along apartheid lines) compounds the problem. In order to appreciate the extent of this problem, it is necessary to quote at length from the most unusual source. In 1982, the Chamber of Mines appreciated the problem of skilled labour shortage and was partly blamed on the educational system.

It was stated that the "problem essentially resolves around the skills deficit in the economically active labour force. Whether in Government or in industry, we are short of trained and experienced people. In the first place, there are too few matriculants [form fives] available for the development of professional skills. In 1981 there were only 1620 pupils in Standard 10. Of these 346 were black, 284 brown and 990 white ... In the case of black schools, maths and science are seldom offered as subjects. This situation is aggravated by the shortage of teachers, and general quality of education across the board is not likely to improve until this problem can be solved. Out of 4,887 teachers employed in the black schools in 1980 at both primary and secondary levels, 2,031 held no formal teaching qualifications. Of the qualified teachers in the black schools, only 14 held a university degree and only 127 had completed matriculation. Pupil to teacher ratios are uncomfortably high. Only 11 per cent of pupils attending school ever reach the matriculation level and if white pupils are excluded, this figure falls to 2.8 per cent. These figures indicate the size of the problem."[51]

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[51]See Chamber of Mines Report of South West Africa/Namibia Report, 1982, p. 4.

It must be stressed, with all the emphasis at our command, that the concern expressed above has nothing to do with the mining companies' genuine regard to the welfare of the black population. This concern is expressed because the companies' interests are at stake. One of the reasons for the shortage of skilled personnel is that there is what the Chamber of Mines terms "gradual drain of skilled [white] personnel ... who [are] leaving to take up residence in South Africa."[52] It was also reported that "the turnover of [white] artisans has not increased substantially since 1981".[53] This has forced the companies to train blacks as apprentices. Therefore, for the purposes of our discussion, two main reasons have contributed to the training of blacks. The companies have realised that African advancement is in their own interest. Due to the war situation, it is becoming increasingly difficult to attract skilled white employees. The war makes European rates of pay, intended to attract and retain skilled workers from abroad, to be far higher than prevailing rates for the best qualified African workers. The war has resulted in the white population to decrease almost every year. Indeed, it does not make economic sense to train an employee who is likely to leave any minute if the political situation deteriorates.

Moreover, since it is possible for the companies to do a deal with a future lawful government, they are forced to train

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[52] ibid., p.3.

[53] ibid.

African employees to fill vacancies left by white employees and at the same time to ensure continued operations of the mines during the early years of independence. The realisation that eventually, independence will become inevitable and that the future government is likely to demand what has become to be referred to as 'Africanisation' of a number of positions of responsibility in the mining industry, force the companies to train more blacks. Therefore, smooth transition without affecting the operation of the mines compels them to start training programmes before decolonization, hence the call for "more needs to be done on the national scale as part of the country's effort to respond to the pre-independence challenge of preparing a corps of competent local people to assume positions at all levels of management."[54] This resulted in the establishment of the Private Sector Foundation (PSF) with a stated purpose of training Africans for skilled jobs.

However, one commentator has remarked that the scheme "provides relatively expensive scholarships for the purpose. The numbers involved are quite small ... Many inside and outside Namibia see the PSF as a cheap cosmetic exercise."[55] It is clear from the discussion above that the educational system of the country makes it difficult to recruit suitable

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[54] ibid. p.4.

[55] See Brian Bolton, (1985), "The condition of the Namibian Workers", in United Nations, (1985), Seminar on the Activities of Foreign Economic Interests in the Exploitation of Namibia's Natural and Human Resources, Ljubljana, Yugoslavia, 16-20 April, p. 34.

Africans for training. This will contribute to the weakening of the government's bargaining position and is likely to strengthen private foreign investors' hand during the bargaining process. The companies will demand a price for training Namibians. The consequence will be that even if the government were to assume complete public ownership, the mining industry will still need the cooperation of private foreign investors. State mining companies are likely to experience serious personnel and manpower problems. There will be a lack of suitably trained, experienced and specialised personnel at practically all stages necessary to cover the administrative and technical operations in the mining industry. All these factors, at least during the early years of independence, will force the government to seek for various interim remedies to bridge the gap. This is likely to include relying heavily on private foreign investors to provide these inputs and will in turn weaken the government's bargaining position.

Paradoxically, even those few who have been trained by the companies are likely to pose a serious problem to the future government in that they have disrupted salary scales. This point is forcefully emphasised by Professor Green. He states that "the efforts of large companies ... to create a stable and skilled black labour force loyal to them will leave a potential time bomb ... their pay scales of R5,000 to 12,500 a year pose serious problems. It is economically

impossible to generalise these income levels to all workers."[56]

Finally, cooperation with competitors will strengthen private foreign investors' hand in the bargaining process. The development and expansion of multinational mining companies brought with it new forms of ownership. It has been eloquently stated by Lanning that today, "the major mining groups control their global empires through bewildering network of directorships which link parent companies to their subsidiaries; mines to suppliers and customers; and the major groups to each other and to government policy-making bodies."[57] The system of interlocking ownership among the mining companies would reduce the government's option of finding interested competitors in the event of an unsatisfactory outcome of negotiations with some of the existing operating companies. The interlocking ownership among the companies at all levels enables them to share information and thus, places them in a powerful position vis-a-vis developing countries. "The cohesiveness of the mining groups enables them to benefit from each other's experience and to block attempts" by developing countries which seek to obtain more concessions from them.[58]

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[56]See Professor Reginald Green, (1987), "Namibia: Dependence, Destabilisation and Development", in Oxfam, Namibia Conference Papers: Conference held in London 11th May, 1987, pp. 61-90 at p.66.

[57]See op. cit. Lanning Greg with Mueller Marti, (1979) Africa Undermined: Mining Companies and the Underdevelopment of Africa, p.330.

[58]ibid. p. 331.

The effect of interlocking ownership is illustrated by the unsuccessful effort by both Zaire and Zambia to attract interested competitors during the early days of independence. It is reported that both countries "attempted to encourage new consortia to take over the management of their copper mines without success, partly because of the reluctance of the mining companies to interfere in the sphere of influence of another company but also because of the information, pressures and threats that can be conveyed along the network of interlocking directorships."[59]

5.3.2 The bargaining position of the future lawful government

Notwithstanding the strength of private foreign investors, the government will have its areas of strength that will enable it to bargain effectively with the companies. The first and perhaps the most effective weapon is that most writers and commentators on Namibia regard Namibia as a major mineral producer with proven reserves. The list of the country's major, medium and minor minerals has been provided in Chapter I, reproduced mainly from ININ's comprehensive study. In a recently published book by UNIN, Namibia is described as "the fourth and seventeenth largest producer of minerals in Africa and the World respectively."[60] The territory is the source of about 50 per cent of the world's

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[59] ibid.

[60] In value terms, see UNIN, (1987), Namibia: A Direct United Nations Responsibility, Lusaka, p. 15.

gem diamond production, and it is the fourth largest copper producer in Africa. According to Hangala, Namibia is "the second largest producer of lithium and vanadium in the world. [It] has half of the world's reserves of germanium deposited in the Tsumeb mines where it is produced as a by-product of other metals. Germanium oxide is primarily used by the electronics industry for various forms of semi-conductors, microprocessing and laser technology [including] several military applications ... As regards Africa, Namibia is one of the leading producers of refined lead, second largest producer of cadmium and fourth largest producer of both zinc and silver."[61] It has the largest open-cast uranium mine in the world, and "is potentially one of the world's leader producers of high grade industrial salt."[62]

There is no doubt that these resources will provide the future lawful government with a strong bargaining position. It is generally agreed by most writers that one company in particular, De Beers, is heavily dependent on the access to Namibian diamonds for its dominant world market position. It has been stated that although "De Beers' own mines account for only about 30 per cent of [diamond] production, they produce 60 per cent of the world's gemstones, largely from

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[61]Hangala Leake S., (1985), Structure of Namibian Mineral Industry: A Strategy Option of Institutional Framework for Mineral Sector Development for Independent Namibia, University Printing Press, Helsinki, p. 16.

[62]ibid. It is also stated that "Namibia is the fourth largest lead exporter among developing countries and in the top five for uranium oxide." See Amon J. Nsekela (ed.), (1981), Southern Africa: Toward Economic Liberation, Rex Collings, London, p. 166.

CDM in Namibia."[63] The contribution which CDM makes to De Beers is enormous (this is illustrated in Chapter III). If the Namibian source is cut off, De Beers' position is likely to be weakened. Indeed, case studies discussed below point to the fact that De Beers' policy is never to allow potential competitors into the diamond trade without its approval. Some of the counter measures against competitors have included making significant concessions to host governments in order to deny its potential competitors any advantage. The experience in Sierra Leone and Botswana will suffice to illustrate this point.

Before independence in Sierra Leone, a company called Sierra Leone Selection Trust Ltd (SLST) had a long-term diamond sales contract with the CSO. The arrangement was very advantageous to De Beers. It was discovered in 1957 by SLST that it was not obtaining a fair price for its diamonds. "We were fortunate", said the company official, "in obtaining the advice of a firm of New York cutters, Lazare Kaplan and Sons Inc. [the firm] confirmed ... that our diamonds were under-priced."[64] The discovery of under-pricing led to the revision of the price schedules. At the same time, SLST entered into a contract with Lazare Kaplan to sell one-twelfth of its diamonds (once contractual obligations

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[63]See op. cit. Lanning Greg with Mueller Marti, (1979), Africa Undermined: Mining Companies and the Underdevelopment of Africa, p. 410.

[64]See Greenhalgh P.A.L., (1985), West African diamonds 1919-1983: An Economic History, Manchester University Press, p.255.

with the CSO came for renewal) in order to provide a check on prices paid by other buyers. At the expiration of the contract with the CSO, SLST was in a strong bargaining position due to the presence of a "well-known American diamond dealing and cutting company, Hary Winston Inc."[65] Winston had tried previously to circumvent the CSO by contracting for Angolian production but was unsuccessful due to political pressure from the Portuguese colonial administration on the operating company.

Negotiations with the CSO broke down in 1961 on the question of selling commission. The CSO was demanding 12 per cent while SLST offered only 4 per cent. Given the presence of Winston, SLST was not prepared to compromise. An agreement was entered into with Hary Winston on the same terms and conditions rejected by the CSO. However, before the contract could be implemented, the CSO intervened. It is reported that much "to the dismay of SLST and Winston, CSO pressure led the Sierra Leone Government to introduce a bill whereby SLST's production had to be sold through the Government Diamond Office."[66] The company refused and did not sell diamonds for 16 months. Eventually, a compromise agreement was reached in 1962 for the GDO to sort and value the diamonds and then sold "in fixed proportions to DICORWAF and three American buyers: DICORWAF 50 per cent, Leon Tempelsman and Son (a firm very close to the CSO) 27 per

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[65]ibid. p. 257.

[66]ibid. the GDO had links with the CSO.

cent, Winston 20 per cent and Kaplans 3 per cent. DICORWAF could purchase at a 10 per cent discount with the remaining half sold at 4 per cent discount, whilst SLST had to pay a 5 per cent 'service fee'. SLST (and the Government) did succeed in substantially increasing revenues received."[67] It is clear from the discussion above that SLST managed to get better terms due to the presence of competitors to De Beers.

Again during the early 1970s after the nationalisation of the diamond industry in Sierra Leone, it is reported that De Beers' monopoly was threatened by one of the most powerful companies in Britain, Lonrho. The presence of this potential competitor strengthened the Government's hand and bargained for better terms than would have been possible. It is reported that "Lonrho ... had ambitions to break De Beers' diamond monopoly ... Lonrho's aim was to set up a rival marketing organisation to compete with De Beers. It was against this background that the five-year contract with the Diamond Corporation [for the marketing of Sierra Leonean diamonds] came up for renewal in 1972. The presence of an eager Lonrho, ready to snap up the business, strengthened the government's hand in the negotiations."[68]

Finally, Botswana is another example whereby that country got better terms during the renegotiation of the diamond

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[67] ibid. p.258. DICORWAF is a De Beers company whose full title is Diamond Corporation of West Africa.

[68] Op. cit. Lanning Greg with Mueller Marti, (1979), Africa Undermined: Mining Companies and the Underdevelopment of Africa, pp. 416-417.

agreement with De Beers, mainly because of De Beers determination to keep out potential competitors. It is stated by Colclough and McCarthy that Botswana is "an important diamond province ... As such [De Beers] could not risk withdrawing from Botswana. This would have invited Botswana to find other partners for its diamond mining, thereby posing a potential threat to the De Beers monopoly."[69] De Beers' attitude may be explained by the presence of a potential rival in Botswana which has resulted into what may be described as 'diamond prospecting war'. It is stated by Garnaut and Clunies that private "exploration for diamonds ... has been maintained at a high level, mainly because of ... De Beers' anxiety to maintain its world-wide diamond monopoly in the face of challenges from possible new entrants. The search for diamonds became much more active when a second company, Falconbridge of Canada, was issued with authorities to prospect for diamonds, so that two companies were effectively racing each other to locate any remaining large deposits of diamond-bearing mineral."[70]

In some cases, if the private foreign investor breaks down negotiations with the government with a view to extracting better concessions can lead to regrets. This is especially the case if there are competitors who are ready and willing to do a deal with the host government. Kennecott's

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[69]See Christopher Colclough and Stephen McCarthy, (1980), The Political Economy of Botswana, Oxford University Press, pp. 151-152.

[70]See Garnaut Ross and Anthony Clunies Ross, (1983), Taxation of Mineral Rents, Clarendon Press, Oxford, p. 270.

experience in Papua New Guinea illustrates this point. Kennecott obtained prospecting rights in Papua New Guinea. Between 1969 and 1972, the company discovered substantial copper in its prospecting area. The discovery was made at a time when the Government was under pressure to renegotiate mining concessions. After the conclusion of Bougainville Copper Agreement 1967 renegotiations (see section 7 below), negotiations with Kennecott began with the terms based on those agreed with Rio Tinto Zinc's Australian subsidiary company. It is stated that Kennecott "insisted on taxation parameters under which additional profits tax might never have been payable even if the mine turned out to be one of the world's most profitable ... insisted on a clause on choice of law that was politically provocative."[71]

The Government was determined to obtain better terms from Kennecott. It was also determined to seek alternative private foreign investors if the negotiations with Kennecott did not produce desired results. On the other hand, Kennecott seems to have miscalculated the bargaining strength of the Government. This was probably based on the belief that it was not easy for the Government to bring in other private foreign investors if Kennecott's terms were rejected. When the negotiations broke down in 1975, Kennecott thought that the Government would resume the negotiations and eventually reach an agreement on its terms.

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[71]Kennecott insisted that the agreement was to be interpreted in accordance with 'the law of developed countries'. ibid, p. 236.

Instead, the Government was forced to look for alternatives. A State owned company, the Ok Tedi Development Company, engaged New York geological consultants, Behre Dolbear to supervise a further prospecting programme. At the same time, the Government found interested competitors who were willing to take over the project on its terms. Eventually, a consortium of Australian, American and German companies were found and an agreement was finally reached in 1976. An operating company Ok Tedi Mining Ltd. was formed. The parties have the following share ownership: Broken Hill Proprietary Company (BHP) - Australian 30 per cent; Kupferexplorations Gesellschaft mbH - German 25 per cent; Mt Fubilan Development, a subsidiary of Amoco Minerals, itself a subsidiary of Standard Oil (Indiana) - American 25 per cent; and the Government 20 per cent. Much to the regret of Kennecott, the Ok Tedi mine has been described in these terms: it "is now Papua New Guinea's premier gold mine, currently producing 21.8 tonnes (700.000 OZ) of gold annually. More significantly, it is the largest gold mine outside South Africa and the Soviet Union. Ok Tedi ... commenced gold mining in May 1984. Copper processing capacity at Ok Tedi plant is projected to gradually increase to 60,000 tonnes of high grade ore a day (yielding 90,000 tonnes of copper per annum) by the end of 1988."[72]

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[72]See ANZ Banking Group (PNG) Ltd, (1986), Papua New Guinea, International Economics Department, Australia and New Zealand Banking Group Ltd, December, p. 3.

It is clear from our case studies that the strength of the host government to extract adequate terms from private foreign investors should not be underestimated. Factors such as abundance of mineral resources, and interested competitors provide a powerful weapon to the host government. There is no doubt that the case studies will provide a useful lesson for Namibia. It must briefly be added here that some of the legal issues discussed in Chapter VI will also significantly strengthen the government's hand vis-a-vis the existing private foreign investors operating in Namibia.

5.4 The changing attitude;the move towards cooperation for mutual benefit

In contrast to the "bitter" days of nationalisations of private property, multinational mining companies have generally adapted to a new environment of host country company relationship. Some of the private foreign investors even prefer a situation whereby the host government owns shares in operating subsidiary companies. For instance, H. Oppenheimer said in 1968, before the nationalisation of copper in Zambia that the "desire of Zambians to play a larger part in the modern sector of their economy is understandable, and I would certainly favour a policy of partnership between private business and the Zambian State."[73] In the case of Bougainville copper mine, it is

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[73]See Anglo American Corporation of South Africa Ltd, Statement by the Chairman, Mr. H.F. Oppenheimer, May 15, 1968. See also Richard Sklar, (1975), Corporate Power in an African State.

reported that the private partner favours the government to own shares in the project. It is stated that the "view was ... expressed that ... Conzinc Rio Tinto of Australia Ltd., would see the disposal of the Government's holding as a vote of no confidence by the Government in the project and in the management of the Company; in fact the private sector shareholders see an advantage to Government in having a direct stake in this Company in terms of ensuring continuity of the company, and maintaining reasonably sympathetic policies to the Company."[74]

It is clear from the examples above that in some cases, private foreign investors actually prefer the host government to acquire equity in the operating company as a tangible guarantee of the State's commitment to the project. It also provides an ongoing support by the host state in areas such as infrastructure, taxation and income policies, reduced risk of nationalisation, etc. Therefore, State participation is regarded as a guarantee that the host State will remain favourably disposed to the mining project than might otherwise prove to be the case.

Perhaps the most recent example of private foreign investor adaptability is the experience of Angola's oil industry. In contrast to the experience in both Cuba and Chile where there was harmonization of policies between capital and the

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[74]See Michael Trebilcok J., (1982), Public Enterprises in Papua New Guinea, Discussion Paper No. 9., Institute of National Affairs, Port Moresby, Papua New Guinea, p. 162

American government, there is a fundamental difference between the policies of the American companies and their home government vis-a-vis Angola. It is stated that the "State Department told Chevron and a score of other US firms [others include General Tire, Boeing, Lockheed, Texaco, Mobil, Conoco, Marathon, and Cities Services] doing a booming business in Angola that it was time that they started thinking about the national interest as well as their balance sheets. In February, while the CIA was dispatching Stinger anti-aircraft missiles to Savimbi's headquarters in Jamba, the executive vice-president of Citicorp was in Luanda, telling the government that in the eyes of the US business community Angola remained a good credit risk. US firms ... have nothing but praise for the MPLA government for its business-like attitude towards foreign investment."[75] It is further stated by Alagiah that it is "one of the ironies of the Angolan situation that a primary task of the Cuban military contingent is to protect the US-managed oil complex ... It is a point that is not lost on the Gulf Oil management in Luanda: 'Frankly I could not give a damn whether it is Cuban or Vietnamese soldiers who are out there guarding our installations, just as long as they do it well ... Our government should not be talking about arming the rebels. They could achieve a lot more by opening up an embassy here.' Gulf officials point out that their joint

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[75]See Jekyll, et. al, (1986) "Washington's two-track policy in Angola moves into the realms of the Surreal," South, April, p.84, col. b.

venture with the Angolan government works better than in similar arrangements elsewhere."[76]

The foregoing discussion shows that if the parties are committed to the equitable arrangement for mutual benefit, there can be a smooth relationship between the host State and private foreign investors despite their ideological differences. It is for these reasons that it will be possible for a future lawful government to work together, on an equitable basis, with private foreign investors within the framework of a modern mining concession. Naturally, it will be up to the government to decide the terms for the operation of foreign mining companies in Namibia.

6. SINGLE CHANNEL STATE MINERAL MARKETING COMPANIES

State control over the sales of its mineral resources has been a priority for many developing countries. In some cases, marketing and sales contracts between developing countries and multinational mining companies have caused some disquiet. There are several reasons for this. Control by private foreign investor over marketing is likely to decrease the host country's control over its mineral resources. The main goal for the State in establishing a State monopoly marketing company is therefore to reassert control over its commercial policy so as to be in a position to take all

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[76]See George Aligiah, (1986), "A Frontline Casualty digs in," South, February, p. 27, col. c.

decisions relating to prices, terms of sales and marketing contracts, and other decisions relevant for effective control over the disposal of the country's mineral resources. Several developing countries such as Zaire,[77] Peru,[78] Chile[79] and Zambia have established State marketing companies. This section evaluates the performance of Zambia's monopoly State marketing company.

