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# **Evolution of the legal framework for oil and gas exploration and production in Namibia**

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September 2013

**Summary:** This article highlights the existing national legal framework in Namibia relating to the exploration and production of offshore petroleum resources. It gives a brief summary of the historical context before discussing the extent to which the policy and legal framework provides for an effective licensing regime to attract the necessary investment, a regulatory framework to manage and control the activities of the industry, and to facilitate the development of a local industry to allow the participation of Namibians in the sector. Consideration is given to the institutional framework, the licensing system, the regulatory approach to health, safety and the environment (including the decommissioning of offshore installations), and the development of a gas sector.

## 1. Introduction

A comparison of petroleum laws worldwide reveals that the exploration and production of oil and gas resources onshore, and also offshore on the continental shelf, involves directly pertinent issues of ownership of the resources and control over activities to exploit these resources. Hence there is a need for an effective legal and regulatory framework with clear and transparent legal, policy and fiscal terms.<sup>1</sup> The main objectives of such a legal framework include the provision of basic rules to facilitate the exploration and production operations in the host country, to regulate the activities of the acreage/licence holders, and to define the administrative, economic and fiscal guidelines for investment in the sector. The framework would normally consist of policies, laws, regulations, guidelines and standards that are designed for the purpose of regulating exploration and production operations within the boundaries of the state. The common trend is to adopt separate laws that deal with the mining of minerals and petroleum exploration and production applying to onshore and offshore areas.

This article discusses how some of these issues are addressed in Namibia: a country still regarded as a frontier area, but one with a stable political environment, a rich endowment of mineral resources, a recent oil discovery<sup>2</sup>, a large gas field and an infant<sup>3</sup>, but energetic, local industry<sup>4</sup>. Namibia is situated alongside a number of countries blessed with major oil and gas discoveries. In the southern African region, neighbouring Angola is a member of the Organization of Petroleum Exporting Countries (OPEC)<sup>5</sup>, and major African oil and gas producer, South Africa also has

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<sup>1</sup> See for example *Oil, Gas and Energy Law* - Global Energy Law & Regulation Portal (OGEL), Legal & Regulatory Documents by Country <<http://www.ogel.org>>; also *Barrows Basic Oil Laws and Concession Contracts* <<http://www.barrowscompany.com>>; An example is the Brazilian Petroleum Law (Federal Law No. 9.478/97), and the National Petroleum, Natural Gas and Biofuels Agency's ("ANP") subsequent regulations, which are aiming to create and implement a transparent and effective legal framework based on competition that would substantially increase the upstream activities (see Lemos and Da Silva, 'Overview of Brazilian Petroleum Regimes', OGEL, 13 June 2013).

<sup>2</sup> See Debruyn, 'Daar's olie!', Republikein, Windhoek, 22 May 2013; Abankwah, 'HRT source rock a good find', Windhoek Observer, 27 June 2013

<sup>3</sup> For an overview of the Kudu Gas Field see Namcor (upstream) <<http://www.namcor.com.na/kudu>> accessed 12 July 2013; see also discussion on the offshore Kudu Gas Field,

<sup>4</sup> See discussion on local oil and gas industry.

<sup>5</sup> See Angola Facts and Figures <[http://www.opec.org/opec\\_web/en/about\\_us/147.htm](http://www.opec.org/opec_web/en/about_us/147.htm)> accessed 5 September 2013

considerable offshore oil and gas production<sup>6</sup>. Countries in eastern Africa (i.e. Mozambique, Tanzania, Kenya and Uganda) have all recently discovered large oil and gas fields. They have established national industries with determined international and local players and strong public sector support: industries that operate within the ambit of reasonable stable political and economically enabling environments. However for most of the countries in southern Africa, their 'oil and gas regimes' did not suddenly spring up overnight. They came about at the end of long periods of regional instability, caused mainly by military conflict, political and civil unrest. The eventual settlement of these incidents culminated in Namibia's independence, the end of civil wars in Mozambique and Angola, and the establishment of a democratic parliamentary system in South Africa.<sup>7</sup> The recent discoveries of oil and gas reserves in these countries (with the exception of Angola which is already a major oil and gas producer in Africa) show that the national legal and fiscal frameworks are proving to be successful in attracting the necessary investment and technical expertise from mature provinces (including producing companies with frontier experience from the Gulf of Mexico and the North Sea) to develop the natural resources. Yet questions are already being asked as to the effectiveness of the legal frameworks in dealing with the challenges associated with the international industry. For example, whether these countries would be able to deal with conflicts over the entitlement, ownership rights and control of oil and gas; catastrophic risks and environmental pollution at the scale of the Deepwater Horizon incident in the Gulf of Mexico; the decommissioning of offshore installations that are proving so costly in the North Sea; offshore safety to prevent an offshore disaster similar to the Piper Alpha; problems with transboundary developments; the need for local content; and issues of corruption, transparency and accountability. These are just some issues that are facing the international oil and gas industry and cast doubt on whether discoveries of oil and gas in these countries will turn out to be a curse or a blessing to these countries.<sup>8</sup> In the case of Namibia, these issues are highly relevant in terms of whether the legal and regulatory framework

