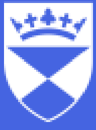

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How robust is the design of the Namibian mining fiscal regime in achieving government objectives?

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Abstract

Extraction of subsoil natural resources is regarded as a conversion of an asset in the ground to assets above the ground, both for the mine operator and the host government. To realise this potential, the host government need to have a robust and effective fiscal regime. The mineral sector fiscal regime provides rules on how rent from the extraction of mineral resource is shared, and in what proportion, with the government, and relates to both taxes and royalties. The design of the fiscal regime is dependent on, inter alia, government objectives. However, many challenges exist during the implementation of a fiscal regime, including poor administration and international tax planning, which reduces its effectiveness no matter how well designed it may be. Based on the literature review, this research aims to assess the design of the Namibian fiscal regime for mining to determine whether it is well designed to ensure attainment of government objectives, and analyse whether it is faced with challenges that may undermine its effectiveness. Namibia is a mineral producing country seeking to achieve improved development outcomes through the judicious use of revenues generated from its mining sector. In this endeavour, the design of the fiscal regime is salient to the realisation of that potential. The study finds that the Namibian mining sector's fiscal regime is not sufficiently developed or robust enough to realise government objectives, that too many allowances and incentives undermine its operation, and that the existance of fiscal loopholes obviate its efficacy too. Specifically, the paper recommends that the fiscal regime for the Namibian mining industry should be reviewed to include a new resource rent tax, as well as address challenges that currently undermine its effectiveness.

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Table and Abbreviations

Table

Table 1: Fiscal regime for mining in Namibia

Abbreviations

VAT Value Added Tax

GDP Gross Domestic Product

SACU Southern African Customs Union

CIT Corporate Income Tax

FDI Foreign Direct Investment

EPZ Export Processing Zone

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1. Introduction

Subsoil natural resources, minerals and petroleum, are extracted as a way of converting an immovable asset in the ground to new assets above the ground, for both the miner operator (company, co-operative, artisanal and small-scale miners) and the government,.[1] A fiscal regime provides rules and regulations that determine how the rent from the extraction of resources is shared between the government and the mine operator.[2] Different fiscal instruments are combined in a fiscal regime, such as bonuses, royalty payments, and corporate income tax. The choice of fiscal instruments and regime design should be driven by the objectives of the government.[3] However, designing and implementing a fiscal regime poses a significant challenge for developing countries, such as Namibia, particularly because many taxpayers, mostly multinational companies, use loopholes such as those provided by transfer pricing (including through company registration in tax havens) to seek to lessen the amount of tax payable to the government[4]. It is estimated that African countries lose a revenue of about US$450-730 million* in corporate income taxes per annum through tax avoidance by multinational mining companies. [5] Therefore, a fiscal regime needs to be both well designed and implemented to ensure achievement of government objectives, while at the same time avoiding an approach that discourages minerals sector foreign direct investment (FDI).

Hence, the research aims to determine whether the design of the fiscal regime for mining in Namibia is robust and well calibrated enough to enable the realisation of government[6] objectives. It will analyse the fiscal instruments used and identify the potential challenges of their implementation. The paper ponders on the question whether the current Namibian mining fiscal regime is well poised to capture a share of the rents that can enable creation of new assets for the government and the citizens and whether it has the capability of

[1] Philip Daniel, Michael Keen and Charles McPherson, *The taxation of petroleum and minerals: principles, problems and practice* (Routledge 2010).
[2] Natural Resource Governance Institute, *Fiscal Regime Design - What Revenues the Government Will be Entitled to Collect* (2015).
[3] United Nations, *Handbook on Selected Issues for Taxation of the Extractive Industries by Developing Countries* (2017).
[4] Natural Resource Governance Institute (n 2).
[5] Giorgia Albertin, Dan Devlin, and Boriana Yontcheva, *Countering Tax Avoidance in Sub-Saharan Africa's Mining Sector.* (IMFBlog, 05 November 2021).
* At the time of this publication, estimated figures has been released as per the reference above.
[6] All references to "government" in this research paper are, by default, to the national government of Namibia.

overcoming the tax challenges that commonly face tax administrators in resource-rich developing nations.