6.1 Background to the establishment of a State marketing company in Zambia

Prior to the nationalisation of the copper industry in 1969, Roan Selection Trust (RST) and Anglo-American Corporation (AAC) handled sales and marketing of Zambia'a copper. Following the nationalisation of the industry in 1969, each of the two private foreign investor companies (RST and AAC) entered into sales and marketing contracts with the newly established joint venture operating companies (NCCM with AAC, and RCM with RST). Under the contracts, each of the private companies were appointed exclusive agents of the joint venture companies. The private companies continued to carry

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[77] A national copper-marketing corporation was established in 1973 to take over functions previously handled by the Belgian company, Societe Generale des Minerais. For details see United Nations Centre on Transnational Corporations, (1981), Transnational Corporations in the Copper Industry, New York, p.68.

[78] Minero Peru was established in 1971 and was given responsibility for the marketing of the country's entire copper production including production from private companies, ibid.

[79] A State marketing monopoly was established in 1952 to market all copper produced in the country, ibid.

out their marketing activities through existing sales facilities.

The contracts proved to be of considerable value to foreign investors appointed as marketing agents since they were protected from government interference in sales and marketing activities. The companies were granted exclusive rights to market all Zambia's minerals for a period of 10 years. Termination of these contracts depended on the redemption of the Bonds and Loan Stock. After a period of 10 years, the contracts could be ended on two years notice or upon redemption of the bonds and loan stock whichever was later.[80] While acting as agents, the private companies were remunerated at 0.75 per cent of gross sales proceeds of all copper metal and 2.5 per cent on cobalt sales.[81] The resulting consequence of the contracts meant that the two private companies and their subsidiary and associate companies were ensured control of production, distribution and marketing. Notwithstanding the disadvantages, two main factors persuaded the Zambian Government to enter into these contracts. Firstly, the contracts served to ensure smooth mining operations and marketing of copper during the early years of nationalisation. Secondly, the Government lacked

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80 For details see United Nations Economic and Social Council, (1984), Transnational Corporations in the Copper Industry of Zambia, New York, 19 March, E/ECA/UN CTC/6, p.22.

81 See Potter, J.G., (1971), "The 51 per cent Nationalisation of the Zambian Copper Mines", as Chapter IV of Faber M.L.O. and Potter, J.G., (1981), Towards Economic Independence: Papers on the Nationalisation of the Copper Industry in Zambia, Cambridge University Press, p.112.

expertise in the marketing of the country's mineral resources. This meant that sales and marketing services of foreign companies were indispensable since at the time of nationalisation, they could not be replaced without disastrous consequences.

Notwithstanding the Government's dependence on the services of the private companies, doubts began to be voiced. The Government soon discovered that the contracts "were working against the interests of the country."[82] It is reported that there were ways in which private companies diverted proceeds at the expense of the Government. First, in order to protect themselves, the companies used to contract "about 80-90 per cent of planned production to 'firm' end-use outlets. The balance, 10-20 per cent, would be contracted on a bolster basis to the affiliated merchanting companies. If and when the merchanting companies received the metal, they sold it on an ad hoc basis, thereby realising prevailing ad hoc premiums which could be as high as $50 per ton."[83]

Secondly, consumers were grouped into two categories: Credit risk consumers (i.e. consumers who are likely to default on payment for the delivered copper) and non-credit risk consumers. Contracts with non-credit risk consumers were made directly between marketing companies and end-users at

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82 Op.cit United Nations Economic and Social Council, (1984), Transnational Corporations in the Copper Industry of Zambia, p.22.

83 ibid p.23.

LME prices C.I.F. at European and Japanese ports. Contracts with credit risk consumers were made "first with the in-house merchanting companies who in turn resold the metal to the fabricators at LME prices plus cost of insurance and freight. The price differential sometimes as high as $80 per ton accrued to AAC and RST's private accounts."[84] The companies argued that the arrangement was intended to protect them from credit risk but as it was later discovered, "in fact, risks were limited by the opening of irrevocable letters of credit long before each shipment was made."[85]

Thirdly, end-users outside Europe in short supply of copper would contact LME merchant who would sell the metal at LME prices "plus prevailing ad hoc premium and cost of freight and insurance. The merchant would subsequently arrange for the copper to be shipped from Zambia while he made his payment to the in-house merchant."[86] Finally, the system used by the company regarding the quality of metal and time of delivery worked to the detriment of the Zambian Government. It was discovered that a "non-critical user, a brassmill for instance, would be persuaded to accept delivery of 102 quality copper, thus freeing the high quality product for selective customers fine wire drawers, for instance, willing to pay a premium price. A customer with large inventories would be persuaded to accept delivery at a later

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84 ibid.

85 ibid.

86 ibid.

date, thus freeing the shipment for a customer requiring immediate delivery at a premium price. Impure copper was also sold at a discount to affiliated merchant houses and, in turn, resold to refineries in Europe and elsewhere."[87]

In addition to the disadvantages noted above, it was generally agreed that the commission or fees provided for in the contracts were too high. During the press conference on the redemption of Zimco's bonds on 31st August 1973, the President Dr. K. D. Kaunda was able to state that the "Agreements give the minority shareholders the sole and exclusive right to provide sales and marketing services for the metals and minerals at a very high fee."[88] It is clear that by 1973, the Government had made preparations and was able to terminate the sales and marketing contracts. The president was able to state that "a new copper marketing company wholly owned by the Government should be established here in Zambia."[89] This resulted in the formation of Metal Marketing Corporation of Zambia Ltd (MEMACO), wholly owned by the Government to take over functions previously handled by the two private companies. The company is owned by Zambia

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87 ibid.

88 See Rahim MacBul and Broad Juliet, The Legislative Framework, Agreements and Financial Impositions Affecting the Mining Industry in African Commonwealth Countries, Commonwealth Secretariat, p.7.39.

89 Address by His Excellency The President Dr. K. D. Kaunda, at a Press Conference on the Redemption of Zimco Bonds, State House, Lusaka, 31st August 1973. For details see op.cit Rahim MacBul and Broad Juliet, The Legislative Framework, Agreements and Financial Impositions Affecting the Mining Industry in African Commonwealth Countries, p.7.40.

Industrial and Mining Corporation which is in turn wholly owned by the Government.

6.2 Performance

MEMACO has played a significant role in the marketing of Zambia's mineral resources. The most significant development is that Zambia is now in a position to ship its minerals directly to its customers. Major exports are electrolytic copper wirebars followed by electrowon cathodes (highly refined copper).[90] The company is making a significant effort to export more electrowon cathodes because according to the company's chairman, the copper industry is experiencing "structural changes" and has resulted into "outlets for wirebars to shrink".[91] As illustrated in Table VII:I,

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90 Chairman's Statement, Metal Marketing Corporation of Zambia Ltd. Annual Report, 1984, p.6.

91 ibid.

TABLE VII:2 Zambia's copper sales to leading customer countries 1976 - 79

Country	1976	1977	1978	1979
Japan	125	127	123	143
France	56	66	63	87
West Germany	122	107	89	75
United Kingdom	93	101	79	72
Italy	74	73	51	56
India	38	13	28	42
U.S.A.	108	57	41	22
China	20	23	22	21

Source: United Nations Economic and Social Council, (1984), Transnational Corporations in the Copper Industry of Zambia, New York, p.24.

the company sells minerals to eight major customers, namely Japan, France, West Germany, United Kingdom, Italy, India, U.S.A. and China.[92] Other customers include Belgium, Greece, Yugoslavia, Sweden, Indonesia, Pakistan, Kenya, Egypt, Malaysia and Zimbabwe.[93]

One of the most important aspect is that most of the country's lead and zinc products are sold to consumers in neighbouring countries. It is stated by the company's Chairman that most lead and zinc annual contracts "were concluded with customers in neighbouring countries who are showing a phenomenal growth potential as consumers of these metals. This is a welcome development as it augurs well for inter-regional trade in our part of the continent."[94] In order to be effective in the performance of its sales and marketing function, the company has sub-agents in a number of developed countries, e.g. Societe Commerciale de Metause et Minervais (Rene Aumas) in France; Metal Distributors (UK) Ltd. in India; Mario Alberti S.P.A. in Italy; Mitsubishi Corporation in Japan; Mitsubishi International Corporation (forwarding agents) in the US; and Metallgesellschaft A.G. in West Germany.[95] In the United Kingdom, it has a subsidiary company called Memaco Services Ltd.[96]

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92 ibid. p.8.

93 ibid. pp.8-9.

94 ibid.p.6.

95 ibid. p.32.

96 The company is incorporated in the U.K.

6.3 Evaluation

Although it could be said that the company has been successful, it is submitted that it faces a number of limitations. It is particularly difficult for a state marketing company, whose success depends on the capacity of the international market to offer better terms such as high prices, to influence the international market in favour of the developing mineral producing country. There is intense competition at the international copper market. The industry is also facing a serious threat from substitutes such as aluminium and plastics which serve as a deterrent to higher prices. Indeed, even major private copper mining companies have attempted to influence the market in their favour with little success. It is reported that in 1946, seven companies controlled 70 per cent of copper production and marketing. By "1978, ... their share had declined to 25 per cent."[97] Several factors contributed to this. First, during its early years, the copper industry was extremely profitable mineral. It is reported that copper companies, such as Kennecott in Chile, were able to realise a 40 per cent profit per year.[98] As a result, new entrepreneurs were attracted into the industry. Secondly, consumers and end-users

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[97] op.cit. United Nations Centre on Transnational Corporations, (1981), Transnational Corporations in the Copper Industry, p.1. The companies are: Kennecott Copper Corporation (U.S.); Anaconda Company (U.S.); Phelps Dodge Corporation (U.S.); Roan - AMC Group (U.S.); Anglo-American Group (S.A.); Union Miniere (Belgium) and Inco (International Nickel, Canada).

[98] See Moran H. Theodore, (1974), Multinational Corporations and the Politics of Dependence: Copper in Chile, Princeton University Press, New Jersey, p.29.

were able to finance the growth of new small copper mines in Africa, South America, Canada, and Asia.[99] Finally, due to the fact that ownership at the different stages of copper production is relatively diffuse, "Absence of marketing possibilities cannot be considered as constituting a substantial barrier to entry into the international copper industry" compared to certain other mineral industries.[100]

The consequence of these developments was considerably to weaken the monopoly power and influence of the original seven giant companies. Intense competition brought about by new entrants resulted into diminishing copper prices and earnings. Even if there was co-ordination among producers, it would be very difficult to introduce effective control over production. All these factors put more pressure on State marketing companies such as MEMACO. Giant private companies have failed to influence the market in their favour, it is inconceivable that State marketing companies can succeed. Lower copper prices benefits consumers who are mostly situated in developed countries while developing copper producing countries continue to experience diminishing earnings since they are dependent on the capitalist world market of the developed countries. In contrast, vertically integrated private mining companies are relatively secure. For instance, in the US, "about 70 per cent of copper production is sold to

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[99] ibid. p.34.

[100] op.cit. United Nations Centre on Transnational Corporations, (1981), Transnational Corporations in the Copper Industry, p.2.

subsidiary fabricators by the copper companies."[101] This enables the companies to sell the locally produced copper at prices set by the companies themselves. Under such a situation, prices are stabilised since this serves the interests of a vertically integrated industry.

The most serious threat to the copper industry of developing countries is substitution. In contrast with the private companies, developing countries are the most exposed in that they are dependent on the developed countries for their markets. It is stated by Sklar that the "European industry is becoming less copper-oriented and more inclined to use substitute materials."[102] The threat from substitutes force copper producing developing countries to introduce a producers price system in order to temper the inroads made by substitutes for copper.[103] This strategy in turn means diminishing earnings for developing countries. Notwithstanding these dilemmas, however, State marketing companies serve a useful purpose. They serve to satisfy nationalistic aspirations of the host developing countries in that the countries can feel that they have control and monitoring capability from the production phase right through to the marketing phase.

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101 See Richard L. Sklar, (1975), Corporate Power in An African State, University of California Press, p.75.

102 ibid.

103 For a detailed discussion on the attempt of giant private copper companies to starve off substitution, see op.cit United Nations Centre on Transnational Corporations, (1981), Transnational Corporations in the Copper Industry, p.3.

7 MODERN MINING TAX FORMULAE

The main objective of mineral taxation is to maximise revenue to the mineral producing country. The financial gain which host developing countries expect from their mineral resources constitutes a major factor in the development of the mining industry. The most appropriate way for capturing the maximum rent is for the State to own and operate its own mines. Where, however, the development of mineral resources is placed largely in the hands of private foreign investors, the influence of government policies on the private sector of the industry can be of major consequence. With regard to fiscal provisions, the host State must develop the most effective taxation system designed to capture the maximum rent from mining projects.

It is generally recognised by both the host country and private foreign investors that fiscal provisions constitute one of the most important aspects in mining agreements. The allocation of expected profits by the parties largely determine the advantages and losses of the parties in any mining agreement. A number of factors determine the distribution of benefits. These include the bargaining power of the parties; the determination of which party bears the initial costs and risks of prospecting and exploration; the financing and construction of the infrastructure; and the economic circumstances of the project (i.e. the profitability of the mining project). The resulting consequence is that fiscal regimes cannot be rigid and immutable schemes. They will always reflect the changing bargaining strength and weaknesses of the parties and the economic circumstances surrounding mining projects.

Mineral taxation has taken a variety of forms. Where mining operations are conducted by private foreign investors, the revenue the host country derives from such operations is generally in the form of fees, rentals and royalties, which are usually embodied in the general mining legislation, and taxes provided in the tax laws (or in some cases in individual mining project agreements). In most cases, income taxes have included taxes on interest, dividends, capital gains, and excess profits. For purposes of our discussion, taxation systems are discussed under seven main headings: fixed fee, royalties, income tax, dividends tax and capital gains tax, higher rates of income tax, progressive profit tax, and resource rent tax. Rentals or surface taxes and stamp duties are not discussed as they are considered to be less important. Moreover, rentals tend to cease immediately when commercial mineral production commences. The experience of three developing countries, namely Botswana, Indonesia and Papua New Guinea is discussed in detail.

7.1 Preliminary Issues

Before we discuss taxation systems in detail, a number of preliminary issues associated with taxation generally need to be pointed out. Major issues include problems associated with the computation of income tax generally, and deductions allowed by tax laws and mining project agreements in calculating net income. Each of these issues are briefly considered below.

7.1.1 Problems associated with computation of income tax

Most developing countries have enacted tax laws which contain complex clauses designed to realise a growing share of revenue from mining operations. The imposition of taxes has resulted in a significant increase in the burden on the administrative capacity of host states. In order effectively to assess income tax, host states must be able to verify the sales price of the minerals and the calculations for deductions of expenses that are charged against gross income. In many cases, the transactions which lead to the income or expenses are with entities affiliated with the foreign private investor. Furthermore, in order to arrive at taxable income, taxing authorities must calculate not only gross income based on the selling price of the minerals but also gross operating costs. The computation of operating costs may present some problems especially when large volume of sales, purchases of goods and services, and even loans are arranged with other vertically integrated companies.[104]

Under such circumstances, taxing authorities have used various methods to approximate arm's length prices in order to determine the affiliate's taxable income. For instance, the mining agreement between Indonesia and P.T. Rio Tinto Indonesia provides that all mineral sales made to affiliates are to "be made only at prices based on or equivalent to arm's-length sales and in accordance with such terms and conditions at which such agreement

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[104] For details see David Smith N. and Louis T. Wells, (1975), Negotiating Third-World Mineral Agreements, Bellinger Publishing Company.

would be made if the parties had not been affiliated."[105] The terms of the agreement further state that open market price is to be used in the calculation of gross income. If the private foreign investor sells mineral products to affiliates at a price different from the open market price, the price to rule for tax purposes is that which would have ruled on the open market if the open market price is higher than the recorded transfer price.

However, there may be some obstacles in situations where a meaningful quoted market price does not exist. Indeed, even in a situation where free market prices exist, these may turn out to be marginal in the sense that the major volume of transactions are based on long-term, unquoted contract.[106] This is likely to present considerable obstacles to the host government. Some host countries have attempted to minimise this problem by adopting a formula based on what has become to be referred to as "cost plus reasonable profit or reasonable return on capital."[107]

7.1.2 Deductions for calculating net income

Most taxation legislation and mining project agreements contain provisions which determine deductions to be allowed in the

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[105] See United Nations Centre on Transnational Corporations, (1983), Main Features and Trends in Petroleum and Mining Agreements, New York, p.119.

[106] See Richard L. Sklar, (1975), Corporate Power in an African State: The Political Impact of Multinational Mining Companies in Zambia, University of California Press, p.52.

[107] See United Nations Centre On Transnational Corporations, (1978), National legislation and Regulations Relating to Transnational Corporations, New York, p.4.

calculation of net income subject to taxation. The deductions vary considerably from country to country and from industry to industry. Therefore, there is no established list of standard deductions because much depends on the particular industry and the tax system of the relevant host country. These deductions include depreciation, amortization, and depletion. Also some payments made by private foreign investors to their affiliates may be accepted as deductible items.

In the case of depreciation, taxation legislation and mining project agreements allow private foreign investors to take as an expense of doing business each year a sum that is intended to represent a cost of capital equipment. The reasoning behind the concept of depreciation is that capital deteriorates in value, therefore, the loss of value should be charged against profits. This has resulted in cash outflow for taxes being reduced since profits stated in the books of the private foreign investor become lower than they would otherwise be. The common practice has been to estimate the life of an asset and allow the write-off to occur in equal amounts each year until the asset reaches its scrap value. For instance in Papua New Guinea, the mining project agreement between the Government and Dampier Mining Company Ltd provides that for income tax purposes, "during the past 10 years of commercial production the life of the mine will not be considered to be longer than 15 years."[108] In contrast, the agreement between Indonesia and P.T. Rio Tinto Indonesia

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[108] Op. cit., United Nations Centre on Transnational Corporations, (1983), Main Features and Trends in Petroleum and Mining Agreements, p.93.

provides that depreciation (and amortization) rates are to be computed" on a straight-line basis of 12.5 per cent per year; there is allowance also for electing an accelerated depreciation rate in any one year of the first four years of possession of the assets."[109]

In most cases, depreciation is used for purposes beyond those that simply reflect the using up of assets. It is used to grant incentives to private foreign investors to postpone taxes in order to allow the write-off of assets quickly. Apart from allowing depreciation for fixed assets (capital equipment), most tax laws allow deductions in recognition of the decline in value of intangible assets, including the costs of developing the mine. Such deductions, in most cases, have often been referred to as amortization and depletion deductions. Therefore, for the purposes of our discussion, amortisation is used to describe the write-off of capitalised expenditures that do not represent fixed tangible assets subject to depreciation. Some agreements specify the number of years over which development costs may be written-off, while others provide for the write-off of those costs in equal annual installments over the life of the mining project.[110]

The agreement between Indonesia and Rio Tinto, cited above, provides the company with an investment allowance of 20 per cent of the total investment, deducted from taxable income at the rate

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[109] ibid.

[110] ibid.

of 5 per cent per year.[111] In addition to the 20 per cent deduction which may be referred to as depletion allowance, amortisation rates are computed at 12.5 per cent per year. The agreement between Chile and the Campania Minera San Jose, S.A. provides the company with an option "to treat all pre-production expenses as start-up expenses and to amortise them in equal installments over five years from the commencement of commercial production."[112] Finally, the uranium agreement in Niger, discussed above, provides that the company is "entitled to a depletion allowance that is not to exceed 10 per cent of total shares, or 33 per cent of net taxable income" on condition that such allowances are reinvested within three years otherwise they can be considered as taxable income.[113]

It is important to note that the difference between amortisation and depletion is very minimal. In most cases, depletion refers to the cost of acquiring and bringing up a natural resource deposit into production. The cost may include, for example, geological surveys, exploration expenses, costs of constructing the infrastructure and any costs incurred up to the commercial production phase.

7.2 Types of Mineral Tax

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[111] ibid.

[112] ibid. p.115.

[113] ibid. p.108.

There are several ways of capturing mineral rents from the exploitation of mineral resources. It is important to note that there is no standard format for mineral taxation. Furthermore, it is also important to note that mineral taxes have been referred to by several names, therefore, the names used in this section may differ from names used by other authors. However, what is important is to describe and analyse substantive issues involved in mining taxation. As long as the concepts discussed are the same, names ascribed to them do not matter much. What follows is a discussion of different types of taxes employed by States in order to capture mineral rents.

7.2.1 Fixed Fee (FF) System

The fixed fee system is mainly applied to the petroleum industry. As applied in the US, the fixed fee is a charge paid by the private investor for the rights to undertake exploration and development in a given area. It is submitted that the charge is analogous to rental fees and royalty charges. The only difference is that in the case of a fixed fee system, private investors have an option to pay a lump sum. However, it is stated by Garnaunt and Clunies that payment "may be spread over time."[114] The fixed fee system has a number of limitations. In most cases, the State may not be in a position effectively to evaluate the potential of the area being charged. Furthermore, the system is likely to result in serious political consequences in that any subsequent discovery of a commercial mineral deposit

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[114] ibid, p.91

by the private foreign investor is likely to be interpreted by government opponents as a give away. Moreover, the host State is likely to be put at a disadvantage because it generally does not have the technical capability to evaluate the potential of mineral resources in its territory. In addition, the fixed fee system seems to resemble the discredited traditional concession system in that the government is likely to sell the nation's mineral resources without evaluating their potential value.