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<sup>6</sup> For details on the oil and gas framework in South Africa oil and gas production see Petrosa <[http://www.petrosa.co.za/products\\_and\\_services/Pages/Crude.aspx](http://www.petrosa.co.za/products_and_services/Pages/Crude.aspx)> accessed 5 September 2013

<sup>7</sup> See Ngoma and Roux, 'Regional Security in Southern Africa Development Community: Perspectives on Security Challenges', in *Globalisation and Environmental Challenges*, Hexagon Series on Human and Environmental Security and Peace, 2008, Volume 3, Part VIII, pp. 811-818

<sup>8</sup> See for example Akwagyiram A, 'Will Mozambique end up like Nigeria or Norway?', BBC News Africa, 4 April 2013; 'Inadequate laws could delay exploitation of Kenya's oil deposits', Kenya Standard newspaper, 17 March 2012; Straziuso A, 'Oil and Gas in East Africa – 2013', Associated Press, Nairobi, Kenya, 21 June 2013

would effectively deal with them and at the same time, encourage investment to fully exploit the oil and gas resources for the benefit of the Namibian citizens.<sup>9</sup>

This article highlights the existing national legal framework in Namibia relating to the exploration and production of offshore petroleum resources. It discusses the extent to which the policy and legal framework provides for an effective licensing regime to attract the necessary investment and a regulatory framework to manage and control the activities of the industry and to facilitate the development of a local industry to allow the participation of Namibians in the sector. Consideration is given to the institutional framework, the licensing system, the regulatory approach to health, safety and the environment, and the development of a gas sector.

## 1.1 Namibia

The Namibian coastline stretches for about 1500 km between Angola in the north and South Africa in the south.<sup>10</sup> The maritime boundaries between the countries are determined by the location of the estuaries of the two major rivers, the Kunene River in the north and the Orange River, which flows into the Atlantic Ocean, in the south.<sup>11</sup> However, to date, only the boundary with Angola has been agreed upon.<sup>12</sup> The lack of agreement with regard to the southern offshore boundary could potentially contribute to an uncertainty surrounding exploration activities in this area. Additionally, since more exploration activities are taking place around the maritime boundary areas, it would therefore be in the best interest for Namibia and its neighbours to address the possible existence of transboundary oil and gas resources. There are various

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<sup>9</sup> For a recent study on the issue of transparency and accountability of Namibia's extractive industries see for example Hopwood G (Ed), *'Namibia's New frontiers, transparency and accountability in Extractive Industry Exploration'*, Institute for Public Policy Research (IPPR) Anti-Corruption Research Programme, Windhoek, June 2013; and Links F, 'On A Slippery Slope: Corruption and the Extractive Industries in Namibia', Anti-Corruption Research Programme, Institute for Public Policy Research, Paper 13, September 2012

<sup>10</sup> For further details on the Namibian coastline see NACOMA, Namibia Coast Conservation & Management Project <<http://www.nacoma.org.na>> accessed 1 August 2013; for information of Namibia's boundary with Botswana see Evans M (Ed), *Decisions of International Tribunals*, ICLQ, 49, 2000 in particular Shaw's discussion of the ICJ decision of 13 December 1999 on the *Case Concerning Kasikili/Sedudu Island (Botswana/ Namibia)*, which concerned the interpretation of the 1890 Anglo- German Treaty, including the nature and the role of subsequent practice, pp. 964-978.

<sup>11</sup> See Moller L, 'The Outstanding Namibian Maritime Boundaries with Angola and South Africa', *International Journal of Marine and Coastal Law*, Vol.18, No.2, June 2003

<sup>12</sup> See *Accord on the delimitation of the maritime border between Angola and Namibia*, 4 June 2002 <<http://www.un.org/Depts/los/Legislationandtreaties/Statefiles/Nam.htm>> accessed 10 August 2013

international examples on arrangements between neighbouring countries on the joint-development of transboundary oil and gas resources which could serve as guidance.<sup>13</sup>