Namibia has been selected as a case study because, despite the endowment of rich mineral resources that the country possesses and a small population, Namibia continues to experience relatively low economic growth and mining-led development. [7]

An investigation conducted by *The Namibian* newspaper in 2018 alleges that out of the gross earnings of N$85 billion received from the sale of Namibian minerals by over 30 companies between 2012 and 2017, only 1% of that amount was paid in corporate tax, with the exclusion of the diamond mining sector.[8] The diamond mining sector contributed to the State a revenue of about 15% of its gross earnings.[9] In addition, the article states that some companies report losses every year although they have exported minerals worth billions of dollars, while some are exempted from paying taxes due to incentives such as tax holidays and export processing zone status. Furthermore, the article alleges that many of the mining companies operating in Namibia have subsidiaries in countries that Namibia has tax treaties with, or in tax haven countries.[10] *The Namibian* report begs the question as to whether the country is indeed benefiting from the exploitation of its natural resources to the proper degree.

By conducting a literature review on the ideal design of the fiscal regime for mining, an assessment will be made in this research paper as to the efficacy of Namibia's mining fiscal regime, in particular in the context of achieving the public policy goal[11] of maximising benefits from natural resources for economic progression and social transformation.

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[7] United Nations Development Programme, 'Namibia Human Development Indicators' (2020) <http://hdr.undp.org/en/countries/profiles/NAM> accessed 26 January 2021.
[8] Lazarus Amukeshe, 'Mines on tax honeymoon' (*The Namibian*, 26 April 2019) <https://www.namibian.com.na/187954/archive-read/Mines-on-tax-honeymoon> accessed 08 May 2020.
[9] Ibid.
[10] Ibid.
[11] Republic of Namibia. 2017. Namibia's 5th National Development Plan. Namibia [accessed 29 May 2020]. https://www.npc.gov.na/wp-content/uploads/2021/11/NDP5.pdf.

2. Design of a fiscal regime for mining

2.1 Objectives of a fiscal regime

In the development of mineral resources, the government and the mine operator have differing objectives that they would like to achieve. However, ideally it is the government's objectives that shapes the design of the fiscal regime[12].

2.1.1 Maximising the present value of net government revenues

The objectives of the host government for resource extraction may vary, but they typically include to maximize the present value of net government revenues, employment creation, boosting the development of local industries, and capacity building.. Although extractive industries are special from other industries in many ways, the unique characteristic is the exhaustibility of subsoil resources.[13] Due to this, the host government aims to obtain maximum benefits from the 'one-time' extraction of these resources[14]. However, the asymmetry of information between the government and the investor, especially in developing countries, causes the government to forego some revenues by providing incentives in order to attract investment[15].

2.1.2 Timing of receipt of revenue

In many countries, including Namibia, mineral resources are vested in the State on behalf of the citizens. Consequently, citizens have expectations from ongoing exploration activities, especially when they become successful, and the host government has to manage these expectations. Early revenues can demonstrate to the nation's citizens that the country is benefiting from their natural resources, while delayed receipt of revenues can promote investment in the country.[16] Hence, governments design their fiscal regimes using different instruments that have different timing effects, some enabling early revenues, while some ensuring receipt of revenues over time.

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[12]United Nations (n 3).
[13] Daniel, Keen and McPherson (n 1).
[14] United Nations (n 3).
[15]Carlo Cottarelli, 'Fiscal regimes for extractive industries: Design and implementation' International Monetary Fund 67.
[16] Peter D. Cameron and Michael C. Stanley, *Oil, Gas, and Mining : A Sourcebook for Understanding the Extractive Industries* (World Bank Publications 2017) (n **Error! Bookmark not defined.**).

2.1.3 Progressivity

The long term nature of extractive projects and the uncertainties around geological and market conditions of the extractive industries have an effect on the profitability of the projects over time. When commodity prices, production techniques, and production rates changes, the profit margin of the project also changes[17]. A fiscal regime should be designed to be able to capture some of the rent from the surplus profits during times of high profits for the government. A fiscal design that incorporates instruments that aim at capturing this rent is said to be progressive[18]. This means that the State's share of the rent increases as the profitability of the project increases.

2.1.4 Neutrality

In designing the fiscal regime, govenrments should take into consideration the capital intensive nature of mining activities and avoid decisions that may distort investment. [19] Therefore, the government should not take 100% of the rent or profit, but aim to find some sort of neutrality.[20] A neutral and stable fiscal regime facilitates investment and has the effect of, all other things being equal, extending the life of mining operations through reducing uncertainty or levels of risk for mine operators/owners. In the mining sector, the government's take of the share is mostly about one-third or more of the rents, while in petroleum, it is higher, around 65 to 85 percent[21].