Given the fact that it is possible for the investor to pay for his rights in a lump sum, the government is likely to exhaust the revenue while the private investor continues to make super profits from the exploitation of the mineral resources. It has been stated that the fixed fee system may only be appropriate "for the sale of exploration, as distinct from extraction, rights and for small-scale unorganized mining activity."[115] The fixed fee system is used in the US "as a means of distributing the rights to extract offshore oil and gas, and also onshore oil and gas from established fields. It is commonly regarded as a successful method off the US mainland."[116] The system may only be appropriate for a developed country where political pressure may not be experienced by the government once the discovery of minerals turns out to be far valuable than the fee paid by the private investor. Indeed, even here, the success of the system will depend on a number of factors such as the "high degree of competition among investors" to enable the state to introduce

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115 ibid

116 ibid

competitive bidding, and reasonable certainty of the property which is being sold.[117] However, these problems may be minimised by raising the rate of income tax once production commence.

7.2.2. Royalties

The royalty system is based on ownership. As owner of the minerals, the State has a right to impose a levy for the depletion of its mineral resources. Another important feature of a royalty system is that it guarantees a certain payment to the State for the depleted mineral resources, regardless of the mining projects' profit or the world market price for the minerals. As long as production and sales last, the State continues to receive revenue. The royalty may be based on a physical unit of production or shipment, or on the value of minerals produced. There is no standard format for levying royalties. There is also limited standards for appropriate levels of royalties even within particular industries. In addition, royalties have been used by States to achieve a number of objectives such as encouraging domestic processing of minerals by offering lower rates, and encouraging private investors not to ignore low-grade ore. Furthermore, the royalty rate variations reflect the complexity of tax arrangements since royalties have been combined with income tax. All these factors partly explain why there is wide variations in methods and rates of levying royalties. These are briefly discussed below.

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117 ibid, p.92

A number of developing countries still levy royalties based on a physical unit of production. These include Sierra Leone - Le 0.55 for each ton produced[118] and Jamaica - $J 0.50 for each ton produced.[119] On the other hand, countries which base their royalties on value include Papua New Guinea - 1.25 per cent on the sum of f.o.b. revenue;[120] Tanzania - 5 per cent of the sales value;[121] Indonesia - 3.6 per cent, (in some cases, a sliding-scale royalty is employed. The rate is increased or decreased "in the direct proportion that the current sales prices differ from the reference prices set out in the agreement");[122] Botswana - 3 per cent on sales revenue;[123] and Colombia - 15 per cent.[124] Royalties based on physical units of production are easiest to administer since they do not involve price determination. The only drawback is that they are likely to decrease in real value, especially in the face of inflation over the life of a mining project. It is mainly for this reason that many developing countries have abandoned the physical unit basis

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118 Op.cit, United Nations Centre on Transnational Corporations, (1983), Main Features and Trends in Petroleum and Mining Agreements, p.85

119 ibid, p.91

120 ibid, p.94

121 Op.cit, Garnaut Ross and Anthony Clunies Ross, (1983), Taxation of Mineral Rents, p.273

122 Op.cit, United Nations Centre on Transnational Corporations, (1983), Main Features and Trends in Petroleum and Mining Agreements, p.118

123 Op.cit, Garnaut Ross and Anthony Clunies Ross, (1983), Taxation of Mineral Rents, p.271.

124 Op.cit, United Nations Centre on Transnational Corporations, (1983), Main Features and Trends in Petroleum and Mining Agreements, p.111

in favour of a royalty based on value. However, the administration of a royalty based on sales price is likely to present considerable problems. Many private foreign investors sell their output to affiliated customers. The price at which such a transfer takes place within the enterprise is likely to affect the amount due to the host country.

Finally, the royalty system has a number of limitations. In practice, royalties have seldom represented a significant portion of State revenue. In addition, a commitment to a high rate of royalty is not favoured by private foreign investors since this is likely to represent an additional cost of extraction. It is the cost that is incurred whether the mining project is profitable or not.

7.2.3. Income Tax

The general shift from royalties to income taxation was probably the most significant development in the history of mining taxation. In contrast to royalties and other fixed payments, payments based on net income or profit are regarded by private investors as the least onerous means for capturing mineral rents. The main reason for this is that income tax does not significantly affect the profitability of mining projects in the same way as other payments discussed above. The concept of income taxation presumes that profits will be made and seeks to increase taxation on higher yield. If there are no profits, private investors are under no obligation to pay tax to the host State. Private investors incur significant obligations only if profits are high.

It is important to note that in some cases, higher income tax rates do not necessarily mean a higher income for the host State. The government take, in most cases, depends on how the taxable base is calculated. Factors that determine the benefits of the parties include the form, timing, and manner of deductions. Faster depreciation and early write-off of expenses means quicker capital recovery by the private investor and reduced income to the host State during the initial period of the mining project. Therefore, the allowances and deductions available to private investors on gross income may result in very little State income in the early years of the mining project. The philosophy behind this state of affairs is that private investors should be attracted by a minimum rate of return on invested capital and cost recovery before profit sharing with the host State takes place.

Most developing countries are tempted to raise income taxes to the highest level in order to obtain revenue to effect social reforms and economic development. It is for this reason that income taxation has become the most important element in the mining agreements between host States and private foreign investors. It is stated that initially, income tax rates were low "25 to 30 per cent and were conceived merely as an additional readjustment of royalties, taxes rapidly became the main device for income-sharing. Today, virtually every new mining project is taxed at approximately 50 per cent."[125] However, if income tax is raised, this is likely to discourage private foreign investors

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[125] op. cit., Erich Schanze and Others, (1981), Mining Agreements in Developing Countries, p. 158.

from investing in the country. The high rate of taxation is also likely to raise operating costs of the mining projects.

In Botswana, taxation of income is governed by the Income Tax Act Chapter 52:01. Income tax is based on income after deducting such items as capital and operating costs (or costs of production). All companies, resident and non-resident are taxed at the same rate of 35 per cent of their taxable income. Taxable income is defined as "the gross income less any amounts exempt from tax (the assessable income) less the cost of production of assessable income (chargeable income) less any dividends paid by a resident company to resident shareholders who are chargeable to tax on such dividends."[126] Items included in the calculation of gross income are commercial royalties; entertainment fees; management and consultancy fees; and dividends and interest arising in Botswana or "in the Rand Monetary Area".[127]

The following deductions are allowed (1) operating costs - in the case of mining companies, these can be written off and carried forward indefinitely; (2) interest on loans incurred in the production of the taxable income - provided the interest rate is reasonable; (3) payments made to approved pension funds and annuities paid to retired employees; (4) expenditures incurred in scientific research; (5) legal expenses, trade union and association subscriptions; (6) excess value of any stock held at

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[126]See United Nations Centre on Transnational Corporations, (1986), National legislation and Regulations Relating to Transnational Corporations, vol. IV, New York, p. 10.

[127]ibid.

the beginning of the tax year over the value at the end of the tax year; and (7) costs incurred in acquiring rights to use designs and trademarks. The amount claimed annually is 4 per cent of the total or the total amount divided by the number of years of use, whichever is the greater.[128]

The imposition of income tax has created conflicts between private foreign investors and host developing countries. Income tax is a species of long term contract which has to reconcile two apparently conflicting needs: stability and evolution. These two needs are, in fact, two interdependent conditions in any mining project agreement. The need for stability arises from the importance of income tax to the parties concerned, namely, the host State and private foreign investors. To the host State, economic development and social progress, in most cases, largely depend upon their mineral income and production. However, a fixed rate of income tax can work at the disadvantage of both parties. If mineral prices are high and income tax rate is low, the host State tends to lose out. On the other hand, if income tax rate is raised and prices fall, the private foreign investor tends to lose out. Some countries, including Botswana, have attempted to minimise these problems by establishing a stable fiscal framework that strives to obtain a high share of mineral rent to the host State while at the same time ensuring private foreign investors an equitable return on their investments commensurate with their risk. This is discussed in detail under relevant sections below.

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[128] ibid.

7.2.4 Dividends Tax and Capital Gains Tax

Dividends paid abroad are usually subject to tax generally known as withholding tax. There is a wide variation of rates from country to country. For instance, the Ivory Coast and Nigeria are among the countries which levy a lower rate, 12 per cent and 12.5 per cent respectively.[129] On the other hand, Kenya, Egypt and Brazil are among the countries which levy the highest rate. Kenya and Egypt levy 20 per cent and 40.55 per cent respectively.[130] In Brazil, the lowest rate is 25 per cent. However, this rate is conditional to the fact that "profits remitted abroad do not exceed 12 per cent of the registered investment."[131] If the profits remitted abroad constitute more than 12 per cent of the registered investment, then "a graduated dividend tax, ranging from 40 per cent to 60 per cent, comes into effect."[132]

Finally, some countries regard capital gains as normal corporate earnings and therefore taxable. There are two methods of levying capital gains tax. Some countries employ a fixed rate, for instance, in Egypt and Nigeria, capital gains tax is levied at

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[129] See United Nations Centre on Transnational Corporations, (1983), National Legislation and Regulations to Transnational Corporations, New York, p. 28.

[130] ibid. For Egypt, see also Law No. 157, 1981.

[131] Op. cit., United Nations Centre on Transnational Corporations, (1983), National Legislation and Regulations Relating to Transnational Corporations, p.38.

[132] ibid.

39.7 per cent and 20 per cent respectively.[133] Other countries vary the rate "depending on the period of time the asset involved has been held."[134] In Ghana, the rate is 55 per cent for assets held "less than five years, and 15 per cent for those held over years."[135]

7.2.5 Higher Rate of Income Tax (HRIT)

A number of developing countries have opted to tax an additional tax on mining by taxing profits "at a higher-than-normal rate."[136] This section discusses the system of HRIT as it is applicable in a developing country, namely, Botswana.

In Botswana, the most important mining project agreement was entered into between the Government and De Beers (through its De Beers Botswana Mining Company Ltd of which it owns 50 per cent - the other half is owned by the Government). The agreement was negotiated between De Beers and the Government of Botswana and ratified by the National Assembly in 1970.[137] The mining project agreement led to the development of a diamond mine at Orapa. Commercial production began in 1971. The initial fiscal provisions were negotiated ad hoc between the Government and De

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[133] ibid.

[134] ibid.

[135] ibid.

[136] Op. cit., Garnaut Ross and Anthony Clunies Ross, (1983), Taxation of Mineral Rents, p. 94.

[137] See Christopher Colclough and Stephen McCarthy, (1980), The Political Economy of Botswana, Oxford University Press, p. 151/

Beers. It set out the royalty and taxation provisions, and provided for the Government to acquire a 15 per cent equity free of consideration and the remainder owned by De Beers. Another important aspect of the agreement is that it incorporated a clause which provided for renegotiation in "abnormal circumstances".[138] In 1974, the Government evoked the clause and demanded a renegotiation. Although it is not possible fully to assess the fiscal provisions of the agreement because such information is regarded by both the Government and De Beers as confidential,[139] some of the information is available.

Renegotiations centred on four main issues: the extent to which the Government was entitled to acquire additional equity in the operating company; the royalty payable by the company; the tax structure; and the sharing of excess profits in the event of the project being more profitable than anticipated. After what has been described as "hard and acrimonious bargain,"[140] the Government and De Beers reached an agreement in 1975. The rate of royalty payments was not specified because, according to some sources, "the Government considered this the most suitable instrument to share in any excess profit, above the target rate

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[138] ibid.

[139] It has been stated that due "to the relationship between the government and De Beers over the economics of the diamond mining industry in Botswana, it is not possible to estimate accurately the rents or the revenues, that accrue to government from the diamond mines." See Stephen R. Lewis Jr, (1981), "The Potential Problems of Diamond-Dependent Development" as chapter 2 of Charles Harvey (ed.), (1981), Papers on the Economy of Botswana, Heinemann, London, p. 15.

[140] See op. cit., Christopher Colclough and Stephen McCarthy, (1980), The Political Economy of Botswana, p. 151.

of return, which the company might make."[141] With regard to income taxation, it has been stated that the Government "used its negotiating strength to avoid any special tax arrangement at all."[142] De Beers is currently subject to normal tax legislation as it applies from time to time. In addition, the Government acquired an additional 45 per cent of equity in the operating company free from consideration, bringing the total share held by the Government to 50 per cent.

In order to avoid any potential conflict in the future, it is reported that the Government reached an agreement with De Beers and set up an undisclosed target rate of return. It is believed that the target rate of return is about 25 to 33 per cent. It is stated by Hartland Thunberg that "Others in the Gaborone business community contended that De Beers had already recovered its full investment in Orapa at the time of renegotiation. They argued that 25 to 33 per cent of operating profits after the full return of principal was still a tidy yield."[143] The Government considered that once the target rate of return was reached and if the project turned out to be more profitable, then taxation rates should be adjustable from time to time. It is believed that the Government receives 65 to 70 per cent of the gross profits through a combination of royalties, dividends, and income taxation.[144]

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[141] ibid, p. 153.

[142] ibid.

[143] See Hartland Thunberg Penelope, (1978), Botswana: An African Growth Economy, Westview Press, p. 50.

[144] ibid.

The mining project has been extremely profitable than was anticipated. This is partly due to the fact that diamond prices have been unusually high. It is stated that "diamond prices have risen by leaps and bounds, being in 1978 about three times what they were in 1971."[145] As illustrated in Table: VII:I, during the six year period from 1971 to 1976, gross profit has been p.102 million, "of which the Government has taken 52 per cent in taxes, dividends, and royalties."[146] It has also been stated by Lewis that the "economic rents accruing to government from diamonds represent 6 - 7 per cent of GDP."[147]

TABLE VII:3 Operations of De Beers Botswana

Gross Profit less retained profit in P. Million	1971	1972	1973	1974	1975	1976
Accruals to Bot. Govt.	0.2	2.8	6.2	9.7	18.2	15.6
Accruals to De Beers	0.7	11.0	10.3	4.8	4.9	5.2

Source: Christopher Colclough and Stephen McCarthy, (198), The Political Economy of Botswana, Oxford University Press, p.150.

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145 Op.cit, Christopher Colclough and Stephen McCarthy, (1980), The Political Economy of Botswana, p.149

146 ibid

147 Op.cit, Stephen R. Lewis Jr, (1981), "The Potential Problems of Diamond - dependent Development" as chapter 2 of Charles Harvey (ed.), (1981), Papers on the Economy of Botswana, p.16

7.2.6 Progressive Profit Tax (PPT)

The shortcomings of the conventional income tax system has forced a number of developing countries to look for alternatives to improve it. The major disadvantage of income tax is that it suffers from the cyclical volatility.[148] Prices for most mineral resources such as copper, for instance, are subject to considerable fluctuation which in turn affects the level of profits. As a consequence, if income tax rates are fixed, the private foreign investor is likely to incur a loss or make minimal profits when mineral prices are low. On the other hand, when mineral prices are high, the private foreign investor is likely to enjoy what has come to be referred to as 'windfall profits'. In an attempt to redress this potential conflict, a number of developing countries, notably Indonesia and Papua New Guinea, have adopted the progressive profit tax (PPT) system.

It is important to understand the concept of the PPT before we discuss it in detail. The PPT is imposed by the State on pure profit or income which represents exceptionally high returns on mineral exploitation. There are two main instances under which the tax is imposed, namely when returns

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[148] Op.cit, United Nations Centre on Transnational Corporations, (1983), Main Features and Trends in Petroleum and Mining Agreements, p.76

are exceptionally high and when profits are high due to increases in mineral prices. If the tax is imposed as a result of high returns, the tax is usually referred to as 'excess profit tax'.[149] On the other hand, if the profits are due to a "substantial rise" in the price of minerals, the tax is usually referred to as 'windfall tax'.[150] Therefore, the PPT may be defined as a tax that is triggered by income in excess of a stipulated rate of return. The common principle underlying this tax is that any income which exceeds a reasonable rate of return will be subject to additional tax. This serves as a means of government participation in the income of private investors that exceeds a reasonable rate of return. In its simplest form, it may be regarded as taxation of profits that remain after deduction of the normal company income tax and an additional income which corresponds to the minimum rate of return necessary to attract private investment.

The PPT offers a number of advantages. It is mainly based on the concept of minimum rate of return on invested capital. This offers some advantages to both private foreign investors and host countries. The minimum rate of return offered by the PPT is usually preferred by private foreign investors since it ensures stability of the rate of return on invested capital. In addition, it provides a fixed framework which

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149 For a general discussion see generally Kameel Khan I.F, (1988), "Petroleum Taxation and Contracts in the Third World: A Law and Policy Perspective", Journal of World Trade, vol.22 No.1, February, pp.67-88 at p.78

150 ibid

may be adjusted to different levels of profitability. If universally applied by the host State, negotiations over each mining project or with each investor becomes no longer necessary. Moreover, it has a potential of encouraging prospecting and exploration as private investors know in advance the tax which will apply to them.

Furthermore, the PPT system enables private foreign investors to repay capital loans within a short period of time as it affords lower initial tax rates during the period of investment recovery. The tax rate is then increased after the private foreign investor has recovered his initial investment capital and has also achieved a minimum rate of return. The tax system also guarantees the private foreign investor against unilateral future tax increases by the host State. It also offers some advantages to the host country in that it ensures the State an equitable rate of return from the exploitation of its mineral resources. Similarly, it minimises potential conflicts between private foreign investors and host developing countries that are characterised by the conventional income tax system. In order to appreciate the effect of PPT, it is necessary to discuss how it operates in reality. The experience of two countries, Indonesia and Papua New Guinea is discussed.

In Indonesia, mining companies are taxed at the standard rate of 45 per cent. The mining project agreement entered into in 1977 between the Government and P.T. Rio Tinto Indonesia (the equity of the company is held by Conzinc Riotinto of Australia Ltd and Rio Tinto Zinc Corporation Ltd) introduced

the PPT system into the agreement. The tax provision provided that the company was to be subject to prevailing Indonesian rate.[151] During the first 10 years after the commencement of mining operations, the company is subject to 35 per cent annual corporate tax rate, increased to 45 per cent thereafter. An investment allowance of 20 per cent is provided and is deducted from taxable income at the rate of 5 per cent per year. Interest payments on loans are also deductible provided that such interest does not exceed "the generally applicable market rate at the time of borrowing."[152] In order for the deduction to be eligible, at least 40 per cent of the mining project's long term capital should be treated as equity.

The most important provision refers to the payment of additional profits (windfall profits) tax "when high profits resulting from extraordinary increases in the price at which the company's products are sold are realized."[153] The tax becomes payable when the company's profits exceed a 15 per cent rate of return "on total funds invested."[154] For the purposes of the PPT, total funds invested is defined to include (1) total invested capital at the commencement of operations, depreciated at 10 per cent; (2) replacement

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[151]Op. cit., United Nations Centre on Transnational Corporations, (1983), Taxation of Mineral Rents, p. 222.

[152]ibid.

[153]ibid, 119.

[154]ibid, see also op. cit, Garnaut Ross and Anthony Clunies Ross, (1983), Taxation of Mineral Rents, p. 222.

capital; (3) the capitalised and depreciated exploration expenditures; (4) net current assets at the end of the year of liability; (5) initial capitalised value of non-replaceable infrastructure outside the mining area and the value of replacement capital; and (6) an annual adjustment of initial capital (1) and replacement capital (2) "based on the export price index of manufactured goods reported in the United Nations Bulletin of Statistics."[155] The additional profits tax is assessed at the rate of 60 per cent on any profits in excess of a 15 per cent rate of return (See Appendix VII:1).

In the case of Papua New Guinea, a conventional income tax was applicable before the introduction of the PPT system. The first significant mining project agreement was the Bougainville Copper Agreement negotiated in 1967 by the then Australian colonial administration.[156] The Bougainville copper and gold mine is owned by Conzinc Riotinto of Australia (a subsidiary of Rio Tinto Zinc Corporation) through its operating company called Bougainville Copper Ltd. After the discovery of a commercial ore, construction began in 1969 and by 1972 the mine began production.[157] Before

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[155]Op. cit, United Nations Centre on Transnational Corporations, (1983), Main Features and Trends in Petroleum and Mining Agreements, p. 119.

[156]For a detailed discussion see Caroline Studholme, (1981), The Legal Regulation of Mineral Exploitation in Developing Countries: A Study in Dependent Development, June, unpublished LL.M. dissertation submitted to the University of Warwick, Coventry, UK.