Key episodes in Namibia's history include Germany's annexation of the territory as a colonial possession in 1884.<sup>14</sup> After 1915, the Union of South Africa occupied German South West Africa (SWA). In 1922, the League of Nations granted a 'C' mandate over the territory to South Africa. In 1966, the United Nations (UN) declared that the territory of Namibia (SWA) was its direct responsibility and the 'C' mandate was terminated by General Assembly Resolution 2145 which confirmed that the administration of the Republic of South Africa (RSA) over Namibia was unlawful.<sup>15</sup> Despite this, the South African administration continued to exercise control over Namibia (SWA) and rigorously enforced apartheid in Namibia, which was based on discriminatory laws and practices.<sup>16</sup> In 1976, the UN authorised the UN Council for Namibia to prepare a comprehensive UN map of Namibia reflecting the territorial integrity of the territory. Although several maps were produced, they did not show

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<sup>13</sup> See for example the Framework Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Norway concerning Cross-Boundary Petroleum Co-operation, Oslo, 4 April 2005 <<http://www.official-documents.gov.uk/document/cm67/6792/6792.pdf>> accessed 5 September 2013

<sup>14</sup> See text of the Agreement between Germany and Great Britain respecting Zanzibar, Heligoland and the Spheres of Influence of the two Countries in Africa, signed at Berlin, 1 July 1890, published in *The Consolidated Treaty Series*, Vol.173, 1890, Perry, Oceana Publications, New York, 1978, pp.271-284. For a brief legal history of Namibia see *NAMLEX*, Index to the laws of Namibia, Legal Assistance Centre, 1997; also R.W Imishue, *South West Africa, An International Problem*, Pall Mall Press, London, 1965, for a discussion on the history from 1915-1960; *The Cambridge History of Africa*, 6c. 1870-1905, (eds. J.D Fage and R Oliver), Cambridge University Press, 1985, pp.405-409, and pp.442-445; for an exposition of the resistance by the Herero and Nama people against German colonialism, see 'The Kaiser's First War on German South West Africa, from 1904 and after', in *The Scramble for Africa, 1876-1912*, Thomas Pakenham, Weidenfeld and Nicolson, London, 1991, pp.602-615

<sup>15</sup> See the International Court of Justice (ICJ) Advisory Opinion on the Legal Consequences For States Of The Continued Presence Of South Africa In Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), 21 June 1971 (Summaries of Judgments, Advisory Opinions and Orders of the International Court of Justice)

<sup>16</sup> The name South West Africa mainly stems from its geographical location in southern Africa, the subsequent colonial reference to *German South West Africa* and the resulting League of Nations mandate given to South Africa; after the UN General Assembly revoked South Africa's mandate over the territory in 1966 it established the UN Council for South-West Africa in 1967 (UNGA resolution 2248 of 19 May 1967), which was renamed a year later as the UN Council for Namibia (UNGA resolution 2372 of 12 June 1968) and which was then dissolved on 11 September in 1990 by the UN General Assembly after the independence of the country *Namibia* (UNGA resolution 44/243) see <<http://www.un.org/documents/ga/res/44/a44r243.htm>> accessed 2 September 2013 and also South Africa History online: Namibia at <<http://www.sahistory.org.za/places/namibia>> accessed 2 September 2013; (see also The South West Africa cases (Ethiopia v. South Africa; Liberia v. South Africa), Summaries of Judgments, Advisory Opinions and Orders of the International Court of Justice, South West Africa Cases (Preliminary Objections), Judgment of 21 December 1962 - <<http://www.icj-cij.org/docket/files/47/4911.pdf>> accessed 1 September 2013

maritime boundaries and were not officially endorsed by the UN.<sup>17</sup> In 1978, the UN Security Council passed Resolution 435, which made provision for the independence of Namibia in accordance with a settlement plan.<sup>18</sup> Finally, on 21 March 1990 Namibia became independent from the RSA in accordance with UN Resolution 435 under the supervision of the United Nations Technical Advisory Group (UNTAG).<sup>19</sup> The new Constituent Assembly adopted a draft Constitution on 9 February 1990, which came into force on 21 March 1990 (recognised as Namibia's Independence Day).<sup>20</sup> Thus the Constitution indicates, very prominently, the desire for complete independence of the whole territory from the RSA and therefore defines the national territory of Namibia as:

the whole of the territory recognised by the international community through the organs of the United Nations as Namibia, including the enclave, harbour and port of Walvis Bay, as well as the offshore islands of Namibia and its Southern boundary shall extend to the middle of the Orange River.<sup>21</sup>

Note that specific reference is made to Walvis Bay, the deep-water port and oil industry hub on the Namibian coast. This area was annexed by Britain in 1878 and administered by South Africa as part of the Colony of the Cape of Good Hope, until reincorporation in an independent Namibia in 1994.<sup>22</sup> On 12 May 2009 Namibia submitted an application to the UN Commission on the Limits of the Continental Shelf (CLCS) to extend the limits of its continental shelf beyond 200 nautical miles from the baselines from which the territorial sea is measured.<sup>23</sup> The application is still under consideration by the CLCS.<sup>24</sup>