2.1.5 Competitiveness

Extractive industries are characterised by high capital requirements, that once sunk, can no longer be recovered if the operations turn out not to be profitable.[22] In addition, investors, in particular multinational companies, have a wide range of investment destinations to choose from around the globe. Due to this, resource-rich countries are in a race to attract investments. Therefore, in designing the fiscal regime and given this competition for FDI, the government need to strike a balance between maximising benefits for the country and providing investors with a return on their investment.

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[17] Ibid.
[18] Daniel, Keen and McPherson (n 1).
[19] Cameron and Stanley (n **Error! Bookmark not defined.**).
[20] Silvana Tordo, *Fiscal systems for hydrocarbons: design issues* (The World Bank 2007).
[21] Cameron and Stanley (n **Error! Bookmark not defined.**).
[22] Ibid.

2.1.6 Administrative simplicity

The guiding principle in designing the implementation and administration of the fiscal regime should be administrative simplicity. Simplicity ensures effective and efficient enforcement. When fiscal regimes are efficient, predictable, stable, and simple enough to be applied effectively and consistently, they can incentivise long-term investment as well as reduce disputes.[23] Unclear tax rules and the absence of guidance notes applicable to extractive industry activities are the main cause of difficulties in fiscal regime administration.[24] There should be a specific part of the tax legislation, or in the sector-specific tax legislation, that provides clear tax rules for the extractive industry, but that remain consistent with the general tax legislation[25]. In addition, administration of fiscal regimes should be organised in an integrated manner, organised around the functions that have to be performed in the tax administration, reflecting principles of specialisation and taxpayer segmentation. Tax institutions need to have adequate capacity with well paid, trained and equipped staff.[26]

2.2 Fiscal instruments for the mining sector

When governments design fiscal regimes, they combine different fiscal instruments that aims at achieving different government objectives. The most common instruments for the mining sector are royalty, income corporate tax, resource rent tax, and State participation.

2.2.1 Royalty

A royalty is a flat rate levied on the gross production or gross revenue. *Ad valorem* royalty, the most common form of royalty, collects a percentage of the value of the resource extracted, applied on the gross value of production.[27] The other form of royalty is the sliding scale royalty, which collects revenue by adjusting the percentage of government take based on the profitability of the project.[28] Royalty captures early revenue for the government, and it is easy to administer. However, if not carefully designed, it can deter investment in some projects, especially the marginal ones.

[23] Ibid.
[24] United Nations (n 3).
[25] Cameron and Stanley (n **Error! Bookmark not defined.**).
[26] United Nations (n 3).
[27] Cameron and Stanley (n **Error! Bookmark not defined.**).
[28] Ibid.

2.2.2 Corporate Income Tax

Corporate Income Tax (CIT) is based on business profits with an ability to depreciate assets and deduct costs and interest.[29] Application of this tax is needed, just like in other sectors, to ensure that the normal return to equity is taxed at corporate level. The Corporate Income Tax shares risk between the government and the investor, hence enabling the fiscal regime to achieve neutrality. However, it is vulnerable to international tax problems.

In the calculation of the Corporate Income Tax, the fiscal regime usually specifies rules regarding allowable deductions, depreciation, loss-carry forward, and ring-fencing. Regarding deductions, the government may want to specify which costs are not to be deducted such as royalties, exploration and development costs, costs regarding buying from related companies, and limiting excessive interest payments. Due to the fact that assets loses value over their lifetime, depreciation and amortization rules are intended to reflect the asset's decreasing value during its useful life, and they dictate the amount of the asset's cost that can be written off in a particular year.[30] Accelerated depreciation/amortization defers tax payments to later years and lowers the tax burden in the earlier years of production. Furthermore, loss carry forward rules determine whether or not remaining losses from a previous year may be subtracted from the profits in subsequent years to lower taxable income.[31] Again, tax liability is deferred to later years if loss carry forward is allowed by the fiscal regime. Lastly, the fiscal regime may want to specify whether projects can be consolidated for tax purposes. If mining companies are allowed to offset the costs of one project from the revenue of another, the government may want to put a limit on the consolidation of these income and deductions for tax purposes, and this practice is called ring-fencing.[32] Ring-fencing ensures early government revenues, however, it may discourage further exploration.