[157]Op. cit, Garnaut Ross and Anthony Clunies Ross, (1983), Taxation of Mineral Rents, p. 228.

the renegotiation in 1974 the agreement was extremely advantageous to the company. It provided for a fixed royalty of one and a quarter per cent of the sale price of minerals and for 20 per cent government equity.[158] Furthermore, it provided for a three year tax holiday and 20 per cent of the company's income was exempt from income taxation. The entire capital expenditure could be written off at the end of the tax holiday period. After this period, the company was required to pay a low rate of tax at 25 per cent for a period of ten years and rise gradually to 50 per cent thereafter. In actual fact, the effective rate could have been 20-40 per cent if the 20 per cent income tax exemption is taken into account.[159] Import duty on "items purchased by the company were frozen at their low 1967 levels, as were a wide range of other taxes and charges."[160] Finally, the government provided a substantial subsidy to infrastructure for the benefit of the company and no withholding tax was provided.

It has been observed that had the agreement been preserved, the company could have recovered its capital including interest by 1974. In addition, no income tax would have been payable "until the early 1980s."[161] Not surprisingly, the agreement could hardly have survived the demise of colonialism. In 1972, the new government introduced a

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[158] ibid. p. 234.

[159] ibid.

[160] ibid.

[161] ibid.

dividend-withholding tax at the rate of 15 per cent. Serious negotiations began in 1973, after the granting of internal self-government, with a view to effect radical changes of the fiscal provisions. An agreement was finally reached in 1974 and introduced radical changes.

Under the 1974 Bougainville Amendment Agreement Act, financial provisions were incorporated under Clause 7.[162] The agreement abolished the automatic 20 per cent exemption from income taxation; abolished the three year tax holiday; and introduced a completely new system of taxation, the PPT. The Government was enabled to introduce income tax in general legislation. Mining taxation introduced by the Government combines income tax with progressive profit tax. Mining income or corporation tax is assessed at the rate ruling generally from time to time. Before the initial investment is recovered, the rate of corporation tax is limited to 35 per cent. After the recovery of the initial capital, the rate rises to 36.5 per cent. Capital is defined as "sales revenue less the sum of capital expenditure and operating costs."[163] In addition, the agreement provides for PPT. The part of income in excess of 15 per cent "of an agreed 'capital base' [is] taxed at a total rate of 70 per cent." The 'capital base' is an "agreed figure roughly corresponding to capital expenditure incurred up to the beginning of 1974,

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[162]For details see op. cit, Caroline Studholme, (1981), The Legal Regulations of Mineral Exploitation in Developing Countries: A Study in Dependent Development, pp. 225-227.

[163]Op. cit., Garnaut Ross and Anthony Clunies Ross, (1983), Taxation of Mineral Rents, p. 233.

net of interest capitalised during construction and of depreciation on items being replaced."[164] The sum is varied each year according to the formula having the effect of adjusting the 'capital base' for changes in the average value of the country's currency against the US dollar, augmented by the "amount of new capital expenditure, and deducting from it depreciation on capital items being replaced."[165]

It has become clear that the PPT system has some advantages in that it automatically captures, for the hose State, a high share of the resource rent. If applied nationally, it has a potential of reducing the administrative burden. Finally, another major attraction of the PPT is that marginal projects are not threatened by the introduction of the tax system because they are taxed according to their level of profitability.

7.2.7 Resource Rent Tax (RRT)

The concept of a resource rent tax is similar to the PPT discussed above. Indeed, in some cases, it has been described as the PPT. For instance, the United Nations Centre on Transnational Corporations refers to it as RRT or "additional profit tax."[166] Even Garnaut and Clunies who are

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[164] ibid, p. 235.

[165] ibid.

[166] See United Nations Centre on Transnational Corporations, (1987), Financial Aspects of Petroleum Exploitation, New York, p. 23. Kameel also states that "A tax which has become well known (Footnote Continued)

regarded to have initiated the application of the tax to mineral resources seem to regard it in the same way. For example, in their discussion under the PPT, they state that the "principle of the PPT has been applied recently to the copper, gold, and silver project of Bougainville Copper Ltd., in Papua New Guinea (since 1974)."[167] And yet when discussing mineral rent taxation in Papua New Guinea, it is stated that "RRT rate is (70 - n) per cent of net cash flow after income tax, where n is the rate at which income tax is assessed."[168] Under the same section, it is stated that "Company income [i.e. Bougainville Company] was to be subject to a PPT, so that the part of income in any year that was in excess of 15 per cent of an agreed 'capital base' would be taxed at a total rate of 70 per cent."[169]

However, it is submitted that the difference between the two tax systems is that the PPT operates together with corporation tax whereas the RRT operates independently of any other tax. It has been stated that the RRT "allows the investing company to achieve a threshold rate of return on its investment before tax is payable."[170] Like the PPT, the

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(Footnote Continued)
over recent years is Resource Rent Tax. This is also called an additional profits tax.' See op. cit, Kameel Khan I.F., (1988), "Petroleum Taxation and Contracts in the Third World," p. 78.

[167] Op. cit, Garnaut Ross and Anthony Clunies Ross, (1983), Taxation of Mineral Rents, p. 97.

[168] ibid. p. 233.

[169] ibid. p. 235.

[170] Op. cit., United Nations Centre on Transnational Corporation, (1987), Financial and Fiscal Aspects of Petroleum, p. 25.

RRT is levied on the private investor's net cash flows after the specified rate of return has been achieved. This is done by employing a specified threshold rate of return to compound forward the private investor's net cash flows. The cash flows will "initially be negative as they represent the exploration appraisal and development activities. The accumulated total thus becomes a larger and larger negative figure. When production starts, the compounding process continues and the accumulated total figure attains a lower and lower negative value. Eventually the accumulated total becomes positive. When this happens, the RRT is levied. It continues to be levied on the positive annual net cash flows."[171] This is illustrated in Appendix VII:2.

The RRT has the following features "(1) no deductions for interest payments, (2) immediate 100 per cent deduction of all capital expenditure, and (3) unlimited carry-forward of losses bearing interest at the threshold rate of return."[172] The threshold rate of return is usually specified in two parts, namely the market rate currently available and the return to reflect the risks of the investment. For instance, Tanzania employs the US Consumer Price Index plus a "real return of 17 per cent."[173] Another method is the same US

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[171] ibid.

[172] See Parlmer Keith F., (1980, "Mineral Taxation Policies of Resource Rent Tax," International Monetary Fund Staff Papers, vol. 27, pp. 517-542 at p. 527.

[173] Op. cit, United Nations Centre on Transnational Corporation, (1987), Financial and Fiscal Aspects of Petroleum, p. 25.

price index plus 22 per cent.[174] On the other hand, Papua New Guinea employees the US prime rate. In addition, the RRT enables the State to devise a multi-tier scheme whereby further tax is levied as the achieved rate of return increases. This will mean that rates of return will be higher than that employed by the first tier. For instance, if the first tier uses a threshold rate of 15 per cent and taxable at 50 per cent, the second tier could use a higher threshold of say 25 per cent which could be taxed additionally at say 70 per cent. This means that in principle, there can be several tiers of RRT.

This tax offers a number of advantages. It enables private investors to recover their capital plus profit return before the tax is levied. Since it taxes only the economic rent of a mining project, it enables the host State to take a large part of the profit without jeopardising the investment. In addition, it enables all mining projects to be viable economic propositions and be profit creating. Marginal projects are not affected because there is a guaranteed return on invested capital. Another advantage of the RRT is that it has an in-built self-adjusting mechanism. It automatically changes to allow profitability to the private investor regardless of changes in the price of minerals and cost conditions. Therefore, the RRT incorporates both flexibility and adjustability into a fiscal regime. It is

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[174] ibid.

also an attractive incentive for the private investor especially during the period of uncertain mineral prices.

Notwithstanding the advantages which the RRT system offers, it also has a number of limitations. First, the effective application of the RRT, as is the case in all taxes, requires effective monitoring of intra-firm transactions of vertically integrated private multinational companies. Monitoring is likely to impose an additional burden on the administrative machinery of the host country. Secondly, the minimum rate of return (supply price of investment) may not necessarily be universal in all situations. Different investors perceive the adequacy of the supply price of investment at different rates. In addition, the supply price of investment may not necessarily be the same in all minerals, or even within the same industry since the location of the project, the cost of production, the size, and ore grade will all have an impact in determining the supply price. Thirdly, the application of the RRT without being supplemented by other taxes may be politically unacceptable to most developing countries. A tax free period especially when profits and mineral prices are high is likely to put pressure on the government notwithstanding the fact that the RRT is likely to obtain a large share of revenue in the future. The other danger is that mineral prices may dramatically drop immediately after the private foreign investor has obtained his minimum rate of return. It may also be possible that minerals may be exhausted before the host government receives revenue from the mining project, especially if mineral prices fall and prolong the tax free period. For these reasons, it is best

to combine the RRT with the standard company income tax, deductible when assessing the RRT.

In spite of the limitations discussed above, the RRT meets most of the criticisms that have been said about the conventional income tax. It offers the possibility of being able to extract economic rents while, at the same time, ensuring that private investors are not deterred from investing in the mining industry. It also strives to increase mutual goodwill and understanding between the parties. It can make it possible, in most cases, for the parties to solve their problems and conflicts of interest in an orderly manner. In sum, although there may be no tax system that can eliminate the tensions between developing countries and private foreign investors, a properly designed tax system such as the RRT can do much to minimise and improve the environment for a stable and mutually beneficial relationship between the parties.

8 CONCLUSION

It has become clear from our discussion above that mining agreements, regardless of their form, are an important symbol of the changing relationship between foreign investors and host developing countries. It has also become clear that the objectives of host developing countries are not merely to require government participation and to maximise financial returns while remaining dormant partners in the industry. Rather, host developing countries seek to be active partners in mineral exploitation, retaining control of the nation's

mineral resources and assuring future development for maximum ultimate benefit. This means that there is a requirement to integrate mining projects into the local economy and to promote national socio-economic development. Indeed, the contractual provisions in the mining agreements with respect to these issues are the means by which developing countries seek to maximise the positive and minimise the negative social and economic impact of foreign investment.

It has become an accepted fact that today, almost all mining agreements between private foreign investors and host developing countries recognise the fact that the promotion of national interest is an initial premise in contracting a mining agreement. However, it is important to note that effective participation policies presuppose agreements calculated to make the mining project suitably staffed to implement the basic decisions of the joint management board. Only participation at all stages of the joint operations can attain the host government's objectives.

A notion that the host government's majority share-holding in a joint venture is indicative of the effectiveness of its participation policies is erroneous. How far majority equity ownership ensures control is a question whose answer depends upon the actual implementation of the agreement. In some cases, decisions would naturally reflect the views of the private foreign mining companies whose technical superiority is sufficient to overcome the consequences of the host government's majority board representation and to keep de facto control notwithstanding their minority position.

The minority partner would then be in a position to exploit fully his role as operator. Therefore, the real balance of forces is to be found in how the enterprise is operated and the parties' day-to-day relations and management. The private minority partner, being the sole supplier and source of technical and commercial assistance, becomes in effect the marketing channel of the joint enterprise and purchase/seller of the minerals produced, thereby controlling completely the parameters of the joint operations.

Furthermore, the resources which mining companies command, such as information and technical expertise give them considerable advantage that can prove difficult for the host government to over come. The transfer of technology is vital in order to acquire the ability to manage and operate the mineral resource projects. However, this is one of the most difficult goals to achieve, since mining companies have a vested interest in protecting their role as providers of the indispensable specialised and managerial services necessary for the development and operation of a mine. Indeed, the bargaining power of the private foreign investor is partly dependent on the monopolisation of technology. This means that until such time when the transfer of technology is completed, developing countries will not be able to exercise full control over their mineral resources that is implied in the mining agreements discussed above. Indeed, the evolution of service contracts are a manifestation of developing countries' inability to manage their mineral projects alone.

Notwithstanding the above obstacles, it is clear from our discussion that developing countries no longer regard mining agreements as mere questions of private concern.

CHAPTER VIII - RECOMMENDATIONS AND OPTIONS FOR NAMIBIA

1 INTRODUCTION

Any newly independent country needs to exercise control over its natural resources. It needs to adopt legislation governing the allocation, use, disposal, development and distribution of its natural resources. Furthermore, it should have a right to amend, repeal, and introduce new legislation to regulate the mineral industry. Finally, it needs to establish institutions and administrative framework to carry out mineral development.

This chapter outlines the mineral policy which the future lawful government of an independent Namibia should adopt. As a developing country, Namibia will adopt policies not unlike those of many other developing countries.

2 DECOLONISATION, MINERAL RESOURCES AND PRACTICAL CONSTRAINTS

The trend at present in most developing countries is towards domestic majority participation in the mining enterprises. This has become possible following efforts taken by these countries to increase their direct control in the exploitation of their natural resources. Furthermore, the tightening of the initial terms of private foreign investment agreements and the increased government participation in the ownership of mining enterprises has produced a variety of

modern agreements or concessions. In some cases, the traditional pattern of transnational operating affiliates in developing countries wholly or majority-owned by transnational corporations has noticeably given way to joint ventures with State-owned mining companies. In addition, multinational mining companies increasingly operate in developing countries on the basis of non-equity participation and co-production agreements.

Modern concessions have come about as a result of a compromise between the principle of permanent sovereignty over natural resources, and the demanding realities of access to technology, capital, skills and markets which private foreign investors can offer. Therefore, the ultimate political goal of modern concessions is thus to emphasise the conception of the developing countries' control over their natural resources while at the same time permitting private foreign investors a role to play in their exploitation. A great majority of these countries realise that mere possession of natural resources and the assertion of permanent sovereignty over their natural resources would do very little for their effective exploitation.

It is submitted that given the experience of other developing countries, it is unlikely that Namibia would opt for a different course. This is likely to be the case notwithstanding what has been discussed in Chapter VI. Indeed, once the issues discussed in Chapter VI are resolved (politically or otherwise), there is nothing that will prevent a future lawful government of Namibia from entering

into mining agreements with private foreign investors on the basis of a new arrangement. This could be with the existing multinational mining companies as well as other companies that may be willing to accept the terms set by the government. Therefore, in the exercise of permanent sovereignty over its natural resources, the future lawful government will be entitled to consider whether to limit the exploitation of mineral resources to government-owned companies or to allow its nationals as well as private foreign investors to take part. These and other matters deserve full and serious consideration if Namibia is to derive full benefit from its mineral resources.

Before the government decides the future of the mining industry, the following questions should be considered. First, who will run the newly acquired enterprises? Will the government have a source of skilled personnel, either from its own population or from friendly countries, to replace the transnational corporations' employees? Will the government be able to sell minerals without assistance from previous owners? This problem may emerge particularly in highly concentrated mining industries such as diamonds where De Beers control worldwide marketing. Who will supply crucial inputs of technology which may be essential to keep the mining industry operating? These questions should be faced before, rather than after the acquisition of the mines.

The right of a state to permanent sovereignty over its natural resources is well established under international law. However, it should be noted that this right is not, as

it were, self-executing. The capacity of a state, especially a newly independent state, to exercise the right depends in large measure upon external and internal political climate. In the case of Namibia, there are several factors which could influence the future lawful government to opt for full public ownership. These include the following: (1) for political reasons, full public ownership may be one of the effective controls over the mineral resources essential for national economic development; and (2) the full public ownership option may be the only solution to some of the companies operating in Namibia mainly because of South African connection. These include operating subsidiaries of State companies such as the Industrial Development Corporation of South Africa and Iron and Steel Industrial Corporation. These companies own and operate a number of mines in Namibia, and they also have equity shares in the mining enterprises operated by private companies such as Rossing.

Furthermore, the future lawful Namibian government may view full public ownership as a continuation of a revolutionary struggle which calls for the people to be masters of their own destiny, not only their political destiny but also their economic destiny. Therefore, the political and economic struggle would be viewed, in a revolutionary sense, as inseparable from one another. Indeed, Article III(b)(7) and (8) of the Constitution of South West Africa People's Organisation, SWAPO, states that "(7) to ensure that the people's government exercises effective control over the means of production and distribution and pursues a policy which facilitates the way to social ownership of all the

resources of the country; (8) To work towards the creation of a non-exploitative ... classless society". This has been reaffirmed on several occasions by the SWAPO President Comrade Sam Nujoma.

In an interview held in August 1979 with Professor Reginald H.Green, among others, the President expressly stated that: "The basic ideological principle of SWAPO is to build a classless non-exploitative society which allows no room, no loophole, for the exploitation of man by man. As one of the fundamental tasks of the new African government would be to destroy all colonial institutions aimed at exploiting and plundering Namibia's mineral wealth, logically, foreign investment would be allowed only in governmental joint ventures based on the principle of mutual respect and of benefit to the Namibian people".[1]

It has already been noted above that public ownership does not mean exclusion of private foreign investors. It is possible that private foreign investors can still play an important role within the context of modern concessions discussed in Chapter VII. Therefore, an important policy issue should relate to foreign ownership. The main objective should be to secure effective participation and control in respect of the activities of private foreign investors. The government should clearly spell out the maximum level of foreign participation that will be permitted

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[1] see Reginald H.Green (Editor), Namibia - The Last Colony, (Longman, London, 1981) p.180, emphasis added

in both existing mining enterprises and new investment propositions.

3 FORMULATING A MINERALS POLICY FOR NAMIBIA

It is important that those who will formulate the policy should have a sound understanding of the mining industry generally and its practices. This will be necessary in order to formulate a realistic mining policy. Furthermore, they should bear in mind that a mineral policy for Namibia can only be developed in the context of a general strategy for economic liberation, self-reliance, and satisfaction of the basic material needs of the Namibian population. Therefore, Namibia's mineral resources have an essential role to play in such a strategy. Here follows a list of the main components of the strategy:

(1) Establishment of a new mining code.

(2) A government owned enterprise company should be established.

(3) The policy should ensure that the future lawful Namibian government receives equitable share of the revenue from mining operations.

(4) Mineral exploitation should be accompanied by adequate provision for training and employment of indigenous personnel.

(5) The mineral policy should provide for mineral conservation measures, increasing orebody recovery and minimising waste.

(6) Provision should be made for procurement, maintenance, and dissemination of geological and mineral resource data.

3.1 Establishing a mining code

The relationship between private investors and the government should evolve within the framework of the mining legislation. Therefore, the primary objective of the mining legislation should be to ensure that foreign investment contributes more effectively to the realisation of the government's economic objectives. The legislation should cover such issues as preconditions for investing in the mining industry; rights and obligations of the private foreign investors and the state; and tax provisions (fiscal regime). It is submitted that without a mining code, no legal mining rights can be established and without such right, very few foreign investors (if any) would venture to commit their capital in an uncertain legal environment. Stability and confidence can only be established if the needs and requirements of the host government and the rights and obligations of the private foreign investor are set out in clear and definite terms. The mining code must also fit into the entire national economic plan in order to guarantee its effectiveness during the implementation phase. It is against this background that the success or failure of the mining code will have to be judged.

The mining legislation must be effective at every phase of mining activities. There is a need to introduce comprehensive mining legislation to remedy some of the

current problems discussed in the preceding chapters. Current mining concessions obtaining in Namibia are characterised by large areas and long periods. There is also a comparative moderateness of the financial terms and the slow evolution in the terms and conditions of the concessions which are tantamount to stagnation and rigidity.

Therefore, the legislation should: (1) state fully and precisely, without any ambiguity, the rights and obligations of the mineral rights holder. (2) Provide a clear and exhaustive list of the causes for termination and forfeiture of mining rights. These may include prolonged and unjustified inactivity (subject to force majeure), non-payment of taxes, serious infringement of the laws or non-fulfilment of obligations. (3) Maximise the rate of prospecting and mine development. (4) Discourage speculation by taking precautions, by means of satisfactory work programmes and substantial expenditure commitments against unnecessary tying-up of large areas where no satisfactory prospecting or production operations are conducted. The legislation should specify in some detail the nature of the prospecting work to be carried out. Mining rights holders should also be required to furnish information acquired in the course of prospecting. There should also be mandatory relinquishment and surrender provisions. (5) Grant to the holder of an exclusive mining right the assurance of enjoying full possession of the granted rights as long as legal and other agreed obligations are complied with. The duration of the mining concession must be compatible with modern concessions. (6) Provide for

the protection of the subsurface, the conservation of the mineral resources and the safety of the operations.

3.1.1 State participation

The emancipated Namibian nation would be deeply suspicious if private foreign capital were allowed to operate without state participation. Participation by the government could also help to boost the morale of the Namibian workers since it would be regarded as a major step towards localisation, and foreign investment would assume a local character and status.

In addition, it would make it easier for local employees to integrate their loyalties, with a consequent reduction in tension with private foreign investor partners. It would also help to improve work performance and productivity among the local employees. Therefore, the overriding consideration for state equity participation in the mining projects should be to control mining activities so that they operate within the overall economic, social, and political policy of a future Namibian government. Furthermore, state equity participation offers an additional advantage in the sense that government directors in the board of directors are placed in a better position. They can scrutinise the activities of the mining enterprise in accordance with government policy. Important issues such as transfers and repatriation of foreign capital and environmental protection can be scrutinised by government directors.