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<sup>17</sup> 'Report concerning the maritime boundaries', to the Namibian Government, Prof. M.H Mendelson, QC, London, 9 May 1995 (expert opinion in a Namibian High Court case (settled out of court): *Pescaboa. SA v Government of Namibia*, 1995, in which the owners of a foreign registered fishing trawler were arrested for illegal fishing in the Namibian exclusive economic zone) – the report examined the existence and precise location of the northern maritime boundary of Namibia in the absence of a formal agreement with Angola.

<sup>18</sup> For text of 'Resolution 435' see *The United Nations System and its Predecessors*, Vol.1, (eds. Knipping, Von Mangoldt and Rittberger), Oxford University Press, 1997, pp.650-651.

<sup>19</sup> See *Namibia-UNTAG Background*:

<<http://www.un.org/en/peacekeeping/missions/past/untagFT.htm>> accessed 12 August 2013

<sup>20</sup> The Constituent Assembly consisted of representatives of all the different political groupings in Namibia (see Namibian Constitution <<http://www.gov.na/constitution1>> accessed 12 August 2013).

<sup>21</sup> Constitution of the Republic of Namibia, Article 1(4)

<sup>22</sup> See 'Act to provide for the transfer to Namibia of the territory of and sovereignty over Walvis Bay and certain islands, and to provide for matters incidental thereto, 14 January 1994; See also Treaty between Namibia and South Africa with respect to Walvis Bay and the Offshore Islands', 28 February 1994 (published in: Oceana Publications, New York, April 1998).

<sup>23</sup> See 'Submission by the Republic of Namibia to the Commission on the Limits of the Continental Shelf (CLCS) on the Outer limits of the continental shelf beyond 200 nautical miles from the

## 1.2 Oil and Gas Resources

Namibia is endowed with a rich variety of minerals including diamonds, uranium, gold, silver, copper, lead, zinc, iron, fluorspar, limestone, etc.<sup>25</sup> It has been stated in numerous geological studies that Namibia's offshore geology has very strong similarities with Brazil's oil rich Santos and Campos basins.<sup>26</sup> This is based on the common geological history during the Cretaceous Period (before the break-up of *Gondwana* that separated the two continents of South America and Africa.<sup>27</sup>

It is widely accepted that before the German colonial period rule over the territory, the local inhabitants in the south of the country used bitumen from the Nama Basin for lighting fires.<sup>28</sup> German geologists operating in the country subsequently confirmed these occurrences of bitumen. The first onshore oil well was drilled in 1929 at Berseba in the Nama Basin, on a dome structure close to one of the highest concentrations of bitumen. This drilling resulted in a gas blow-out but no oil was discovered. Further stratigraphic wells were drilled in the Nama Basin. One licence was issued over the onshore Ovambo/Etoshia Basin and seismic surveys were conducted before the drilling of four wells, which were regarded as not commercial.<sup>29</sup> The offshore Kudu gas field was discovered in 1974 by Chevron and Soekor (see discussion on Kudu gas field). To date less than 20 exploration wells have been

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baselines', Oceans & Law of the Sea, Division for Oceans Affairs and the Law of the Sea <[http://www.un.org/depts/los/clcs\\_new/submissions\\_files/submission\\_nam\\_50\\_2009.htm](http://www.un.org/depts/los/clcs_new/submissions_files/submission_nam_50_2009.htm)> accessed 10 August 2013

<sup>24</sup> The submission was made and discussed at the 25th Session of the CLCS which was held at the United Nations Headquarters, New York from 15 March to 23 April 2010. The Commission decided on the basis of article 5 of annex II to UNCLOS, that the submission would be addressed by a sub-commission to be established in accordance with rule 51, paragraph 4 of the rules of procedure, at a future session (see Statement by the Chairperson of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission, CLCS /66, 30 April 2010 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/337/97/PDF/N1033797.pdf?OpenElement>> accessed 1 September 2013; and also <<http://www.un.org/News/Press/docs/2010/sea1930.doc.htm>> accessed 1 September 2013

<sup>25</sup> See 'Summary of Namibia's geology', Geological Survey of Namibia <<http://www.mme.gov.na/gsn/namibiageology.htm>> accessed 10 July 2013

<sup>26</sup> See Bray, Lawrence and Swart, 'Source rock, maturity data indicate potential off Namibia', Oil & Gas Journal, August 1998; see also Ashipala, 'Brazilians upbeat about oil in Namibia', The Namibian Sun, Windhoek, 20 June 2011;