2.2.3 Resource Rent Tax

Changes in commodity prices, market conditions and production techniques will impact the profitability of the project, giving rise to huge rents during times of high profitability.[33] Providing for resource rent tax in the fiscal regime will ensure that government revenues rise as rents increase, making the fiscal regime progressive and neutral. Most importantly,

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[29] Ibid.
[30] Daniel, Keen and McPherson (n 1).
[31] United Nations (n 3).
[32] Ibid.
[33] Garnaut and Clunies-Ross (n **Error! Bookmark not defined.**).

the inclusion of rent taxes can reduce the need to renegotiate the terms of the contract or change the rules unilaterally, which helps to achieve stability and credibility of the fiscal regime and make it competitive.[34]

2.2.4 State equity participation

State equity participation refers to regulations that require or permit the State to own a portion of equity in mining companies.[35] The government's equity can be in a form of fully paid interest, carried interest, or free interest.[36] Fully paid interest means the government pays the full cost of its ownership in the mining company, but this can be paid for through non-equity contributions such as through infrastructure provision. Carried interest means that the investor pays the government's share of the project costs until the production stage, after which the State relinquishes the dividend payments until the costs and interest are fully paid. Equity participation by free equity allows the government to acquire ownership in the mining company at no cost.[37]

State equity can be owned through state-owned enterprises, mining ministries, or other government agencies. Although State participation in the extractive sector can have a fiscal motivation or tax dimension, it is usually motivated by non-fiscal objectives such as knowledge transfer and participating in decision-making related to the project.[38] However, State participation have disadvantages and the government may not achieve its goals of participating due to uncertaninty over the project's profitability, additional cash calls, international tax problems, and issues related to minority shareholders' rights in the mining company.[39] Also, it can have negative impacts on investment decisions. Despite this, State participation can help to maximise government revenues when structured carefully.[40]

2.2.5 Witholding Tax

Significant dividend and interest payments as well as subcontractor payments to non-residents are common in the mining sector because of substantial foreign investments and

[34] Ibid.
[35] Jack Calder, *Administering Fiscal Regimes for Extractive Industries: A Handbook* (INTERNATIONAL MONETARY FUND 2014).
[36] Paul Collier, 'Principles of resource taxation for low-income countries' in *The Taxation of Petroleum and Minerals* (Routledge 2010).
[37] Charles McPherson, '9 State participation in the natural resource sectors' The taxation of petroleum and minerals: Principles, problems and practice 263.
[38] Calder (n 35).
[39] McPherson (n 35).
[40] Ibid.

the provision of special expertise and services that are not available in the host country. The tax from these payments, called withholding tax, is withheld by the company, which pay it over to the government on behalf of the non-resident payees. Besides the generation of revenue from these taxes, the government use withholding tax to discourage excessive payments to non-residents as a means of profit shifting to lower tax jurisdictions.[41]

2.2.6 Import and export duties

Import duties are levies or taxes that are charged on imported goods, usually done with the purpose of protecting domestic industries.[42] Mining activities are capital intensive in nature, and they require highly specialized equipment which is commonly unavailable in the producing country. Although import duties can allow the government to receive early revenues because they are paid during the exploration and development phases of the project life, they push up costs in the sector and lower the profitability of the projects. Consequently, this reduces the ultimate tax revenues from the mining sector. In light of this, majority of resource-rich governments may offer some kind of import duties exemptions during the exploration and development stages as an incentive to invest, although the exemption might not apply during the production stage.[43]

On the other hand, export duties are introduced in some states with the aim of encouraging local value addition.[44]

2.2.7 Value Added Tax

Value Added Tax (VAT) is a consumption tax placed on the value of goods and services. VAT paid on domestic outputs is credited against the VAT paid on inputs.[45]

[41] Cameron and Stanley (n **Error! Bookmark not defined.**).
[42] Ibid.
[43] Daniel, Keen and McPherson (n 1).
[44] Ibid.
[45] Ibid.

3. Challenges in the implementation of fiscal regimes

Designing and implementing fiscal regimes can be a tedious task especially for developing countries. When designing a fiscal regime, issues of implementation should be considered because a fiscal policy can fail to meet its objectives if implemented poorly, no matter how well designed it may be[46]. Specifically, challenges may arise in the administration of the fiscal regime, and international tax issues that may undermine the success of the fiscal system.