It is also important to note that state equity participation enables the government through government directors, to control the extent to which mining companies

allow their parent companies to profit from their relationship with their subsidiaries (as is the case today especially with regard to the diamond industry). Government directors would be in a position to scrutinise purchasing and marketing arrangements, fees for provision of technical and consultancy services, and investment of surplus funds, all of which are currently being used by the mining companies in order to avoid taxation. It is further submitted that a state equity participation provision in the mining legislation could help to develop a nucleus of experienced managerial personnel in the public sector in that local labour becomes directly involved. Finally, in addition to skills, state equity participation could be used as a mechanism for the transfer of technology.

There are a number of factors which would dictate or influence the government to opt for partial public ownership (i.e., joint ventures) as opposed to complete ownership (although this may not be necessarily the case in all situations, it could be possible for the government to completely own some enterprises or even all enterprises with an option for service contracts). These include the following: (1) whether the parent company of the operating firm to be partially owned has an absolute world-wide monopoly over the technology of production and over marketing to the extent that its co-operation would be absolutely necessary for the maintenance of production and outlets; (2) whether political and diplomatic circumstances for full public ownership would be such that it would cause an unacceptable political risk should the product of the enterprise be boycotted at the international market (this

would only arise where such public ownership takes place without the support of the former private foreign investor); (3) whether full public ownership would cause considerable difficulties for the government in raising capital from the international financial market (this again would depend on whether the former owner agrees with the terms and conditions set by the government in acquiring the enterprise); and (4) whether full public ownership would cause considerable difficulties in the management and operation of the mining projects due to lack of trained Namibian personnel.

3.1.2 Fiscal Provisions

The basic premise of a mineral policy of the future lawful Namibian government should be that the returns from mining activities should first and foremost benefit the country.

To correct and remedy the current adverse effects of taxation laws and regulations, future laws and regulations governing taxation in the mineral industry should contain the following provisions, among others:

(1) Administrative fees - these are the fees which are normally charged by the host government to mineral rights holders for its services. These include granting prospecting, exploration and mining rights; registration of documents (e.g., in the Mines Registry); and any other administrative services which the government may render to the mineral rights holders.

(2) Surface taxes - these are usually charges for the mining rights holders' exclusive right to explore or exploit a specific area covered by the prospecting and/or exploration

licence. The main objective for these charges, in most cases, is to ensure continuous and effective development work on the area in which these rights are exercised, and to effect speedy prospecting and exploration so that mining can begin as soon as possible in order to discourage speculation. It is for the above reasons that the main purpose of these charges is not to produce revenue for the host government, therefore, they are usually not high although in some cases they could be high enough to discourage the locking up of large areas (as is the case in Namibia) for speculative purposes when the host government is anxious to develop its mineral resources. Finally, since the main aim of these charges is an inducement to explore and produce minerals, they tend to cease as soon as commercial production of the minerals begins.

(3) Royalty charges - these are the charges which are payable to the host government purely on the basis of ownership of the minerals. There could be a number of options left to the government, it could choose to specify royalty rates in the mining code, or negotiate them project by project, or even both. The rates may vary according to the type of the mineral being mined (e.g., source materials - such as uranium, precious stones and metals - such as diamonds and silver, and base metals - such as copper) or according to the value and grade of minerals. We have already discussed in the preceding chapter that early royalties in most developing countries were based on a physical unit of production or shipment. Royalties based on physical unit of production has one advantage in contrast to that based on value, namely, it is the easiest to administer

in the sense that they do not involve price determination for purposes of calculating the amount due to the host government. However, a royalty system based on physical unit of production is diminishing in value because it has tended to decrease in real value in the face of inflation over the life of a concession agreement, especially if the rate is fixed by legislation. This has already been discussed in detail in Chapter VII.

Therefore, it is recommended that the future lawful Namibian government should seriously consider a royalty system based on value. This would help to minimise the erosion of value, and to capture for the government some of the increased profits from mining operations, especially when mineral prices rise.

(4) Income taxes - this is one of the most important issues which needs to be settled as soon as the territory gains its internationally recognised independence. In order to minimise loss of revenue to the state, the law should clearly define the accounting and valuation procedures, for purposes of levying income tax. In order to minimise some of the problems discussed in Chapter IV, it would be useful to adopt some of the modern tax formulae discussed in Chapter VII. Important issues that need to be considered should include pricing, loan finance from affiliates and interest charges on such loans. Intra-firm transactions such as charges for services rendered by affiliates should be given primary consideration in the legislation.

3.1.3 Renegotiation and phase-out provisions

It would be useful to stipulate in the mining legislation that in the event of unforeseen circumstances, the state should be entitled to renegotiate with any foreign investor to change any of the provisions which may be contained in the contract. The legislation should be as explicit as possible to specify some of the events which would entitle the government to renegotiate the contract. The legislation could refer to the benefits obtained by other states in the region (or internationally) from comparable mining ventures. Furthermore, it would be useful for the legislation to include provisions which would prescribe periodic consultations and review of the contract with the private investor.

It must be noted that renegotiation between foreign investors and host states in developing countries has taken place in spite of specific clauses which existed in most traditional concession agreements debarring the state from changing the agreement terms in any manner whatsoever. It suffices to state that such stipulations have now lost their significance, and a more realistic approach has taken their place. It is in this context that Namibia may not face considerable opposition from private foreign investors.

The legislation should also include phase-out provisions. This is important in that the government may not wish to be tied in perpetuity to the private foreign investors. Although mining projects have a limited life, it sometimes happens that additional ore is discovered and added to reserves as mining proceeds and the operation may continue far beyond the years commonly used in planning mining projects. It is assumed that after such a long period of

time (about 15-30 years), the state or its nationals would have acquired the technical and financial capability to continue the mining operation on its own. There are a number of ways which the legislation could take in order to effect transfer of equity ownership from the private foreign investor to the state. One method is to make provision in the legislation for an automatic reversion of ownership to the state at the expiration of the agreement (if the duration is fixed). A variation of this may be to include a provision in the legislation for renegotiation during the duration of the agreement, and a new agreement after this could require a greater shareholding by the state.

3.1.4 Default, termination and surrender provisions

The legislation should include provisions which allow the state to terminate the contract with the private investor in case of default or if certain circumstances arise. It would also be important for the legislation to include clauses concerning the state's right to terminate and the procedure to be adopted before such termination is effected. The private investor could be disqualified if he loses certain qualifications which enables him to obtain mineral rights within the terms of the legislation. The grounds for disqualifications may include insolvency, bankruptcy and liquidation. In addition, effective sanctions should be introduced to safeguard against false information by the private investor prior to the conclusion of the contract. The legislation could provide that upon termination, all rights and obligations of the parties to the contract should

lapse (except the obligations and liabilities incurred by the parties under the agreement prior to its termination).

Termination provisions would ensure that mineral development is actively pursued in accordance with the legislation. It would also serve as an effective and necessary deterrent against mal-performance. The legislation should also include provisions dealing with the distribution of assets upon termination. There should be a distinction between pre- and post-production termination, and between movable and immovable assets. The private foreign investor should be given a reasonable period to remove from the prospecting or mining area any structures and installations placed on the area.

The most important provision should cover restoration and safety. This should also cover environmental protection. Therefore, the legislation should not only contain provision protecting the environment during mining operations, but there should also be appropriate provisions committing the private investor to restore the land after termination. The provisions should stipulate that the private investor should leave the mining area, and everything thereon, in a safe condition. He should be obliged by legislation to make safe all holes and excavations to the satisfaction of the state. He should also be required to take all reasonable measures to restore the surface and all structure thereon to their original condition. In order to fulfil this obligation, he should be given access to his former mining area for a reasonable period after termination of the prospecting and mining rights.

4 INSTITUTIONS FOR MINERAL SECTOR DEVELOPMENT

The future lawful Namibian government should establish a state exploitation company to participate in the exploitation of the mineral resources. The institution could be used to undertake mining operations and to form joint ventures with multinational mining companies (on the majority equity participation basis). Some of the joint ventures could be with state companies owned by other African mineral producing countries and possibly with state enterprises from socialist countries.

The features of state exploitation companies are that they pay taxes to the state as any other company, they transfer earnings to the state in the form of dividends, they are free from political interference in their day-to-day operations (at least this is the assumption but the practice may be different),[2] they recruit staff on a professional basis, and they are headed by people who, though they are usually political appointees, are professionally competent to run the company. In addition,the companies are accountable to their board (the board usually consists of government representatives, trade unions, and any other persons who may be appointed on their professional qualifications) for their

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[2] see generally, A.J.Kawana, State Holding Companies as Instruments of Government Policy: The Rise and Fall of the British National Enterprise Board (NEB), (September 1984) unpublished LL.M. dissertation submitted to the University of Warwick - U.K.

investment program, production performance, and profitability.

The state mining company could be involved in regional integration. This implies a certain degree of regional collaboration in the field of domestic productive resources including mining. This could take the form of regional as well as binational projects, combining the production factors of two or more Southern African countries and joining together the skills of domestic public enterprise mining companies. It is submitted that the promotion of public enterprises created and controlled by national governments in the region could be an important way of achieving national as well as regional control and bargaining power in international investment relations. The formation of joint ventures in the region could lead to a possible new strategy in terms of collective self-reliance and strengthening the negotiating capabilities of the countries involved vis-a-vis transnational corporations.

There are several advantages in promoting regional cooperation. The cooperation could increase the number and types of alternatives available in the context of the region or international markets. Furthermore, public enterprises in most developing countries differ from the multinational mining companies in several respects such as size, organisational structure, motivations and strategy. In general, joint investment originating from the region may be more responsive to certain priorities and objectives of the host governments (e.g., greater national participation and

control). In addition, these joint enterprises could undertake certain mining projects, the financial, technical or marketing implications of which may be beyond the capabilities of individual countries in the region. These joint enterprises could then be used to counteract the presence of or replacing multinational mining companies in strategic sectors (or activities) of the mineral industry. They could also serve to improve negotiating conditions for the acquisition of foreign input, with or without the direct participation of multinational mining companies. Finally, various alternatives could be developed for collaboration among public mining enterprises of two or more countries, with multinational mining companies acting as suppliers of specific input.

The future lawful government should play an active role in marketing the mineral products through a state marketing company (preferably wholly owned).

It is important to note that although public ownership through State companies (which could then form an association with private foreign investors) offers certain advantages, it also suffers from a number of limitations. Experience shows that majority State ownership in a joint venture does not necessarily give more management control. The extent of the governments' share of control may be in proportion to its share of equity ownership. However, in many instances, this may not be the case. One device for dissociating equity ownership from control may be the assignment of different classes of shares to the private foreign investor and the

host government. It is possible that the holder of a particular class of shares may be empowered to appoint a certain number of directors regardless of the claims on the assets of the enterprise represented by the shares.

It may be a big mistake to think that a mere acquisition of a majority equity interest in a mining enterprise can extricate the mining industry from the global network of the multinational mining companies. It is for these reasons that multinational mining companies have shown a willingness to adapt to a new legal arrangement such as a joint venture formula. In addition, taking into account political aspirations of the host developing countries, the companies have realised that joint ventures may effectively defuse nationalist objections to foreign control of the mineral resources without substantially diminishing the companies' actual control of their financial returns.

Furthermore, since most joint venture formulas include the presence of important government officials on the board of directors, it can assure the companies easy access to local capital and other numerous advantages such as peaceful industrial relations. Finally, a joint venture formula may also help to improve communications between the government and the companies. Therefore, unless transfer of majority ownership is matched by a meaningful transfer of crucial managerial powers and the acquisition and mobilisation of technical expertise for the purpose of effective management, effective control of the mining industry by the future lawful Namibian government would prove to be illusory.

It is for these reasons that the concept of ownership has lost some of its significance in the eyes of multinational mining companies. They have adapted themselves to a new contractual environment in which they can have sufficient control over critical decisions and continue to receive attractive financial benefits with little direct claim to ownership.

In order to minimise some of the problems discussed above, a number of suggestions have been put forward, some of which include evaluating contractors before a decision is made as to whether or not to enter into a contract with a particular private foreign investor. For example, Professor Green recommends the following factors to be taken into account: (a) the reputation of the contractor in both home and host country; (b) the experience of the contractor; (c) technical know-how of the contractor; (d) willingness to train local personnel; (e) fees charged; and (f) other alternative sources.[3]

The main functions of the state exploitation company should include the following: (1) To intervene in the international trade in minerals so as to maintain or expand markets for Namibian minerals, and to prevent or combat any action designed to control or restrict her markets; (2) To supervise

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[3] see Professor Reginald H.Green, A Guide to Acquisition and Initial Operation: Reflections from Tanzanian Experience 1967-74, as Chapter II of Julio Faundez and Sol Picciotto, (editors), The Nationalisation of Multinationals In Peripheral Economies, (The Macmillan Press Ltd., 1978) p.64.

purchases in Namibia and the utilisation of services in the territory by mineral producing companies. Regarding purchases, preference should be given to domestic products; (3) To supervise the purchase of mining equipment and the utilisation of services abroad; (4) To advise the government on all matters relating to the production and sale of minerals, in any form, within the territory and abroad, and particularly in relation to technical, social, economic and financial conditions of domestic production, their markets, uses, and processes; (5) To promote the production of minerals, and to be authorised to participate in and to establish companies; and (6) To promote the use of Namibian minerals and their by-products throughout the world.

5 SOCIAL ASPECTS

We have already discussed in the preceding chapters that the commanding heights of the current Namibian economy is the preserve of the international capital. This state of affairs leaves the mass of the African population terrorised, repressed, and savagely exploited. It must be noted that the independence struggle has raised the political consciousness of the Namibian masses into a new mould. This would force the government to restructure social, economic and political relationships in a fundamental way. The struggle has an important educative impact, and as the confrontation continues, the masses have become aware of the complicated network of imperialist forces. They have become fully aware as to why the present oppressive and exploitative system is being sustained by the presence of the multinational

companies. The understanding of all these factors has resulted in the crystallisation of a much more meaningful anti-imperialist ideology.

Therefore, the struggle should not only be seen in the context of national liberation, but it should also be seen in the context of economic and social revolution. This is clearly reflected in SWAPO's political programme which is vehemently against entrepreneurial aggrandisement. It is in this context that a future mining legislation should take these aspirations into account. One of the principal benefits which Namibia could expect to derive from a mining venture is that of the creation of enhanced opportunities for employment and training of local personnel. Another such benefit is in the form of the generation of ancillary economic activities such as the production of goods and services for the use in the mining and related activities and the generation of new industries in the region.

The mining legislation should aim at achieving the following benefits among others: (1) infrastructures must be so designed to meet the reasonable requirements of the government for the orderly development of the country and the integration of the mining community into the local community, which infrastructure should include adequate facilities for the health, safety and material well-being of all local persons employed or living in the vicinity of the mines. (2) The maximum utilisation of locally produced goods and services. (3) The minimum interference with or pollution of the physical environment of the area of operations. (4)

Restoration of all affect areas so as to afford their maximum subsequent utilisation in the interest of the nation.

It is submitted that in the case of Namibia, environmental and health provisions could be incorporated in the mining legislation in order to be effective and generally applied to all mining projects. The legislation could contain detailed provisions spelling out the steps to be taken with regard, in particular, to the disposal of waste materials and to the restoration of mined and waste disposal areas. The legislation could also require the submission of detailed proposals as to the manner in which the mining operation is to be conducted and how the mined areas are proposed to be restored as well as the methods proposed to be adopted to prevent damage resulting from water run-off and the avoidance of soil erosion. Provision should also be made to ensure that the restoration programme proposed by the companies is such as will ensure that the restored areas are so restored as to render them readily utilisable for such purposes as the government would reasonably require.

In order to minimise reliance on expatriate labour, localisation clauses should be included in both mining legislation and joint venture agreements. The establishment of formal training programmes should also be encouraged. Detailed training provisions should be included in the joint venture agreements. Time programmes should be fixed in the joint venture agreements for the progressive localisation of employment in the enterprise. For instance, there may be a requirement for the reduction of expatriate personnel to a

fixed percentage by a certain year with subsequent further fixed reductions at pre-determined intervals of time. The success of this arrangement would partly depend on extensive training programmes for Namibians in all aspects of the enterprise operation.

6 CONCLUSION

Namibia has a lot to learn from the experience of other African mineral producing countries. We have already noted that just as sovereignty has now been acknowledged to be meaningless without economic control, so ownership of mineral resources has little significance,in economic terms, unless it is translated into effective control and concrete financial benefits reinforced by sound managerial and technical skills. While the adoption of the legal arrangements discussed above in the mining legislation would be helpful, such devices would not by themselves assure Namibia its development goals.

The future Namibian government may encounter formidable difficulties in restructuring the mining industry. It may be possible that no amount of revision in contractual arrangements could effectively deter the companies from realising their desired return or retaining a de facto control in Namibia's mineral industry. As long as the companies enjoy worldwide monopoly of such vital resources as capital, technological and managerial skills, and distribution outlets, the institutional arrangement may not serve any useful purpose since the companies would always

find ways of ensuring that Namibia pays an appropriate price for the vital resources at their command.

However, although these dangers cannot be entirely discounted, it may be possible to follow the example of other African countries which have adopted measures designed to achieve economic control of their natural resources. It is important to note that economic control by the future Namibian government cannot be achieved by legal craftsmanship alone, there are other aspects such as political, economic, and the mobilisation of skills that are the essential preconditions of economic self-sufficiency. However, it would be a big mistake to dismiss the importance and relevance of legal and institutional arrangements.

As for the companies, they should realise that they have done enormous injustice to the Namibian people. As long as this cruel injustice and inequality persists, there would certainly be a permanent state of antagonism and distrust which may continue to menace the future relationship between the Namibian government and the companies. The government would always face powerful pressures from the African population to intervene in order to remove the inequities of the current arrangement. Therefore, unless the current arrangements are reformed to ensure a more equitable system, the confrontation between the Namibian people and the mining companies would persist. Our discussion shows that the only effective approach to public ownership is the complete exclusion of the existing mining companies from all

operations in production, management, distribution and finance.

There are certain preconditions that have to be fulfilled in order to achieve a successful public ownership. First, in order for complete nationalisation to be successful, Namibia should be placed outside the capitalist camp. Second, the future Namibian government must be in a position to run the mining operations with local technical and managerial personnel. This may not be possible for reasons noted above. The illegal South African racist regime has precluded the development of a technical and managerial intelligentsia among the African population, and it is likely to take a long time to produce them on large enough scale to manage the industry. The mining legislation must contain certain important objectives. It must ensure that mineral rights should only be granted to a foreign mining company in partnership with the government in return for specific obligations. It should ensure that there is rapid and thorough prospecting of mineral resources, and in the case of significant discoveries, their production should be in a manner consistent with the national interest. Furthermore, the legislation should ensure that mining activities are effectively monitored at each stage of the mining operations. Finally, the legislation should include a clause to the effect that in negotiating mineral agreements, the state should require mining companies to accept as binding all legislative and regulatory changes which may be enacted from time to time in the future.

The success of the relationship between the government and private foreign investors will depend on the recognition by the private foreign investor of the national aspirations of the state; and the recognition by the state of the private foreign investor's requirement of a reasonable opportunity to recover his investment with a fair return. In short, there should be mutual recognition of each other's rights. Indeed, this is what Comrade President Sam Nujoma had in mind when he stated that private "foreign investment would be allowed only in governmental joint ventures based on the principle of mutual respect and benefit to the Namibian people" (supra).

APPENDIX I:1

The Distribution of GDP by Sectors of Economy %

YEAR	AGRICULTURE & FISHING	MINING	INDUSTRY	SERVICES	TOTAL	GDP R MILL
1920	13	59	3	25	100	13
1925	12	49	6	33	100	11
1930	5	44	8	43	100	10
1935	46	13	7	34	100	8
1940	48	4	6	42	100	10
1945	46	13	6	35	100	20
1950	34	33	6	27	100	61
1955	26	39	6	29	100	129
1960	15	34	13	38	100	142
1965	20	47	8	25	100	214
1970	16	31	14	39	100	379
1975	16	27	17	40	100	674
1977	18	33	14	35	100	1,135

Source: Reginald H.Green, Kimmo Kiljunen, Marjalusa Kiljunen, (1981), Namibia The Last Colony, Longman, p.65.