<sup>27</sup> See Mello, et al, 'Promising Giant New Hydrocarbon Frontier: The Namibian Continental Margin', Geo ExPro, Issue 6, Volume 8, 2011

<sup>28</sup> For a brief historical overview of oil and gas exploration see Namcor <<http://www.namcor.com.na/history>> accessed 1 August 2013

<sup>29</sup> For an illustration of the location of the wells offshore Namibia, see Map on the Seismic DataBase and Wells Offshore Namibia, by Namcor, compiled by Baumgartner which was produced for the AAPG International Pavilion 2002 (Map scale- 1:1,000,000), see also Namcor website <<http://www.namcor.com.na>> accessed 10 August 2013

drilled offshore by international oil companies including Norsk Hydro, Sasol, Chevron, Shell, Chevron, Ranger, Chariot, HRT, etc.<sup>30</sup> In addition, a number of Deep Sea Drilling Project (DSDP) and Ocean Drilling Project (ODP) wells were drilled in the deeper waters for scientific research and these produced valuable data of the seabed and subsoil. Since 2008 there has been a rapid increase of exploration activities in all the major onshore and offshore geological basins in the country with positive results showing strong presence of hydrocarbons.<sup>31</sup> On 21 May 2013, an announcement was made for an oil discovery offshore Namibia however the discovery was later re-classified as non-commercial.<sup>32</sup> Consequently, this excitement about oil discoveries which are so often linked with bad governance certainly evoked some interesting responses in the country.<sup>33</sup> Some local groups have already raised a number of concerns related to the impact of an oil discovery on the local communities, environment, and the economy for consideration by both government and industry. These include aspects that are directly related to the effectiveness of the legal and contractual framework for oil and gas exploration and production: the resource curse, transparency, corruption, accountability, health, safety and environmental protection and the participation of local communities.<sup>34</sup> Certainly, some of the challenges for the upstream oil and gas sector have been pointed out by the 1998 Energy Policy including good governance with effective institutional and procedural arrangements; and independent supervision of legal, fiscal and environmental terms.<sup>35</sup>

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<sup>30</sup> See note 28 supra

<sup>31</sup> See 'Ministerial briefing statement on the petroleum exploration activities 2011/2012', Minister of Mines and Energy, Namibian Parliament, Windhoek, 6 July 2011; see also Bray, et al, supra note 17

<sup>32</sup> See 'Olievonds', Republikein, 21 May 2013; See also 'HRT Oil Discovery-Oil must benefit all', Namibian Sun, 22 May 2013; 'HRT fails to find commercial oil in first of three Namibia wells' Reuters, 20 May 2013; See also 'Oil Exploration in Namibia: A boost for development?', H.E. Neville Gertze, Namibian Ambassador to Germany, Berlin, 31 January 2012

<sup>33</sup> For an overview of issues relating to the governance of the oil and gas industry in oil producing West African countries see Leon Moller, 'The governance of oil and gas operations in hostile but attractive regions: West Africa', *International Energy Law Review*, 2010, 28, I.E.L.R, Part 4, pp.110-122

<sup>34</sup> Supra note 9; the IPPR Report 'Namibia's New frontiers, transparency and accountability in Extractive Industry Exploration' made useful recommendations including the alignment of laws, regulations, and business and government practices with international extractive industry standards including the oil and gas sector.

<sup>35</sup> See Energy Policy, Part 3.2, Upstream Oil and Gas, pp. 27-32.

## ***2. The policy and institutional set up to attract investment for the exploration and exploitation of oil and gas resources in Namibia***

### **2.1 The National Energy Policy**

At independence, the government policy for the mining of natural resources was a mixture of German colonial law, *Imperial Mining Ordinance for German South-West Africa* of 8 August 1905, and an extended South African mining legislation in the form of the 1968 *Minerals Ordinance*, which applied equally to the exploitation of both minerals and petroleum.<sup>36</sup> There was no formal government policy that dealt separately with the mining and petroleum sectors but it was inevitable that this situation would not last forever. The new government adopted a robust approach and set a high priority on preparing new legislation that would promote Namibia's geological potential by providing modern laws for the ownership of mineral and petroleum resources, an orderly licensing system and fair regulation of both the mining and petroleum industries.<sup>37</sup> Consequently, the promulgation of the *1991 Petroleum Act* and the *1992 Minerals Act* (which repealed the 1968 Minerals Ordinance) made it possible to attract the investors needed to carry out the costly mining and exploration operations. It encouraged the participation of more private players in the mining, oil and gas industries in the country.<sup>38</sup> Formal licensing rounds were held to attract some of the major international oil and gas companies to undertake offshore exploration in Namibia. An Energy White Paper was adopted in 1998 as the national energy policy for the exploitation and development of the petroleum resources of the country.<sup>39</sup>