3.1 Poor administration and complexity of the fiscal regime

In developing countries, such as Namibia, tax administration is complicated by several factors that causes inefficiencies of tax authorities to collect government revenues properly. The existence of too many resource taxes, each with separate rules for returns, assessments and payments that are not coordinated, is one of the factors causing difficulties in the administration of fiscal regimes.[47]

In addition, different taxes may be fragmented and administered by different authorities who are poorly cooperative. Also, administrative staff may be poorly qualified and managed, increasing the inefficiency of the institutions even further, particularly if the taxes concerned are not simply designed. Of most importance are the poor procedures and poor design of forms which makes the extraction of assessment data difficult. Lastly, developing countries have a lack of one single agency or person responsible for recording the combined revenue generated from the sector.[48]

3.2 International tax issues

The global nature of the mining industry and the extensive involvement of multinational companies poses a challenge of international tax issues, which should be considered during

[46] United Nations (n 3).
[47] Jack Calder, 'Resource tax administration: Functions, procedures and institutions' in *The Taxation of Petroleum and Minerals* (Routledge 2010).
[48] Ibid.

the design of the fiscal regime. Tax rules applying to international transactions can enhance or undermine the effectiveness and attractiveness of a fiscal regime. Fundamentally, international tax issues are suffered on the corporate income tax and withholding tax. Aggressive international tax planning can occur through transfer pricing practices, tax avoidance and treaty shopping, taxation of capital gains on interest transfers, and thin capitalisation.[49]

3.2.1 Transfer pricing

Tansfer pricing is a business practice done when pricing the trading of goods and services between entities that are affiliated.[50] These affiliated businesses can be subsidiary companies that are owned by one parent company. Transfer pricing can however be abusive when the prices of the traded goods or services are inflated or lowered in order to shift profits to a lower tax jurisdiction, while deductions are being shifted to the higher tax jurisdictions.[51] In the extractive industries, transfer pricing often occurs in two forms.[52] Firstly, a subsidiary in the mineral producing country may sell its minerals to a related company at a price that is abnormally low in order to lower its reported revenues and, consequently, the amount of its royalties or income tax liabilities in that country. Secondly, the subsidiary within the mineral producing country may buy goods and services from the related company at exorbitant prices, thus inflating its reported costs and lowering its declared profits there. Resource-rich African countries, including Namibia, depend more on tax revenues compared to their peers in the developed world. This makes the issue of abusive transfer pricing more serious for African governments, and hence, careful consideration need to be applied during the design of the fiscal regime. To counter this problem, some States have introduced an arm's length principle for transfer pricing in their tax laws. The arm's length principle requires companies to price the trade of goods and services between their affiliated entities at a market rate that would have been applied if those companies were not related.[53]

[49] Peter Mullins, '13 International tax issues for the resources sector' The Taxation of Petroleum and Minerals 378.
[50] Philip Daniel and Victor Thuronyi, 'International tax and treaty strategy in resource–rich developing countries: experience and approaches' in *International Taxation and the Extractive Industries* (Routledge 2016).
[51] Ibid.
[52] Mullins (n 49).
[53] Daniel and Thuronyi (n 48).

3.2.2 Tax avoidance and treaty shopping

In addition to abusive transfer pricing, multinational companies may abuse the idea of bilateral taxation treaties to erode the tax base of the mining projects. Tax treaties reduce the levels of withholding taxes allowed, or eliminate them completely.[54] Withholding taxes on dividends, interest, and management or technical services fees can substantially be reduced by treaty shopping.

3.2.3 Taxation of Capital Gains on transfer

In the extractive industry, capital gains tax is a tax on the income obtained from the sale of a mining license or an equity in a mining license.[55] Transfers of mining licenses can entail substantial amounts of money, and if they are not taxed, the nation may be perceived to be losing out on this benefit to the seller of the license. Although, in actual fact the overall tax from the project to the government stays the same if the equivalent tax deduction is permitted from the buyer's taxable income.[56] Nevertheless, because of the time value of money, enforcing a capital gains tax enables the government to collect a portion of the overall taxes earlier in the project life.

If the fiscal regime only taxes gains on direct transfers of the license itself, mining companies may evade taxes by transferring interests in a non-resident holding company that controls the local subsidiary that owns the mining license. [57] Also, capital gains taxes may be prohibited on citizens of a country which the government has a tax treaty with. Therefore, taxation of capital gains from the transfer of interests in mineral rights poses another challenge for developing countries.

3.2.4 Thin Capitalisation

Mining companies may lower their taxable income through payments of excessive interests. This is done by taking out loans with interest rates greater than the market rate. In international businesses such as those typical in the mining industry, this may be done through the "thin capitalization" method.[58] This is when foreign investors finance projects

[54] Ibid.
[55] Mullins (n 47).
[56] Daniel and Thuronyi (n 48).
[57] Cameron and Stanley (n **Error! Bookmark not defined.**).
[58] Ibid.

with a little amount of equity and a substantial amount of loans from associated companies.[59] Using more loans than equity allows the investors to decrease their taxable income by deducting the interest paid on these loans as costs. To curb the excessive deduction of interests, fiscal regimes need to design rules that put a limitation on the amount of interest deducted where there is an excessive ratio of debt to equity through thin capitalization. [60]

Therefore, in designing their fiscal regimes, governments should take into consideration these international tax issues in order to ensure that the tax regime is competitive and attractive for foreign investment, while at the same time ensuring that it is robust enough to capture the government's share of the resource rent, by avoiding erosion of the tax base through aggressive tax planning.