APPENDIX 1-2

LIST OF TRANSNATIONAL CORPORATIONS DIRECTLY OR INDIRECTLY INVOLVED IN THE MINERAL INDUSTRY OF NAMIBIA

COUNTRY AND COMPANY	SUBSIDIARY OR ASSOCIATE OPERATING IN NAMIBIA	PRODUCTS/ACTIVITIES
1 USA		
1.1 Bethlehem Steel Corp	Ebco Mining and Exploration Company	Krantzberg tungsten mine
1.2 Davy Inc	A G McKee and Company	Development of Rossing Uranium mine
1.3 Energy Minerals Corp		Mining & Prospecting
1.4 Fluor Corp		
1.5 The Hanna Mining Company		Mining & Prospecting Mining & Prospecting
1.7 International Minerals and Chemical Corp		Mining & Prospecting
1.5 Midwest Uranium Corp		Uranium Prospecting
1.8 Newmont Mining Corp	Tsumeb Corp Ltd Newmont Holding Co of SWA (Pty) Ltd O'Okiep Copper Co	Mining of base metals
1.9 Nord Resources Corp	Nord Mining and Exploration (Pty) Ltd	Joint ventures in copper, tungsten, tin & wolfram mining & prospecting Uranium Prospecting
1.10 Phelps Dodge Corp	Western Nuclear Inc	Uranium Prospecting
1.11 Southern Uranium Corp		Mineral & exploration
1.12 Superior Oil Company	Falconbridge Nickel Mines Ltd	Mineral rights
1.13 Tomm Oil and Gas Exploration Company	African Coast Diamond & Minerals (Pty) Ltd	Uranium Prospecting
1.14 Tristate Nuclear Inc		Uranium Prospecting
1.15 Union Carbide Corp		Onganja Copper Mine
1.16 Zapata Corp	Zapata Mining (Pty) Ltd	Mining
2 UK		
2.1 Alpine Holdings Ltd		Mining
2.2 Charter Consolidated Ltd	Kiln Products Ltd	Construction of Rossing Uranium mine
2.3 Davy Corp Ltd	Power Gas Ltd Davy Inc	Uranium mining Base metal mining
2.4 RTZ Ltd	Rossing Uranium Ltd	
2.5 Selection Trust Ltd	Tsumeb Corp Ltd South West African Selection Trust (Pty) Ltd	

COUNTRY OF COMPANY	SUBSIDIARY OR ASSOCIATE OPERATING IN NAMIBIA	PRODUCTS/ACTIVITIES
3 FEDERAL REPUBLIC OF GERMANY		
3.1 Kraftwerk Union AG		Uranium enrichment
3.2 Metallgesellschaft AG	SWA Lithium Mines (Pty) Ltd	Lithium, aluminium phosphate, bismuth
3.3 Norddeutsche Affinerie		Copper refining
3.4 Ohlthave Gruppe	Khan Mine (Pty) Ltd	Copper mining
3.5 Urangesellschaft MBH		Development of Rossing Uranium Mine
3.6 Veba AG	Uran-Isotopentrennungs-GMBH (URANIT)	Uranium processing
4 SOUTH AFRICA		
4.1 Anglo American Corp of South Africa Ltd	Minerals & Resources Corp Ltd, SWACO, Kiln Products Ltd, Gold Fields of South Africa Ltd, Anglo American Coal Corp Ltd, & LTA Ltd	Prospecting and mining of base metals and uranium
4.2 De Beers Consolidated Mines Ltd	CDM	Diamond mining
4.3 Diamond Mining and Utility Co (SWA) Ltd		
4.4 Federale Mynbou BPK	Klein Aub Koper Maatskappy BPK	Copper mining
4.5 Federick Volksbeleggings BPK	Otjihase Mining Company Ltd Klein Aub Koper Maatskappy BPK	Mining
4.6 General Mining Union Corp Ltd	Klein Aub Koper Maatskappy BPK	Copper mining
4.7 Gold Fields of South Africa	Trekkopje Exploration & Mining Co (Pty) Ltd	Mining and Propsecting
4.8 Industrial Development Corp of South Africa	Rossing Uranium Ltd	Uranium mining
4.9 Iron and Steel Corp of South Africa Ltd (ISCOR)	Uis Mining Company (SWA) Ltd	Tin mining
4.10 Johannesburg Consolidated Investment Company Ltd (JCI)	Otjihase Mining Company (Pty) Ltd	Mining
4.11 Moly Copper Mining and Exploration Company		Mining

COUNTRY OF COMPANY	SUBSIDIARY OR ASSOCIATE OPERATING IN NAMIBIA	PRODUCTS/ACTIVITIES
5 FRANCE		
5.1 Compagnie Francaise de Petroles	Minatome SA	Petroleum & Uranium Prospecting
5.2 Imetal SA	Le Nickel Penarroya	Metals
5.3 Pierrelatte and Narbonne Uranium Plants		Uranium enrichment
5.4 Pechiney-Ugine Kuhlann	Minatome SA	Uranium enrichment
5.5 Vendome SA		Silver and copper mining
6 CANADA		
6.1 Comines Ltd	Eland Mining and Exploration (Pty) Ltd	Mineral exploration
6.2 Consolidated Mining and Smelting		Mineral exploration
6.3 Dolman Industries Ltd	Futura Mining	Mining
6.4 Falconbridge Nickel Mines Ltd	Oamites Mining Co (Pty) Ltd, Falconbridge of South West Africa Pty Ltd. Ranch Mining Co (Pty) Ltd	Prospecting and mining of base metals
6.5 Novanda Mines	Zapata Mining (Pty) Ltd	Onganji Copper mine
6.6 Rio Algom Ltd	Rossing Uranium Ltd	Uranium mining
7 NETHERLANDS		
7.1 Royal Dutch Petroleum Co	Billiton Exploration SWA (Pty) Ltd	Mining and Prospecting
8 AUSTRALIA		
8.1 Dave Ltd		Diamond concessions
8.2 Leichardt Exploration		Diamond concessions
8.3 Steller Mining		Diamond concessions
9 PORTUGAL		
9.1 Erongo Rocks and Gems		Diamond processing

Sources: United Nations, (1983), International Conference in Support of the Struggle of the Namibian People for Independence, Paris 25-26 April, 1982, A/Conf.120/8, 4 April; UN Centre on Transnational Corporations, (1982), Role of Transnational Corporations in Namibia, August; United Nations, (1982), Plunder of Namibian Urnaium, New York; SWAPO, (1982), Trade Union Action On Namibian Uranium, London; Gail Hovey, (1982), Namibia's Stolen Wealth: North American Investment and South African Occupation, The Africa Fund; and United Nations, (1985) Reference Book on Major Transnational Corporations Operating in Namibia, New York.

APPENDIX III:1

PRODUCTION OF GEM DIAMONDS IN NAMIBIA, 1951-1955

YEAR	1951	1952	1953	1954	1955
THOUSAND CARATS	478,075	541,027	617,411	688,536	797,207

Source: US Dept of the Interior, Bureau of Mines - Minerals Yearbook, vol.1 - Metals and Minerals, p.489

PRODUCTION OF GEM DIAMONDS IN NAMIBIA AND SOUTH AFRICA (THOUSAND CARATS), 1963-1983

YEAR	NAMIBIA	SOUTH AFRICA	TOTAL AFRICA	WORLD TOTAL
1963	1,076	1,797	5,550	6,424
1964	1,387	1,790	6,553	7,449
1965	1,491	1,948	6,631	7,201
1966	1,583	2,485	7,493	8,024
1967	1,700	2,000e	7,449	9,093
1968	1,552	3.399	9,931	10,600
1969	1,923	3,612	11,240	13,063
1970	1,772	3,758	11,361	13,297
1971	1,566	3,169	10,342	12,454
1972	1,516	3,370	11,492	12,688
1973	1,520	3,448	10,130	12,462
1974	1,491	3,440	9,341	11,689
1975	1,660	3,435	7,916	10,264
1976	1,609	3,340	7,416	9,675
1977	1,901	3,862	7,996	10,400
1978	1,950	4,000	6,790	11,000
1979	1,850	3,670	7,529	10,657
1980	1,482	2,812	7,506	10,446
1981	1,186	3,429	7,664	10,261
1982p	963	3,442	7,614	10,182
1983e2	915	4,554	14,565	20,837

p = preliminary
e = estimated
2 = includes near-gem and cheap-gem qualities

Source: US Dept. of the Interior, Bureau of Mines: 1963-1966 see Minerals Yearbook, 1966, volume 1-11, Metals, Minerals and Fuels, p.484; 1967 - Minerals Yearbook, 1967, p.520; 1969-1978 Minerals Commodity Summaries 1979, pp.59 and 356; 1979, see Mineral Facts and Problems, 1980; and 1980-1983, see Bureau of Mines Bulletin 675, 1985

APPENDIX III:2

PRODUCTION OF GEM DIAMONDS IN AFRICA (THOUSAND CARATS) 1965-1966

COUNTRY	1965	1966
NAMIBIA	1,491	1,583
SOUTH AFRICA	1,948	2,485
ANGOLA	878	964
CENTRAL AFRICAN REP	268	270
CONGO [1,2,e]	318	318
ZAIRE [2]	14	15
GHANA	225	282
GUINEA [e]	21	21
IVORY COAST	119	110
LIBERIA [e]	277	343
SIERRA LEONE	658	629
TANZANIA	414	473
TOTAL AFRICA	6,631	7,493
WORLD TOTAL	7,201	8,024

e = estimate
1 = exports
2 = probable origin, Zaire. Zaire produces 70 per cent low quality industrial, 20 per cent near gem quality, and only 10 per cent gem quality, see The Times (London) 4th June 1981, p.17, col.f

Source: US Dept. of the Interior, Bureau of Mines - Minerals Yearbook, (1966, vol. 1-11, Metals, Minerals, and Fuels) P.484

APPENDIX III:3

WORLD PRODUCTION OF NATURAL DIAMOND, 1979-1982 (MILLION METRIC TONS)

COUNTRY	1979	1980	1981	1982	QUALITY
ZAIRE	15.5	14.0	12.5	12.2	(92% INDUSTRIAL)
USSR	12.0	12.0	12.0	12.0	(80% INDUSTRIAL)
SOUTH AFRICA	8.6	8.7	9.5	8.9	(60% INDUSTRIAL)
BOTSWANA	4.4	5.1	4.96	7.77	(85% INDUSTRIAL)
ANGOLA	0.84	1.5	1.40	1.3	(75% GEM)
NAMIBIA	1.6	1.56	1.25	1.0	(98% GEM)
GHANA	1.5	1.1	1.25	1.0	(85% INDUSTRIAL)
VENEZUELA	0.8	0.8	0.75	0.75	(70% INDUSTRIAL)
LIBERIA	0.5	0.5	0.5	0.5	(60% GEM)
BRAZIL	0.34	0.35	0.37	0.38	(50% GEM)
TANZANIA	0.5	0.5	0.5	0.5	(50% GEM)
C.A.R.	0.3	0.3	0.3	0.3	(66.6% GEM)
IVORY COAST	0.1	0.1	0.1	0.1	(60% INDUSTRIAL)

Source: Leake S.Hangala - Structure of Namibian Mineral Industry (1985) p.17, quoted from Mining Annual Review, 1983

Appendix 111:4

DIAMOND BOARD FOR SOUTH WEST AFRICA

Tenth Floor, CDM Centre
10 Bülow Street
Windhoek 9000
Telephone (061) 35061
Tel. Add.: "Diboswa"

P. O Box 1906
Windhoek
9000
South West Africa / Namibi

5th August 1982

Mr Eric Lang
P O Box 11132
WINDHOEK 9000

Dear Mr Lang

You have asked this Board to answer a number of questions which you put to us in our discussion on 21st July 1982. Your questions cover a wide range but in general they are directed towards an enquiry as to whether the State is exercising adequate control over the production and sale of diamonds in this country and in particular whether the State is satisfied that there are no malpractices which might result in the State getting less than the full amount of taxes and imposts properly due to it arising from diamond production. You have also raised questions in regard to the duties of the Secretary of the Diamond Board for S W A.

The answers to certain of your questions would involve giving detailed descriptions of the way diamonds are recovered, weighed, recorded, handled and transported at the C D M Mine at Oranjemund, and details as to which individuals attend to these duties. The answers would also involve giving details of the checks which are conducted to ensure the accuracy and integrity of records and procedures, and the honesty of personnel. These answers would reveal security procedures followed by the S W A/Namibia Police including the Diamond and Gold Branch, as well as C D M personnel at the mine and elsewhere, and for obvious reasons it would not be in the interests of the State to make them publicly known. I am sure you will appreciate that it would be very unusual to give an ordinary member of the public such privileged information, and I regret it cannot be made available to you.

On behalf of this Board, I have no hesitation in giving you an absolute assurance that proper and adequate controls, in the interests of the State, are in force from the time the rough stones are extracted from the mining property until they are sold into the diamond markets of the world, and that the appropriate taxes and duties due to the State are collected in full.

The interests of the State in this matter are protected by a diverse number of bodies and organisations which act directly on behalf of Government and for its benefit. The interests of the State are protected not only by the functions of this Board, whose members are all appointed by the State, but also by the Chief Inspector of Mines and the officials of his Department, who are responsible to the Secretary for Economic Affairs and through him to the Chairman of the Minister's Council. The Auditor General has access to the books, reports, minutes, correspondence, sales and production statistics and other information which he may require. The Revenue Authorities have access to the books and all records of the diamond producers. The South West Africa Police and members of its Gold and Diamond Branch play a vital part on behalf of the State in regard to diamond security matters, not only on mining property but elsewhere as well.

At C D M comprehensive methods are employed by internal and external auditors to monitor the procedures for the recording of diamond production and for the handling and transport of diamonds from the various sources on the mine right through to the stages where they are exported out of Namibia and sorted, valued and sold. The internal control and security measures adopted throughout these procedures are in our opinion effectively implemented and they are conducted in a conscientious manner by all the parties concerned. In short, we are satisfied in regard to the State's control over the diamond industry in this country and in particular in regard to the procedures for the calculation and collection of its due entitlement of duties and taxes arising from diamond production in the territory.

The procedures followed in Namibia are similar to those in practice in the Republic of South Africa and elsewhere in Southern Africa. They include refinements and modifications which have been made as a result of advances in modern technology and practical experience in the diamond industry gained over many years, which has produced an efficient system for the control of diamond mining and marketing in the best interests of the State.

Some of your questions were critical of the fact that the Secretary of the Diamond Board is an employee of De Beers and that the Board's offices are located in the same premises as those of C D M. We are satisfied that this is the most efficient way of handling the secretarial affairs of the Board and that no malpractices have resulted from these arrangements. The duties of the Secretary involve specialist expertise and judgment which would be difficult to find outside the diamond industry. The auditors of C D M are different to those of the Diamond Board itself, whose books and records are subject to audit by the Auditor General. Confidential statistics relating to Diamond Board matters such as production, sales, export duty and the like are kept separately. Special

3/ .....

confidential documents are kept in the personal safe custody of the Secretary. In view of the audit checks and controls exercised over Diamond Board records by the Auditor General, the Board is satisfied that it would not be possible for a De Beers employee to falsify information in favour of C D M or any other party without detection.

You appear to have some information in connection with incorrect statistics or documentation which you say were submitted to the Board by the Secretary. We do not know where you obtained this information, but we can inform you that there was one occasion when statistics were incorrectly reported to him by an outside source, and consequently reported to the Board but these were rectified at a following Board meeting. The Secretary himself discovered the errors.

Two further matters were raised by you. You asked whether any transfer pricing was taking place (relating to the production of C D M) and whether overmining was taking place on the C D M property. The answer is "no" in both cases. In regard to your question on overmining, this subject is fully dealt with in the letter to you dated 4th August 1982 from C D M (Pty) Limited.

We enclose a copy of our letter of today's date to Mr J Putz, for your information.

Yours sincerely

P J MALHERBE
CHAIRMAN

c.c. Mr J Putz

APPENDIX III:5

CDM (Proprietary) Limited

4th August 1982

Mr Eric Lang
P O Box 11132
WINDHOEK 9000

Dear Mr Lang

We are writing in response to our discussions with you at our offices on 23rd July 1982, when you enquired about the mining policy followed at C D M. The background to the Company's mining policy is explained in this letter, from which you will see that a computer planning model has been developed and that modern operations research techniques are in use to ensure that no pay ore will remain at the end of the life of the mine. You also enquired as to the date when the "F" Blocks were mined and the rate of mining.

The C D M mine is very old in the sense that it has been operating for over sixty years. The mining policy has therefore had to be adapted to the ore reserves available from time to time and, of course, also to prevailing market conditions relating to carats, the size of diamond produced, and the quantities required. Indeed in the depression of the thirties the mine was effectively closed down and again there was very little production in World War Two. In the interests of the Company and its shareholders production was rapidly built up after the War until it exceeded one million carats in 1962.

A high point was reached in 1969 when 1.84 million carats were produced, at the height of the very buoyant conditions prevailing at that time in the diamond market. Production continued at around 1.6 million carats per annum thereafter and in the year 1976 it was 1.69 million carats. A peak of 2 million carats was reached the following year - for one year only - when market conditions were unusually strong. Since then, annual production has been steadily declining and last year it fell to 1.2 million carats, partly as a

2/ .....

The "F" Blocks (which you referred to as "F" Fields in our discussion) were mined during the 1950s, 60s and 70s as part of the general plan for the orderly mining of all exploitable areas within the Company's property. The blocks were mined at varying rates over these years, as and when required in terms of the overall mining policy.

The declining production rates at C D M in 1979, 1980 and 1981 reflect the downturn in the diamond market. In particular, with a view to reducing costs without reducing sales in terms of the quota, C D M closed one of its four main plants in May 1981, as well as ceasing production from two sample plants. The resulting reduction in working costs minimised the decrease in contributions payable to the State. These policies were and are clearly in the interests of the shareholders and the State and they are totally incompatible with your accusation that the Company is following a "scorched earth" policy.

C D M is an old mine nearing the end of its life and as such it must be expected that it is unlikely that production could be maintained at the peak levels of its heyday. Present ore reserves indicate a life between twelve to fifteen years but because prospecting continues one can be reasonably confident that barring unforeseen circumstances, C D M will continue in production at least until the turn of the century. Substantial sums are being spent on prospecting for diamonds both within and outside C D M's present concession areas. Such expenditure has for some five years been running at over R10 million per annum. Incidentally, C D M has also been spending over R1 million per annum on prospecting for other minerals in Namibia and it is also in the process of completing a R5 million general minerals survey in certain lesser-known parts of Namibia which are not considered prime prospecting areas, because of the nature of the surface geology and the expense involved. The information from this survey is placed on open file at the offices of the Geological Survey in Windhoek for the benefit of the nation.

In recent years a major mine sampling programme by means of 10 meter wide trenches has resulted in reclassifying large volumes of previously unpay ore in the Southern area. Low grade dumps containing conglomerate from the old field screening plants have also been sampled and most have been brought into reserves. In terms of the overall life of mine plan some are being treated at present, as on their own they would be uneconomic.

The construction of the modern H M S plants and the constant review of marginal reserves and old tailings dumps have justified the introduction and development of a computer planning model for orderly mine planning based on modern operations research techniques. This will ensure that no pay ore will remain at the end of the life of the mine.

In conclusion, I am sorry to say that it will not be possible to arrange for you to visit the mine at Oranjemund. In coming to this decision we have had to take into account the fact that you have no business connections with C D M nor the diamond industry, nor indeed with any organisation with whom we have dealings.