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<sup>36</sup> Mines, Works and Minerals Ordinance, 1968 (Ordinance 20 of 1968); Although the Namibian legal system was and remains closely linked with the South African legal system, the treatment of minerals has always differed because of the German colonial influence. In South Africa, minerals and petroleum were generally treated as part of the ownership of land until 2004. The Imperial Mining Ordinance for German South-West Africa of 8 August 1905 (which was based on the General Prussian Mining Act of 1865 – the *Berggesetz*) vested title to all minerals in the Imperial Government (see for example the case of *Namibia Grape Growers and Exporters Association and Others v The Ministry of Mines and Energy and Others* (SC) 2004 NR 194 (SC)).

<sup>37</sup> The 'Minerals Policy' was adopted in 2003 after a process that involved most major stakeholders including the mining industry through multi-stakeholder workshops -see copy of policy <<http://www.mme.gov.na/publications.htm>> accessed 20 July 2013

<sup>38</sup> The Minerals (Prospecting and Mining) Act, 1992 (Act 33 of 1992), signed by the President on 16 December 1992 (Government Gazette No.199). The Act provides for the reconnaissance, prospecting and mining for, and disposal of, and the exercise of control over, minerals in Namibia.

<sup>39</sup> The Directorate of Energy of the Ministry of Mines and Energy formulated the 'Energy Policy' with the assistance of energy and policy experts on the Southern African energy sector with stakeholder participation and consultation workshops throughout the country. The Policy was approved by the

The policy covers the exploitation of offshore petroleum resources and deals with energy demand (mainly household energy), supply (electricity, upstream oil and gas, downstream liquid fuels, downstream gas, and renewable energy) and a number of cross-cutting issues (economic empowerment, environment, energy efficiency and regional energy trade and co-operation).<sup>40</sup> The policy's aim is to optimise possible national benefits while achieving the necessary balance of interests to attract investment in the energy sector. It identifies the different roles and functions of industry participants, and lays out the basic legal and fiscal criteria. The main objectives of the policy are security of supply, social upliftment, effective governance, investment and growth, economic competitiveness, and economic efficiency and sustainability.<sup>41</sup> The policy on the petroleum sector is based on the fundamental issue of the national ownership of the natural resources within the country and it defines the government's role and that of the investor/extractor of the resource. It provides for the relationship between the government and the companies or persons that are directly responsible for the extraction of the resource through petroleum licences and joint ventures. The policy also provides for fixed licensing rounds and for an open bidding system.

## **2.2 The institutional framework to administer and regulate the oil and gas industry**

### *(a) The Ministry of Mines and Energy: custodian, regulator and promoter*

In Namibia, the role and responsibility for developing the natural resources sector, overseeing the industry activities and promoting the resource potential of the country is given to a government Ministry of Mines and Energy (MME / Ministry) to exercise on behalf of the State. The Namibian Constitution bestows ownership of the natural

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Cabinet and tabled in Parliament in July 1998 - see 'Energy Policy' <<http://www.mme.gov.na/energy/index.html>> accessed 12 August 2013

<sup>40</sup> Ibid

<sup>41</sup> Since independence, Namibia adopted a successful policy to promote exploration. On an evaluation of the policy see, Date-Bah, 'Promoting petroleum exploration in Namibia', Resources Policy, Vol.20, No.4, December 1994; see also Light and Shimutwikeni, 'Namibia, practically unexplored, may have land, offshore potential', Oil and Gas Journal, 8 (1991), pp. 85-89

resources (including oil and gas) below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia in the State.<sup>42</sup> The Petroleum Act vests all rights in relation to petroleum in the State, through the Ministry of Mines and Energy.<sup>43</sup> The MME is considered the ‘custodian’ of energy and natural resources and is responsible for the promotion, development and regulation of the mining and petroleum sectors in Namibia.<sup>44</sup>

The main function of the MME is to act as the State’s guardian of the mineral resources: to licence the use of the resources to a third party (state agency or private entity) and to regulate the commerce in petroleum so as to protect the interests of the country and its citizens. MME is responsible for the promotion, regulation and development of the mining and petroleum sectors in Namibia. The "Minister", defined by the 1991 Petroleum Act as the ‘Minister of Mines and Energy’, is the head of the Ministry and he or she is assisted by a Deputy Minister. Responsibility for the management and administration of the Ministry lies with the ‘Permanent Secretary’ (who is answerable to the Minister). The Ministry comprises four Directorates: Geological Survey, Mines, Energy, and Administration and Finance.