[59] Daniel and Thuronyi (n 48).
[60] Ibid.

4. Namibia mining fiscal regime

4.1 Country overview

Namibia is a mineral-rich developing country in south-western Africa. The country has a large surface area, but with a population of only 2.5 million people.[61] The country has enjoyed uninterrupted peace and political stability since independence in 1990. Good infrastructures such as roads, railways and port facilities are some of the advantages of this arid country. Geologically, Namibia has a favourable environment, with geological information being regularly updated by the Geological Survey of Namibia. The country has a well-developed mining industry, with revenues from the sector accounting for 9%* of the Gross Domestic Product (GDP) in 2021, making it one of the backbones of the economy.[62] The country produces diamonds, uranium, copper, zinc, lead, gold, lithium, dimension stones, and semi-precious stones.[63] In addition, Namibia is the second* world largest producer of uranium after Kazakhstan, Canada, and Australia,[64] and it is among the top seventeen* producers of gem-quality diamonds in the world.[65]

4.2 Design of the Namibian fiscal regime for the mining sector

Taxation of the minerals sector in Namibia is provided for by the Minerals (Prospecting and Mining) Act 33 of 1992, the Income Tax Act 24 of 1981, the Value Added Tax Act 10 of 2000, and the Export Levy Act 2 of 2016.

Table 1: Fiscal regime for mining in Namibia[66]

Tax Instrument	Applied to	Rate
Royalty	Diamonds Dimension stones	10% 5%

[61] UNITED NATIONS DEVELOPMENT PROGRAMME (n 7).
[62] Chamber of Mines of Namibia, 2021 Annual Review (2022).
[63] Ibid.
[64] World Nuclear Association, ‘World Uranium Mining Production’ (World Nuclear Association, July 2022) < https://world-nuclear.org/information-library/nuclear-fuel-cycle/mining-of-uranium/world-uranium-mining-production.aspx> accessed 07 July 2022.
[65] Daniel Workman, ‘Diamond Exports by Country’ (World's Top Exports, July 2022) http://www.worldstopexports.com/diamond-exports-country/ accessed 07 July 2022.
*This information has been updated to reflect 2021 figures as per the above three references.
[66] Chamber of Mines of Namibia, ‘Mining Tax Regime’ (Chamber of Mines of Namibia, 05 May 2020) https://www.chamberofmines.org.na/index.php/mining-tax-regime/ accessed 05 May 2020.

	Precious metals, Base and Rare metals, Nuclear fuel minerals Non-nuclear fuel minerals, Industrial minerals, Semi-precious stones	3% 2%
Corporate Income Tax	Diamond mining companies Non-diamond mining companies Non-mining companies	55% 37.5% 32%
Withholding Tax	Dividends < 25% shareholding Dividends > 25% shareholding Interest Royalties Management, technical, admin, and consulting Non-resident director's fees and fees paid to foreign entertainers	20% 10% 10% 10% 10% 25%
Import Duty	Uplift 10%, Subject to Southern Africa Customs Union (SACU) standards	
Export Duty	Varies for different minerals, with processed minerals being taxed less and unprocessed minerals receiving a high tax.	0.25% - 2%
VAT	All taxable supplies Direct export of goods and services	15% 0%

The fiscal regime of Namibia provides a range of tax allowances and deductibles in the calculation of the Corporate Income Tax. Royalties are tax deductible. Exploration and development costs are also deducted in full in the first year of production. Depreciation is allowed on a straight line, in three equal annual allowances. In addition, expenditure for subsequent exploration is not ring-fenced and can be deducted fully in the year, while losses are carried forward indefinitely. Furthermore, capital gains are not taxed.[67]

The fiscal regime for the Namibian mining industry does not provide for mandatory State participation. Nonetheless, a state-owned company, Epangelo Mining, was established in 2008 with the aim of ensuring national participation in the exploitation of the country's mineral resources. Although not legislated, the state-owned company has acquired shares

[67] Ibid.

in some mining companies on a carried interest basis. Apart from the involvement of State participation through Epangelo Mining, the government of Namibia has previously entered into a 50%-50% equity joint venture with De Beers Group (owned by Anglo American) for the diamond mining projects.