Yours sincerely

D B HOFFE
RESIDENT DIRECTOR

APPENDIX III:6

NAMIBIA'S PRODUCTION OF COPPER, REFINED LEAD, ZINC, TIN, SILVER, AND CADMIUM COMPARED WITH OTHER AFRICAN PRODUCERS

COPPER (000 TONS)	1978	1979	1980	1981	1982	1983
NAMIBIA	37.7	41.9	39.2	44.3	48.8	54.2
ZAMBIA	643.0	588.3	595.8	587.4	529.6	514.9
ZAIRE	423.8	399.8	459.7	504.8	502.8	502.8
S.A.	209.3	204.2	211.9	210.6	207.1	210.8
BOTSWANA	14.6	14.6	15.6	17.8	18.4	20.3
MOROCCO	4.3	8.3	7.2	7.6	20.9	19.0
ZIMBABWE	33.8	29.6	27.0	24.6	24.8	19.0
OTHER	5.4	1.4	1.5	0.4	0.3	0.1
TOTAL	1371.9	1287.1	1347.9	1397.5	1352.7	1340.8
NAMIBIA'S SHARE IN %	2.7	2.7	2.9	3.2	3.6	4.0

REFINED LEAD (000 TONS)						
NAMIBIA	39.5	41.7	42.9	41.7	40.6	35.4
MOROCCO	30.0	36.8	42.4	52.3	58.6	57.6
S.A.	23.6	23.3	35.4	26.9	30.4	29.6
TUNISIA	16.6	17.7	19.2	17.8	15.1	12.2
NIGERIA	-	1.5	2.0	2.0	0.4	0.4
ZAMBIA	12.9	12.8	10.0	9.9	14.6	14.6
OTHER	3.0	5.0	5.0	5.0	5.5	5.5
TOTAL	125.6	138.8	156.7	155.6	165.2	155.3
NAMIBIA'S SHARE IN %	31.4		27.2	26.8	24.6	22.8

ZINC (000 TONS)						
NAMIBIA	36.6	29.0	25.4	36.4	35.7	35.9
S.A.	68.7	56.5	81.7	86.7	90.5	108.4
ZAIRE	82.8	73.0	67.0	75.6	82.1	81.9
ZAMBIA	50.5	53.7	42.9	39.7	52.5	43.0
ALGERIA	4.1	9.2	7.6	20.0	22.0	21.6
OTHER	17.3	13.7	15.1	16.1	14.0	-
TOTAL	260.0	235.1	239.7	274.5	303.5	304.8
NAMIBIA'S SHARE IN %	14.1	12.3	10.6	13.4	11.8	11.8

TIN (000 TONS)	1978	1979	1980	1981	1982	1983
NAMIBIA	1.0	1.0	1.0	0.9	0.8	0.6
S.A.	2.9	2.7	2.4	2.8	3.0	1.5
ZAIRE	3.4	3.3	3.2	2.3	2.2	1.0
NIGERIA	2.9	2.7	2.5	2.4	1.7	0.7
RWANDA 1	1.5	1.4	1.5	1.3	1.2	0.6
ZIMBABWE	0.9	0.9	0.9	1.2	1.2	0.6
OTHER	0.2	0.2	0.2	0.2	0.2	0.1
TOTAL	12.8	12.2	11.7	11.1	10.3	5.1
NAMIBIA'S SHARE IN %	7/8	8.2	8.5	8.1	7.8	11.8

SILVER METRIC TONS						
NAMIBIA	46.1	53.5	51.3	58.7	49.9	60.1
S.A.	96.6	100.7	232.0	235.4	216.0	72.9
ZAIRE	89.1	91.7	78.8	80.1	59.2	
MOROCCO	97.4	102.1	98.1	99.6	100.0	
ZIMBABWE 2	34.5	30.4	29.5	26.7	28.6	
ZAMBIA	33.3	28.4	23.8	22.2	27.6	29.1
OTHER	7.2	8.7	10.4	5.7	3.6	
TOTAL	404.2	415.5	523.9	528.4	484.9	
NAMIBIA'S SHARE IN %	11.4	12.9	9.8	11.1	10.3	

CADMIUM METRIC TONS						
NAMIBIA	79.0	81.0	70.0	0.0	110.0	47.0
ZAIRE	186.0	212.0	168.0	230.0	281.0	281.0
ALGERIA	34.0	50.0	50.0	50.0	50.0	50.0
TOTAL	299.0	289.0	289.0	280.0	441.0	387.0
NAMIBIA'S SHARE IN %	24.4	24.2	24.2	0	24.9	12.4

1 = includes Burudi prior 1980
2 = smelter production

Source: Leake S.Hangala Structure of Namibian Mineral Industry (1985) pp.40-43. Quoted from World Metal Statistics, June 1984

APPENDIX III:7

Imcor Zinc (Rosh Pinah Mine) Difference between Overseas and Inland Prices for Zinc and Lead Concentrates

(A) Zinc

Year	t(1)	Unit Price (2) R/t	Inland Sales Profits (3)	Prevailing Market (4) Price R/t	Market Price related (5) Sales Profits	Difference between (6) (3) and (5)
1979	28,449.0	300.59	8,551,600	692,39	19,697,803	
1980	20,664.7	244.35	5,049,500	594,62	12,287,644	11,146,203
1981	30,001.6	346.91	10,407,900	741,64	22,250,287	7,238,144
1982	29,830.7	431.56	12,873,800	807,81	24,097,538	11,842,487
1983	22,046.6	584.71	12,890,900	856,90	18,891,732	11,223,738

(B) Lead

Year	t(1)	Unit Price (2) R/t	Inland Sales Profits (3)	Prevailing Market (4) Price R/t	Market Price related (5) Sales Profits	Difference between (6) (3) and (5)
1979	8,819.2	434.12	3,872,700	1,035,44	9,131,752	5,259,052
1980	6,972.3	452.39	3,154,200	705,80	4,921,049	1,766,849
1981	8,631.1	386.15	3,332,900	635,83	5,487,912	2,155,012
1982	7,843.0	304.89	2,391,900	589,42	4,624,000	2,232,012
1983	10,753.6	99.91	1,074,400	471,24	5,067,526	3,993,126

Notes: (1) Yearly production of zinc and lead concentrates; (2) Producer list price charged by Imcor Zinc (R/t); (3) Yearly revenue from zinc and lead concentrates; (4) Prevailing market price (LME) R/t; (5) What could have been realised had the company based its sales on (LME); (6) The difference between producer list price and prevailing market price that could have been taxed had the company based its sales on (LME).

Source: Thirion Commission, 1985 Table No. 118, p. 571.

APPENDIX III:8

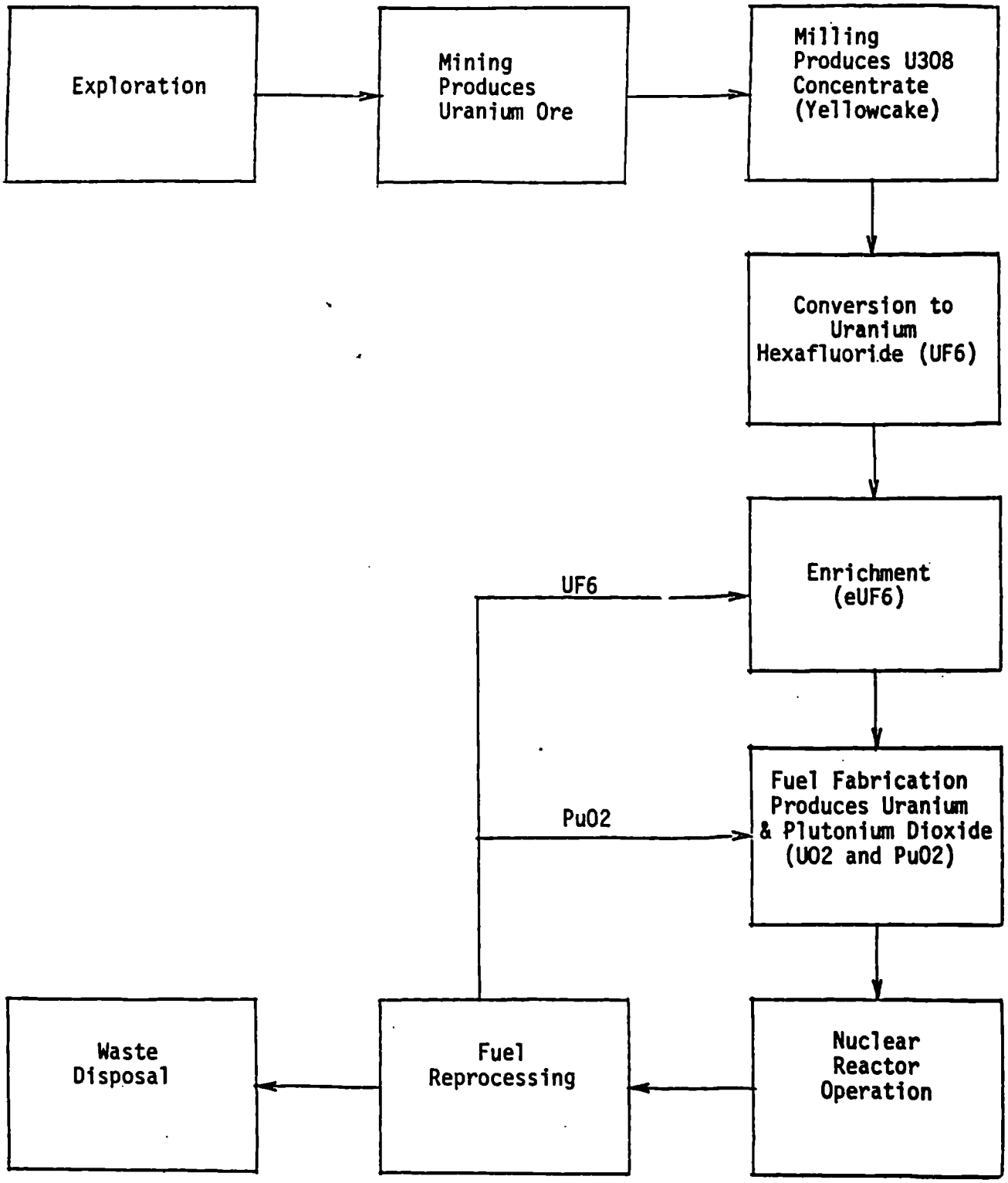
TCL's earned unit prices R/t for its refined lead exports

1981	RSA	Italy	Japan
July	608,38	735,95	699,13
October	745,44	770,98	751,30
November	698,22	868,53	722,02
1982			
March	615,11	695,84	665,19
April	627,36	629,60	641,40
May	610,66	652,49	660,04
June	616,00	652,15	658,13
July	595,53	642,98	658,13
September	618,77	620,10	635,39
1983			
January	493,64	466,53	480,87
April	491,70	516,61	493,60
May	506,65	539,02	505,02
June	483,96	494,33	508,58
July	457,57	486,56	471,59

Source: The Thirion Commission Table No. 121. Based on Monthly Reports to the Office of the Chief Inspector of Mines, SWA.

Appendix 111:9

THE NUCLEAR FUEL CYCLE



Source: United Nations Centre on Transnational Corporations (1983) Transnational Corporations and Contractual Relations in the World Uranium Industry: A technical Paper, New York, p.2

Luce's reply

Foreign and Commonwealth Office

London SW1A 2AH

From The Minister of State
Richard Luce MP

7 January 1982

Dear Mr Sapper,

I am writing in reply to your letter of 3 December to the Prime Minister with which you presented a petition about the supply of uranium from Namibia to the United Kingdom.

Successive governments have for some years considered that, while South Africa's administration of Namibia is unlawful, the arrangements under which uranium from Namibia is imported into this country do not conflict with any of our international obligations. When critics suggest that our purchases of uranium from Namibia are in contravention of international law, they usually refer to Decree No 1 of the UN Council for Namibia which purports to prohibit - for the time being - exploitation of the natural resources of Namibia. We do not recognise the UN Council's claim to be the legal administering authority of Namibia, since the UN General Assembly acted beyond its competence under the UN Charter in establihsing a subsidiary body with the powers which it purported to confer on the Council. In addition, the contract for the importation of uranimum to the United Kingdom is between Rossing Uranium Limited and the Central Electricity Generating Board. It is not a Government contract, and we could not therefore 'cancel' it as you suggest in your letter.

We believe that a peaceful solution of the Namibia problem could be the key to ending the cycle of violence in the area. That is why we continue to work, with our partners in the Western Five, for an internationally recognised settlement. The responses we have received to our proposals for Constitutional Principles to guide the Namibians Constituent Assembly are encouraging, although we do not underestimate the difficulties which could face us in the next phase of negotiations. In case you have not already seen it, I enclose a copy of the communqué issued after the meeting of Foreign Ministers of the Five in Brussels on 10 December.

I am sending copies of this letter to the co-signatories of yours.

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Richard Luce

TRADE UNION SEMINAR ON NAMIBIAN URANIUM

to stop the illegal trade in Western Europe

LONDON, 29–30 JUNE 1981

SWAPO'S HISTORIC POSITION ON THE CONTRACTS FOR NAMIBIAN URANIUM.

During the last six years, SWAPO of Namibia has consistently and strongly opposed the contracts of various Western countries for the illegal importation and processing of Namibian uranium.

In a statement to the United Nations Council for Namibian's Uranium Hearings in July 1980, Cde.Theo Ben Gurirab, SWAPO Representative at the United Nations, linked the Decree Number 1 on the protection of Namibia's natrual resources with the fundamental reality that SWAPO's own 'struggle for liberation, justice and national independence is above all a struggle about natural resources on land and under the sea and about the related question of who owns and controls them.'

Thus SWAPO's opposition to the illegal contracts is fundamental to the Namibian liberation struggle and our people's quest for effective control of their own resources. As SWAPO stated in April 1981 (Guardian 15.4.1981), mining of uranium in Namibia today is of no benefit to our people. On the contrary, the only benefactors of this illegal undertaking are the companies involved, the Western governments and the South African regime. Apart from recognising immediate costs to the workers at the mine, pointed out by Cde. Gurirab in July 1980 - 'we are ... gravely traumatized when we anticipate the immense health hazards and the dangers of radioactivity that threaten the well-being of our people and the environment' - SWAPO's central concern is the fact that the uranium contracts serve to perpetuate the oppression of the whole Namibian nation. As we stated on 11.3.1980, 'defiance of international law through the contracts not only encourages the (South African) regime's violation of United Nations resolutions demanding its withdrawal from Namibia, but actually facilitates its attempts to entrench itself in our country. Taxes paid to the illegal administration, together with profits accruing through is own share in Rossing Uranium Ltd., effectively finance the war against the Namibian people. In this way, the contracts fund a massive army of occupation...'.

Likewise, the contracts have implications for Western diplomacy over N mibia. It is no accident that the countries involved in negotiations over the future of our country are those with large stakes in the mining of Namibian uranium. As we stated in January 1981, 'Western collusion in the theft of Namibian uranium and other natural resources contradicts the professed role adopted by the Western Contact Group in negotiations for an 'internationally acceptable solution' to the Namibian situation. It can only be regarded as hypocritical for Western diplomats to make pious utterances about their commitment to 'self determination' for our people while Western multinationals with the tacit approval of their governments, continue to fuel South Africa's war.'

Organised by SWAPO in co-operation with Namibia Support Committee
188 North Gower St., London NW1 2NB. Tel.(01) 388 5539.

SWAPO's position on the exploitation of Namibian uranium has the full backing of international law, most specifically defined in United Nations Decree No.1 on the Protection of Namibia's Natural Resources. On every occasion that SWAPO has called for an end to the illegal trade in Namibian uranium we have invoked the relevant provisions in international law. These provisions include the right of a future Government of Namibia to demand reparations for materials illegally stolen from Namibia under South African occupation. On 11.3.1980, SWAPO reasserted its position on this:'SWAPO of Namibia as the legitimate representative of the Namibian people regards the exportation of Namibian uranium as theft, and, as is provided for in Decree Nol of the United Nations Council for Namibia, SWAPO will claim compensation for it as the Government of an independent Namibia with the full authority of international law behind it.'

SWAPO has repeatedly condemned the operations of Rio Tinto Zinc, Britain's largest mining multinational, in Namibia. In 1976, we insisted that Western governments take steps to terminate the contract, stating that 'in this there can be no question of trying to maintain a position on the fence. Those who have relations with the South African regime in Namibia and actively contribute by trade and revenues to the regime are helping to perpetuate the illegal occupation of Namibia and South Africa's cruel exploitation of our people.'

SWAPO has also called on the labour movement internationally to take steps to implement Decree No. 1, even in the absence of governmental compliance with international law in this regard.

APPENDIX IV:1

Government Revenue derived from taxation of income from mining 1974-78

Category	1974/76 R.Mill	1976/77 R.Mill	%(c)	1977/78(d) R.Mill
1 Diamonds	57.1(a)	51.5	27.6	73.1
1.1 Income Tax	41.1	27.3		45.0
1.2 Profits Tax	7.0	9.2		12.2
1.3 Export Duty	9.0	15.0		15.9
2 Other mines(b)	8.0	0.6	0.3	1.0

Notes:

(a) total revenue from diamonds
(b) excluding Rossing Uranium Ltd
(c) percentage to total Government revenue
(d) estimate

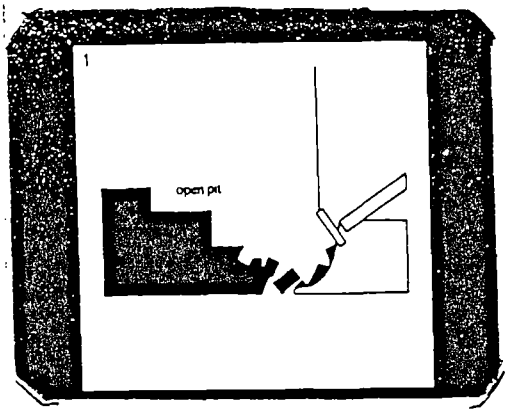
Source: Wolfgang H.Thomas, (1978), Economic Development in Namibia : Towards Acceptable Development Strategies for Independent Namibia, Kaiser Grunewald, p.250.

TCL's Contribution to Government revenue and dividends paid to shareholders

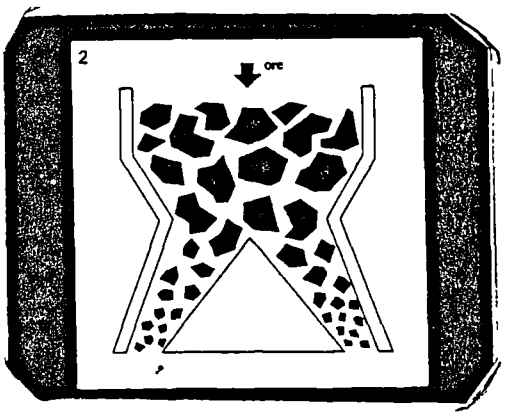
R.MILL	1966	1971	1974	1978	1981
Gross Revenues	81.6	50.18	107.3	86.5	99.76
Taxation	12.6	7.28	11.9	5.8	0
Net Income (loss)	31.0	14.5	21.02	11.57	(5.89)
Dividends	28.0	21.0	19.34	12.7	0

Source: Gail Havey, (1872), Namibia's Stolen Wealth, The Africa Fund p.31.

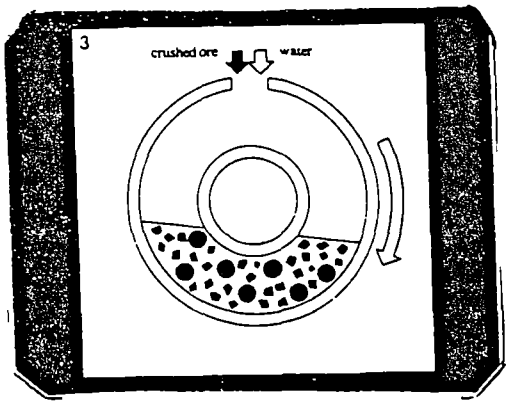
Appendix V:1 Rossing operations: from mining to yellowcake



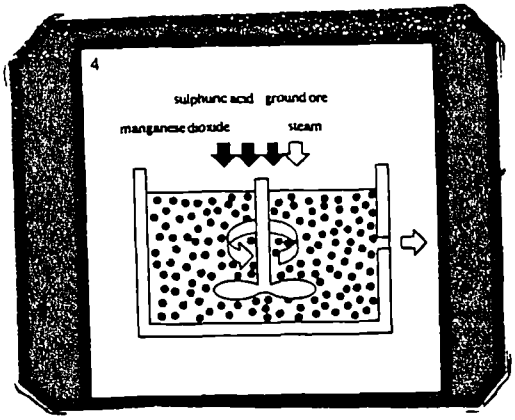
(1)Mining



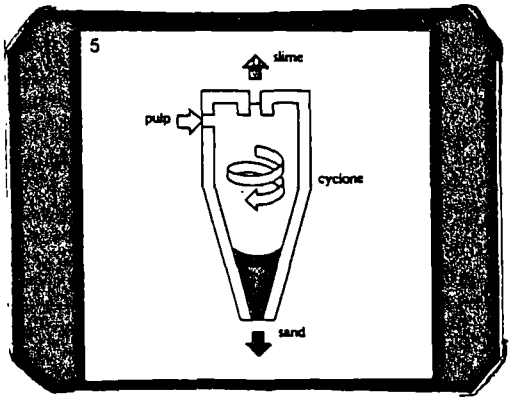
(2)Crushing



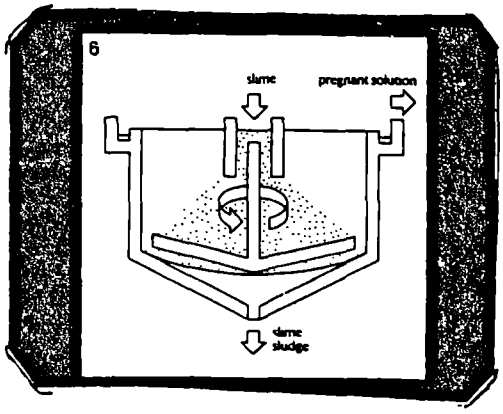
(3)Grinding



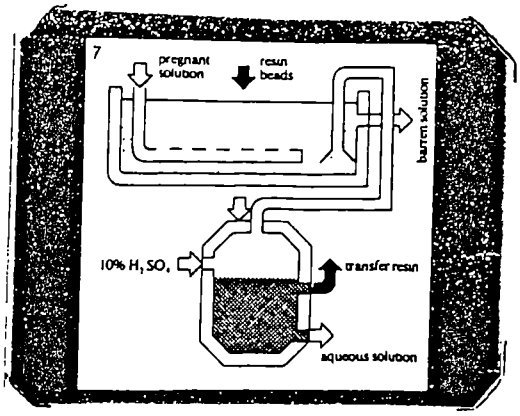
(4)Leaching



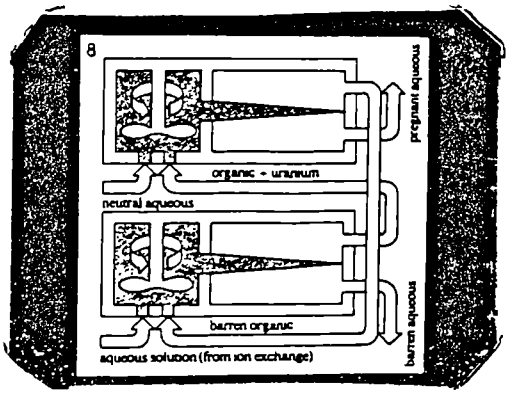
(5)Sand/Slime Separation



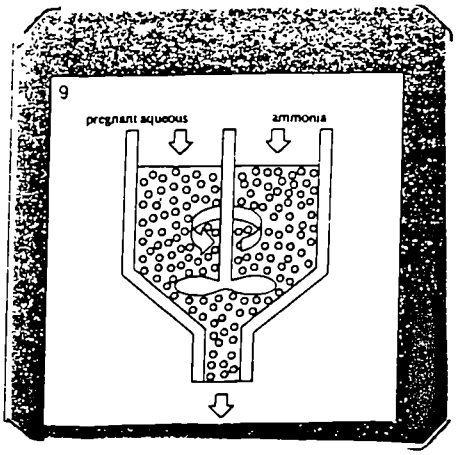
(6)Thickening



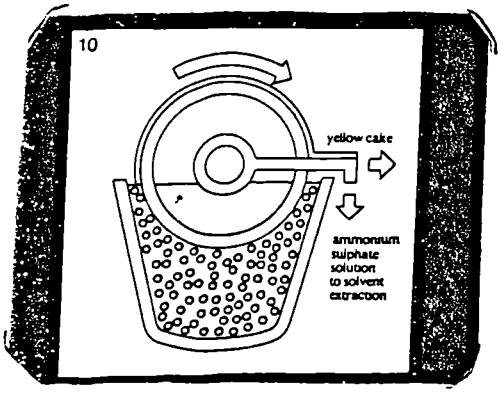
(7)Continous Exchange Plant-CIX(11)