The 1991 Petroleum Act provides for a ‘Commissioner for Petroleum Affairs’ who is appointed by the Minister in accordance with the rules of public services.<sup>45</sup> The Commissioner is responsible for the administration of the Act and the monitoring and regulation of the activities of the petroleum licensee companies to ensure compliance with the licence, petroleum agreement and the Act. The Commissioner is assisted by geologists and a Chief Inspector (with petroleum inspectors) who is responsible under the Act to ensure legal and regulatory compliance in the areas of health, safety and environment.<sup>46</sup> Both Commissioner and Chief Inspector are responsible for the regulation of the upstream industry.

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<sup>42</sup> See Namibian Constitution, Article 100 (Sovereign ownership of natural resources)

<sup>43</sup> Section 2, Petroleum Exploration and Production Act 1991 (Act 2 of 1991)

<sup>44</sup> The Minister is the head of the Ministry assisted by a deputy Minister. The Permanent Secretary is responsible for the management and administration of the Ministry and is answerable to the Minister. The Ministry consists of the four Directorates on Geological Survey, Mines, Energy and Administration and Finance (see Ministry structure <<http://www.mme.gov.na>> accessed 10 July 2013); The Minister is a member of Cabinet which consist of the President, the Prime Minister and other Ministers that the President appoints from the National Assembly, for the purpose of administering and executing the functions of the Government (see Article 35 of the Namibian Constitution).

<sup>45</sup> Section 3(1)(a)

<sup>46</sup> Section 3(1)(b)

On the downstream side, the supply, transportation and distribution of petroleum products are regulated by the downstream division within the Directorate of Energy which is responsible for the administration of the 1990 Petroleum Products and Energy Act.<sup>47</sup> The Act regulates the price at which the refined petroleum products may be sold. It was also instrumental in the establishment of the National Energy Council (NEC) and it plays a key role in terms of the setting of objectives and the functioning of the NEC. The key responsibility of the NEC as a statutory body is to advise the Minister on matters concerning the supply of energy; the development, exploitation and utilisation of the energy resources; and the availability of energy resources potentially capable of being developed, exploited or utilised for Namibia. Essentially, it assists the Minister to co-ordinate and rationalise activities connected with the energy industry in Namibia.<sup>48</sup> In addition to the regulatory functions of the Ministry, the 'Petroleum Products Regulations' regulate the import, supply, storage, possession and sale of petroleum products; the licensing of and conducting of business by wholesalers, resellers and consumer installation operators; the application of health, hygiene, safety and environmental standards and requirements; and minimum specifications regarding standards of facilities, structures and equipment and restrictions on the sale and use of petroleum products.<sup>49</sup>

For the downstream gas industry, a Gas Bill was developed in 2001. It proposes the establishment of a licensing framework and national gas regulator to monitor the performance of licence conditions and promote reliability of service.<sup>50</sup> The overlapping functions of the above downstream petroleum and gas regulators provide the Ministry with a number of options. These include the combination of the regulatory functions of these two subsectors into one national downstream regulator or the creation of one national energy regulator for the whole energy sector (i.e. a single entity dealing with oil, gas and electricity).<sup>51</sup>

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<sup>47</sup> Petroleum Products and Energy Act, 1990 (Act No. 13 of 1990)

<sup>48</sup> Ibid. The National Energy Fund Act 2000 established the National Energy Fund and its organization.

<sup>49</sup> The Petroleum Products Regulations 2000, made under sections 2 and 2A of the Petroleum Products and Energy Act, 1990 (Act No. 13 of 1990) came into force on 3 July 2000.

<sup>50</sup> See Draft Gas Bill No.2 b (29 June 2001), Ministry of Mines and Energy

<sup>51</sup> Currently the electricity supply industry is separately regulated by the Electricity Control Board (ECB), a statutory regulatory authority established under the Electricity Act 2 of 2000 (repealed by the Electricity Act, 4 of 2007). The core mandate of the ECB is to exercise control over the electricity supply industry with the main responsibility of regulating electricity generation, transmission,

(b) *The National Oil Company: technical adviser and commercial participant*

The National Petroleum Corporation (Namcor) is the technical advisory body to the Minister. It is also the government agency for participation in the industry (on behalf of the State).<sup>52</sup> Potentially, this dual function and role of Namcor could result in its involvement in issues where there is a conflict of interest. Consideration of such circumstances could lead to Namcor relinquishing its advisory role in order to allow it more commercial freedom and the opportunity to participate fully in exploration and production activities. Whether this concern, and potential outcome, is realistic is open to debate, given Namcor is a state-owned national oil company, established under the Petroleum Act.