The government of Namibia provides a range of incentives to promote competitiveness and foreign direct investment in the country. Some mining companies that perform mineral beneficiation in the country have been accorded Exclusive Processing Zone (EPZ) status. EPZ regime acts as a tax haven that benefits export-oriented manufacturing businesses, and it is meant to promote knowledge transfer, capital inflow, capacity building, and employment creation.[68] The EPZ status gives a range of advantages including no tax regime, lifetime benefits, and equal treatment of local and foreign investors.[69] In addition, the Namibian mining fiscal regime provides for a five-year tax holiday that some mining companies has benefited from.[70]

Namibia has signed double taxation agreements with Botswana, France, Germany, India, Malaysia, Mauritius, Romania, the Russian Federation, South Africa, Sweden, and the United Kingdom.[71]

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[68] Republic of Namibia. 1995. Export Processing Zones Act 9 of 1995. https://www.lac.org.na/laws/annoSTAT/Export%20Processing%20Zones%20Act%209%20of%201995.pdf accessed 26 May 2020.
[69] Ibid.
[70] Ibid.
[71] Daniel and Thuronyi (n 60).

5. Assessment of the Namibian mining fiscal regime

The fiscal regime of the Namibian mining industry is based on the licensing system with a royalty-tax scheme, where the government charges a royalty and imposes the generally applicable tax regime.

5.1 Assessment against the instruments

The different instruments used ensure the steady inflow of revenue over time. Royalties, which although might be regressive in nature, ensure receipt of early revenues for the government. CIT and state participation in some projects ensures receipt of revenue over time. Furthermore, the use of withholding taxes, import and export duties, and VAT increases the revenue obtained from the mining sector.

The combination of royalties and State participation with carried interest can distort investment decisions for marginal projects. However, the regime can be said to be neutral because government fiscal take in Namibia, which is less than 55%, still leaves some rent for the investors which is sufficient to encourage investment.

Interestingly, the fiscal regime for the Namibian mining industry does not make use of mineral resource rent tax that ensures that government revenues go up with profitability, i.e. the country's fiscal regime for mining is not progressive. This fact is despite Namibia being in a strong position to implement a progressive fiscal regime given the scale of its mining sector: it is one of the world's largest producers of minerals such as diamonds and uranium. Despite that, progressivity is largely absent and the government is hence losing revenue that may have been obtained during times of high prices and profitability.

The potential for the re-opening of key uranium mines, e.g. Langer Heinrich, in Namibia currently mothballed in the period of low prices that followed the Fukushima Daiichi nuclear power plant disaster of 2011, may depend on attractive (to the company) rates of royalty and tax being applied to these operations given that rising uranium prices are likely, at least initially, only to make such mines marginally profitable to operate. A progressive fiscal regime would recognize this fact and apply lower rates of tax and royalty to facilitate the re-opening of those mines, in line with the analysis above that Namibia is actively competing

for mining sector FDI with other jurisdictions offering alternative mineral targets for extraction.

Namibia's fiscal regime has a range of instruments that makes it competitive compared to other states within the Southern African region. The presence of several tax allowances and deductibles, incentives, as well as the absence of ring-fencing and zero tax on capital gains, makes the regime more appealing to investors. In addition, the non-mandatory participation of the state can also incentivise investment into the country.[72]

The administration of the fiscal regime shows fragmentation of different taxes being managed by different authorities. The royalties are collected by the Ministry of Mines and Energy, while the CIT and other taxes are being collected by the Ministry of Finance. This indicates a complex fiscal regime, hence, administrative simplicity cannot be achieved through the current design of the fiscal regime.

The range of instruments used, when combined with the allowances and incentives provided, makes the fiscal regime insufficient to realise the maximizing of benefits from the sector. Firstly, the deduction of royalties, exploration and development costs, absence of ring-fencing, and the unlimited interest payments will result in substantial amounts of deductions which will drastically reduce the tax base, resulting in companies to be reporting losses especially in the first few years of production. The ability of these losses to be carried forward indefinitely to coming years means that mining companies will end up not paying taxes for many years although they are in production. Also, the deferred receipt of taxes is not economically sound due to decreasing value of money. Furthermore, State participation by carried interest might not yield revenues for many years because after the unlimited carried forward losses have been fully deducted, the government will have to wait again for more years for their portion of ownership to be recovered from their dividends before they can receive any pay-out. Secondly, the incentives aimed at employment creation has not been effective due to the capital intensive nature of mining and the rapidly increasing automation of the industry which is making mining companies to produce tons of minerals with few people. Additionally, job creation via backward and forward linkages is very limited because of the enclave nature of mining projects. Thirdly, the zero tax on capital gains on