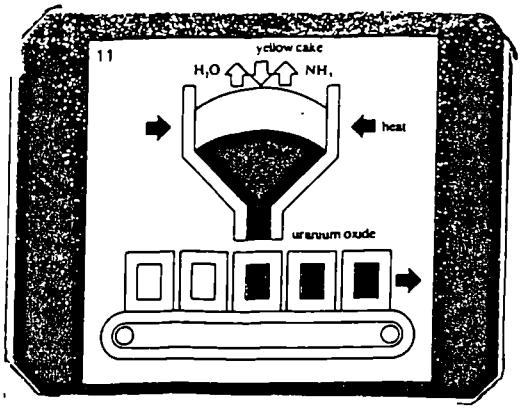
(8)Solvent Extraction Plant SX(12)



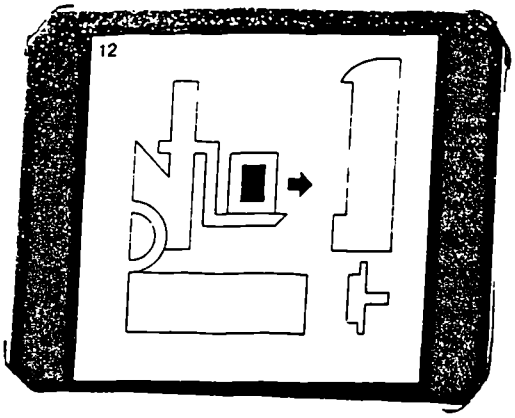
(9)Precipitation



(10)Filtration



(11)Drying



(12)Loading and Despatch

(13)

Cloud of radioactive dust from open cast mine which contaminates the surrounding environment.

APPENDIX V.1

Notes: 1 = mining by drilling, blasting, loading and haulage.

2 = Ore is delivered to the primary crushers and then to the coarse ore stockpile. It then passes through further series of crushers and screens until the particles are - 14 mm, and then fine ore is stored on another stockpile.

3 = Grinding - crushed ore is reduced into further slurry.

4 = leaching and oxidation process in large mechanically agitated tanks, the pulped ore is oxidised by manganese dioxide and dissolved by sulphuric acid at elevated temperatures.

5 = Cyclones separate sand and slime, the sand is pumped through pipes to a tailings disposal area.

6 = Counter current decantation thickeners wash the slimes. A clear uranium-bearing solution (pregnate solution) overflows from the No. 1 thickner while the washed slime is mixed with the sands and pumped to the tailings area.

7 = The pregnate solution comes into contact with beads of specially-formulated resin. Ions containing uranium are absorbed onto the resin and are preferentially extracted from the solution.

8 = The acidic eluate from the ion exchange plant is mixed with an organic solvent which takes up the uranium bearing component, the organic solution is mixed with a neutral aqueous ammonium sulphate solution.

9 = The addition of gaseous ammonia to the Ok liquor coupled with the PH adjustment, precipitates ammonium diuranate which is then thickened for a yellow slurry.

10 = The ammonium diuranate is recovered on rotating drum filters as a yellow paste - "yellow cake".

11 = Drying and roasting drives off the ammonia leaving uranium oxide.

12 = The product is packed into metal drums, the drums of uranium oxide are then loaded and exported to overseas customers for further processing.

13 = Dust caused by blasting.

Source: Rossing Uranium Ltd, An Introduction to Rossing the largest uranium mine in the world, pp. 6-7; Photo No. 13 taken from Namibia Support Committee pamphlet "Working on the Nuclear Chain Gang" p.14.

APPENDIX V:2

Employment Estimates by Economic Activity, 1977

Economic Activity	Blacks(1)	Whites	Total	% of total
Small agriculture	240,000	-	240,000	50.3
Large agriculture	50,000	6,500	56,500	11.8
Fishing & Fish processing	7,000	500	7,500	1.6
Mining	19,000	3,500	22,500	4.7
Manufacturing	9,750	2,750	12,500	2.6
Transport & Communication	11,500	1,000	12,500	2.6
Commerce & Finance	20,000	5,000	25,000	5.2
Government	15,000	15,000	30,000	6.3
Domestic service	35,000	-	35,000	7.3
Construction	12,500	1,750	15,000	3.2
Others(2)	20,500	500	21,000	4.4
TOTAL	441,000	36,500	477,500	100

Notes:
(1) Blacks includes coloureds.
(2) Others includes unemployed and self-employed.

Source: UNIN, (1986), Namibia Perspectives for National Reconstrution and Development, p.635.

APPENDIX V:3

Skill Levels in the Mining Industy 1985

Managerial/Administrative(1)

Black	White	Total
N(2)	500	500

Professional(1)

Black	White	Total
N	1,250	1,250

Skilled/Para Professional

Black	White	Total
2,000	1,750	3,750

Semi Skilled/Clerical

Black	White	Total
6,000	N	6,000

Unskilled

Black	White	Total
4,200	N(2)	4,200

Notes:
1 = estimates
2 = negligible

Source: Professor Reginald H.Green, (1987), "Namibia: Dependence, Destabilisation and Development", Conference Paper presented at a Conference on Namibia, 11 May, oxfam, pp.21-22.

UNITED NATIONS

DECREE No. 1

FOR THE PROTECTION OF THE NATURAL RESOURCES OF NAMIBIA

Conscious of its responsibility to protect the natural resources of the people of Namibia and of ensuring that these natural resources are not exploited to the detriment of Namibia, its people or environmental assets, the United Nations Council for Namibia enacts the following decree:

DECREE

The United Nations Council for Namibia,

Recognizing that, in the terms of General Assembly resolution 2145 (XXI) of 27 October 1966 the Territory of Namibia (formerly South West Africa) is the direct responsibility of the United Nations,

Accepting that this responsibility includes the obligation to support the right of the people of Namibia to achieve self-government and independence in accordance with General Assembly resolution 1514 (XV) of 14 December 1960,

Reaffirming that the Government of the Republic of South Africa is in illegal possession of the Territory of Namibia,

Furthering the decision of the General Assembly in resolution 1803 (XVII) of 14 December 1962 which declared the right of peoples and nations to permanent sovereignty over their natural wealth and resources,

Noting that the Government of the Republic of South Africa has usurped and interfered with these rights,

Desirous of securing for the people of Namibia adequate protection of the natural wealth and resources of the Territory which is rightfully theirs,

Recalling the advisory opinion of the International Court of Justice of 21 June 1971,[1]

Acting in terms of the powers conferred on it by General Assembly resolution 2248 (S-V) of 19 May 1967 and all other relevant resolutions and decisions regarding Namibia,

[1] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16.

Decrees that

1. No person or entity, whether a body corporate or unincorporated, may search for, prospect for, explore for, take, extract, mine, process, refine, use, sell, export, or distribute any natural resource, whether animal or mineral, situated or found to be situated within the territorial limits of Namibia without the consent and permission of the United Nations Council for Namibia or any person authorized to act on its behalf for the purpose of giving such permission or such consent;

2. Any permission, concession or licence for all or any of the purposes specified in paragraph 1 above whensoever granted by any person or entity, including any body purporting to act under the authority of the Government of the Republic of South Africa or the "Administration of South West Africa" or their predecessors, is null, void and of no force or effect;

3. No animal resource, mineral, or other natural resource produced in or emanating from the Territory of Namibia may be taken from the said Territory by any means whatsoever to any place whatsoever outside the territorial limits of Namibia by any person or body, whether corporate or unincorporated, without the consent and permission of the United Nations Council for Namibia or of any person authorized to act on behalf of the said Council;

4. Any animal, mineral or other natural resource produced in or emanating from the Territory of Namibia which shall be taken from the said Territory without the consent and written authority of the United Nations Council for Namibia or of any person authorized to act on behalf of the said Council may be seized and shall be forfeited to the benefit of the said Council and held in trust by them for the benefit of the people of Namibia;

5. Any vehicle, ship or container found to be carrying animal, mineral or other natural resources produced in or emanating from the Territory of Namibia shall also be subject to seizure and forfeiture by or on behalf of the United Nations Council for Namibia or of any person authorized to act on behalf of the said Council and shall be forfeited to the benefit of the said Council and held in trust by them for the benefit of the people of Namibia;

6. Any person, entity or corporation which contravenes the present decree in respect of Namibia may be held liable in damages by the future Government of an independent Namibia;

7. For the purposes of the preceding paragraphs 1, 2, 3, 4 and 5 and in order to give effect to this decree, the United Nations Council for Namibia hereby authorizes the United Nations Commissioner for Namibia, in accordance with resolution 2248 (S-V), to take the necessary steps after consultations with the President.

The foregoing is the text of the Decree adopted by the United Nations Council for Namibia at its 209th meeting on 27 September 1974 and approved by the General Assembly of the United Nations at its 29th Session on 13 December 1974. For additional copies and information, please communicate with the United Nations Commissioner for Namibia, Room DC-328, United Nations, New York, N.Y. 10017 or at the Office of the United Nations Commissioner for Namibia, Box 33550, Lusaka, Zambia.

APPENDIX VI : 2

ARTICLE 22 OF THE COVENANT OF THE LEAGUE OF NATIONS

(1) To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.

(2) The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

(3) The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.

(4) Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.

(5) Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defence of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League.

(6) There are territories, such as South-West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.

(7) In every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge.

(8) The degree of authority, control, or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council.

(9) A permanent Commission shall be constituted to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates.

APPENDIX VI:3

MANDATE FOR GERMAN SOUTH WEST AFRICA

The Council of the League of Nations:

Whereas by Article 119 of the Treaty of Peace with Germany signed at Versailles on June 28th, 1919, Germany renounced in favour of the Principal Allied and Associated Powers all her rights over her oversea possessions, including therein German South-West Africa; and

Whereas the Principal Allied and Associated Powers agreed that, in accordance with Article 22, Part I (Covenant of the League of Nations) of the said Treaty, a Mandate should be conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa to administer the territory aforementioned, and have proposed that the Mandate should be formulated in the following terms; and

Whereas His Britannic Majesty, for and on behalf of the Government of the Union of South Africa, has agreed to accept the Mandate in respect of the said territory and has undertaken to exercise it on behalf of the League of Nations in accordance with the following provisions; and

Whereas, by the aforementioned Article 22, paragraph 8, it is provided that the degree of authority, control or administration to be exercised by the Mandatory not having been previously agreed upon by the Members of the League, shall be explicitly defined by the Council of the League of Nations:

Confirming the said Mandate, defines its terms as follows:—

Article 1

The territory over which a Mandate is conferred upon His Britannic Majesty for and on behalf of the Government of the Union of South Africa (hereinafter called the Mandatory) comprises the territory which formerly constituted the German Protectorate of South-West Africa.

Article 2

The Mandatory shall have full power of administration and legislation over the territory subject to the present Mandate as an integral portion of the Union of South Africa, and may apply the laws of the Union of South Africa to the territory, subject to such local modifications as circumstances may require.

The Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory subject to the present Mandate.

Article 3

The Mandatory shall see that the slave trade is prohibited, and that no forced labour is permitted, except for essential public works and services, and then only for adequate remuneration.

The Mandatory shall also see that the traffic in arms and ammunition is controlled in accordance with principles analogous to those laid down in the Convention relating to the control of the arms traffic, signed on September 10th, 1919, or in any convention amending the same.

The supply of intoxicating spirits and beverages to the natives shall be prohibited.

Article 4

The military training of the natives, otherwise than for purposes of internal police and the local defence of the territory, shall be prohibited. Furthermore, no military or naval bases shall be established or fortifications erected in the territory.

Article 5

Subject to the provisions of any local law for the maintenance of public order and public morals, the Mandatory shall ensure in the territory freedom of conscience and the free exercise of all forms of worship, and shall allow all missionaries, nationals of any State Member of the League of Nations, to enter into, travel and reside in the territory for the purpose of prosecuting their calling.

Article 6

The Mandatory shall make to the Council of the League of Nations an annual report to the satisfaction of the Council, containing full information with regard to the territory, and indicating the measures taken to carry out the obligations assumed under Articles 2, 3, 4 and 5.

Article 7

The consent of the Council of the League of Nations is required for any modification of the terms of the present Mandate.

The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations.

The present Declaration shall be deposited in the archives of the League of Nations. Certified copies shall be forwarded by the Secretary-General of the League of Nations to all Powers Signatories of the Treaty of Peace with Germany.

Made at Geneva the 17th day of December, 1920.

Appendix VII:1 **A Sample of Fiscal Impositions Levied by 14 Developing Countries**

Country[1]	Tax Systems				
	Royalties	Income Tax	Dividends Tax	CGT[E]	PPT & RRT
Argentina		45%[F] 33%[D]	17.5%	15%	15,20,25%
Botswana	3%	35%	15%		65 - 70%[C]
Brazil		35%	25-60%		40%
Columbia		40%	20-40%		
Egypt			40-55%	39.7%	
Indonesia	3.6%	35%[B] 45%[A]	10%		15[R]=60%
Ivory Coast		50%	12-18%		
Jamaica	$J 0.5%/t	35%	15-37.5%		10%
Kenya		45%[D] 52.5%[F]	20%	7.2 - 22.5%	
Malaysia		40% 50%[P]			5%[M]
Nigeria		45% or 2% of turnover	12.5%	20%	
Papua New Guinea	1.25% fob	35%[B] 36.5%[A]	15%		20[R]=70%
Sierra Leone	Le 0.55/t	70%			
Tanzania	5%	22.5%[N] 45%[Z]			

Notes: 1

In addition to the taxes indicated above, a number of taxes such as interest tax, stamp tax, and royalties and management tax are levied. In broad terms, most of the countries referred to have the same categories of expenditure for the purposes of granting capital allowances for income tax purposes. These include permanent buildings, plant and machinery (used for exploration, development or mining), and intangible assets (e.g. rights, licences, surveys, administrative and other charges incurred prior to mining).

A= After capital recovery; B = Before capital recovery; C = taxes and dividends on diamonds; D = domestic companies; E = Capital gains tax; F = foreign companies; G = Progressive profit tax; H = Resource Rent Tax; M = 5 per cent excess profits where the company's chargeable income exceeds $M 200,000 a year and if such company has no residence office, branch, agent or representative in the country; N = 22.5 per cent for the first 5 years; P = Petroleum tax; R = Rate of return on invested capital; T = Access profits tax of 15 per cent on profits of over 12 per cent to 15 per cent of capital, 20 per cent on profits of over 15 per cent to 20 of capital, and 25 per cent on profits in excess of 20 per cent of capital; and Z = 45 per cent in subsequent years.

Sources: Garnaut Ross and Anthony Clunies Ross, (1983), Taxation of Mineral Rents, Clarendon Press, Oxford, pp. 220, 233, 271, and

273; United Nations Department of Technical Co-operation for Development, (1980), The Nickel Industry and the Developing Countries, New York, pp. 72 & 80; United Nations Centre On Transnational Corporations, (1983), National Legislation and Regulations Relating to Transnational Corporations, New York, pp. 88-91, 129-130, 203-205, 216-219, 234-239, 265-267, 278-279, 282-283, and 313-316; United Nations Centre On Transnational Corporations, (1986), National Legislation and Regulations Relating to Transnational Corporations, vol. IV, New York, pp. 8-12, 179, 181-182, 185, 220-222, and 233-234; United Nations Centre On Transnational Corporations, (1986), National Legislation and Regulations Relating to Transnational Corporations, vol. V, New York, p. 133; United Nations Centre On Transnational Corporations, (1983), Main Features and Trends in Petroleum and Mining Agreements, New York, pp. 85, 91, 94, 111, and 116; and Dave Stevens, (1978), "Taxation in the Mining Industry," paper presented to the workshop on Mining Legislation and Mineral Resource Agreements, Gaborone, Botswana 9-13 October, UNCTC and Commonwealth Secretariat, pp. 227-233.

Appendix VII:2 Example of the Calculation of the Resource Rent Tax

Year	Net cash flow $ millions	Accumulated net cash flow (previous year amount (if negative) brought forward & compounded at 20% then added to (2))	Taxable cash flows (positive values of (3))	Resource Rent Tax (4) x 50%
1	-100	-100		
2	-100	-220		
3	-50	-314		
4	+10	-367		
5	+130	-130		
6	+180	-192		
7	+180	+50	50	25
8	+230	+230	230	115
9	-200	-200		
10	+150	-90		
11	+130	+22	22	11
12	+100	+100	100	50

Explanation: In the example, the rate of return is 20%. Income is first earned in year 4 but the accumulated total net cash flow at 20 per cent continues to be negative until year 7 when the private investor achieves a 20 per cent rate of return on his investment. In year 7, the surplus after deductions is $50 million (4) taxed at 50 per cent so that the host State receives $25 million (5). The following year (year 8) the surplus is $230 million divided by 50 per cent the revenue which accrues to the State is $115 million. No income is earned in year 9 and 10 (e.g. due to additional investment) but surplus revenue is earned

in year 11 $22 million and 12 $100 million and again divided by 50 per cent comes to $11 million and $50 million respectively.

Source: United Nations Centre on Transnational Corporations, (1987) Financial and Fiscal Aspects of Petroleum Exploitation, New York, p. 24.

APPENDIX VIII:1

BARGAINING POWER AND WEAKNESSES OF THE PARTIES

FACTORS FAVOURING NAMIBIA

1 ABUNDANCE OF MINERALS
2 LACK OF SUBSTITUTES
3 ORE QUALITY MINERALS
4 HIGH WORLD MARKET PRICES
5 INTERESTED COMPETITORS
6 DEPENDENCE OF COMPANIES ON MINERALS (eg GEM DIAMONDS)
7 SUPPORT BY WORLD OPINION AND INTERNATIONAL LAW (eg UN, OAU, AND DECREE NO.1)
8 DIVERSIFIED EXPORTS
9 LINKS TO OTHER PRODUCING STATES

FACTORS FAVOURING THE COMPANIES

1 ALTERNATIVE SOURCES OF MINERALS
2 POSSIBILITY OF SUBSTITUTION
3 COSTLY MINING
4 MARKET POWER, SPECIALISATION AND TECHNOLOGY
5 MONOPOLY OF MINING, PROCESSING AND MARKETING
6 LACK OF QUALIFIED NAMIBIAN WORK FORCE
7 POLITICAL SUPPORT BY HOME COUNTRIES
8 COOPERATION WITH COMPETITORS

CONFLICTING INTERESTS

1 SUBJECTION TO NATIONAL LAW
2 ADJUSTMENT OF CONTRACT TERMS
3 NATIONAL PARTICIPATION
4 REINVESTMENT OF PROFITS
5 DOMESTIC PROCESSING
6 DEVELOPMENT OF DOMESTIC SUPPLY INDUSTRIES
7 LOCALISATION OF LABOUR
8 LABOUR-INTENSIVE TECHNOLOGY
9 SHORT CONTRACT DURATION

1 INTERNATIONAL INVESTMENT PROTECTION
2 MINIMUM NATIONAL INTERFERENCE
3 PROFIT REPATRIATION
4 PROCESSING ABROAD
5 PURCHASE ABROAD
6 DEPENDENCE ON EXPATRIATES
7 CAPITAL-INTENSIVE TECHNOLOGY
8 LENGTHY DURATION OF CONTRACT WITH PRECISION AND COMPREHENSIVENESS, AND EXCLUSION OF LEGISLATIVE CHANGES

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