[72] Prosper Nkala, 'An evaluation of selected changes proposed in respect of the South African mining tax regime' (University of Pretoria 2017).

transfers means that the country is not getting anything from the transfers of their assets, which is revenue foregone on the side of the government. Conclusively, the Namibian mining fiscal regime is not robust in maximising the present value of net government revenues and employment creation.

Overall, the instruments used in the Namibian fiscal regime make the regime sufficient to ensure receipt of revenues over time, and they make the regime neutral and competitive to attract FDI. However, it is not progressive, not simple to administer, and most importantly, it is not robust enough to maximise the present value of net government revenues.

5.2 Challenges of implementation

Like other developing countries, the fiscal regime for the mining sector in Namibia highlights the challenges faced in the implementation of the fiscal regimes. Firstly, the administration of the fiscal regime is fragmented and complicated, with different taxes being administered by different authorities.

Secondly, the design of the Namibian fiscal regime for mining indicates vulnerability to international tax planning. The absence of provisions related to thin capitalization provides room for excessive debt to be used for funding in comparison to equity. In addition, an analysis into the eleven tax treaties that Namibia has signed indicates that limits on withholding are selective and inconsistent, which provides opportunities for tax evasion. [73]Namibia's fiscal regime has incorporated rules to overcome abusive transfer pricing practices. It requires cross-border transactions between affiliated entities to be adjusted to an arm's length principle. Arm's length principle is an accounting practice that requires prices for trades between related companies to be set at a rate that would have been applied if those companies were not related.[74] The Namibian transfer pricing legislation requires the taxpayer to provide documentation that a sound transfer pricing policy has been developed to determine prices according to the arm's length principles. However, the capacity of tax regulators to effectively audit these transactions remains questionable. Also, specific regulations as to what the acceptable arm's length rate would be are not available. Thus, the capability of the regime to effectively address transfer pricing issues is not well defined.

[73] Daniel and Thuronyi (n 60).
[74] Mullins (n 47).

Overall, the design of the Namibian tax regime has many loopholes that may undermine its effectiveness in achieving government objectives.

6. Conclusion

The objective of the research was to perform an assessment of the fiscal regime for the mining industry in Namibia and determine its robustness in achieving government objectives. The research has found that the regime is not robust enough to ensure that government objectives are met. Although some objectives such as receipt of revenues over the lifetime of the projects, neutrality and competitiveness are satisfactorily met, the instruments used are not robust enough to achieve the progressiveness, administrative simplicity of the regime, as well as maximizing the present value of net government revenues that can be used for economic development of the country. Royalties and exploration and development costs are tax deductible, projects are not ring-fenced, losses are carried forward indefinitely, no limit on thin capitalization, and there is no tax on capital gains on transfers of the mining licenses.

Furthermore, the assessment has found that the regime is faced with many challenges that may undermine the effectiveness of its implementation. Although there are transfer pricing rules, the capacity to effectively implement them and the acceptable arm's length rate remains a question. In addition, the country does not have consistent limits on withholding, which provides an opportunity for tax planning and treaty shopping. Lastly, the administration of the tax regime for the Namibian mining sector is fragmented and complicated, with different taxes being administered by different institutions which are not coordinated, and with each tax having its own rules for return, assessment, and payments.

With the abundance of resources the country is endowed with, it cannot continue to mainly rely on royalties only. It is therefore recommended that the Namibian government reviews its fiscal regime for mining and introduce resource rent tax. In addition, there is a need to appoint only one institution or agency that will deal with all tax related issues of the mining industry to eliminate the fragmentation and complexity of the regime. The regime should also incorporate comprehensive rules to avoid international tax planning, including thin capitalisation and having consistent limit on withholding for all tax treaties. Finally, the fiscal regime should introduce a tax on capital gains on transfers, place limits on the deductibles, and minimize the incentives. Effecting these changes will ensure the robustness of the fiscal regime to capture maximum benefits for the government and the citizens, while avoiding challenges that may topple its implementation. Additional revenues to the government is

critically needed now to assist the economy to recover from the impacts of Covid-19 and the global economic downturn.

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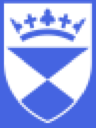

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