Namcor was formerly known as the *Suidelike Olie-Eksplorasiekorporasie (SWA) (Eiendoms) Beperk (SWAKOR)*. It was set up as a subsidiary of the South African state agency, SOEKOR (after its establishment in 1965), at the time when political sanctions were applied against the South African regime and when the International Court of Justice (ICJ) ruled against the South African occupation of Namibia.<sup>53</sup> SWAKOR operated as an arm of the South African government in Namibia mainly for the purposes of exploration and exploitation of oil and gas resources. It had a Board of Directors and was registered as a company incorporated with limited liability under the Companies Ordinance of SWA.<sup>54</sup> SWAKOR's exclusive rights relating to oil in the territory was based on section 60(1) of the Mines Ordinance. A corresponding natural oil prospecting grant of 15 November 1968 was registered in the Office of the Registrar of Deeds.<sup>55</sup> In 1974 SWAKOR was instrumental in the

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distribution, supply, import and export in Namibia through setting tariffs and issuance of licenses. The ECB executes its statutory functions through the Technical Secretariat headed by the Chief Executive Officer, see Electricity Control Board <<http://www.ecb.org.na>> accessed 1 August 2013

<sup>52</sup> Section 8, Petroleum (Exploration and Production) Act 1991

<sup>53</sup> In November 1962, the United Nations General Assembly adopted a resolution calling upon all Member States to impose separate and collective sanctions against South Africa. The General Assembly, in *Resolution 1899 (XVIII)* of 13 November 1963 on the question of Namibia, urged all States to refrain from supplying in any manner or form any petroleum or petroleum products to South Africa. See General Assembly – Resolutions adopted by the General Assembly during its eighteenth session, UN Home Page <<http://www.un.org/documents/ga/res/18/ares18.htm>> accessed 26 July 2013; see also See Rosalyn Higgins, 'The Advisory Opinion on Namibia: Which UN Resolutions Are Binding under Article 25 of the Charter?', ICLQ, Vol. 21, No. 2 (April 1972), pp. 270-286

<sup>54</sup> Companies Register, No.164/67

<sup>55</sup> Registration Number 48/1969, Windhoek

discovery of Namibia's only offshore gas field. Namcor took over the position of SWAKOR in 1991 and it registered under Namibian Companies Act (with the government as the sole shareholder). Namcor is headed by the Managing Director who is responsible for the day to day activities of the company and answerable to the Board of Directors (consisting of 5 members with a chairperson). The Board, in turn is accountable to the Minister of Mines and Energy.<sup>56</sup>

The main functions of Namcor are set out under Part 3, section 8 of the Petroleum Act. Consequently, when required by the Minister, Namcor shall (i) carry out reconnaissance operations, exploration operations and production operations, whether on its own or together with any other person; (ii) carry out any process of refining, or disposing of, or dealing in, petroleum or any by-products of such petroleum, or to take part in any such process carried out by any other person; (iii) advise or otherwise assist the Minister in relation to, or in any negotiations in relation to any agreement referred to in section 13, or in relation to the discovery of, petroleum or the development of petroleum resources. Furthermore, Namcor may carry out reconnaissance operations, exploration or production operations, on its own, on behalf of the State, or with another entity. It is also under a duty to assist the Commissioner in the exercise of his or her powers, duties and functions under the Act.<sup>57</sup>

Namcor's main activities up to 1998 focused on the acquisition of data and the promotion of Namibia's petroleum potential. However, since then the company has become more active in the industry and has since been co-licensee in a number of licences. In recent years it has also established itself as a key player in the downstream industry: importing and supplying 50% of the Namibian petroleum products locally.<sup>58</sup> However, the relationship between the government and Namcor was challenged during a court case in 2010/11 involving the Minister of Mines and

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<sup>56</sup> See Namcor Annual Report 2011, Windhoek, p.2; and Kaira, 'Gawaxab appointed Namcor chairman', Windhoek Observer, 20 January 2012

<sup>57</sup> Other functions in terms of the Act, allow Namcor to perform in Namibia or elsewhere such actions as may be necessary or expedient to be performed for or in connection with the exercise of its powers and the performance of its duties and functions under this Act. The Minister may only require the carrying out of any operations after written notice, after he afforded an opportunity, that it is in the public interest that Namcor has the necessary financial and technical ability to perform these operations.

<sup>58</sup> See Adetona, 'NAMCOR fueling Namibia', Namibia Economist, 5 February 2010

Energy, Namcor and other parties.<sup>59</sup> The case and subsequent appeal concerned the question as to whether the government acted lawfully when it revoked a mandate given to Namcor to import 50% of Namibia's annual requirement of petroleum products. Arguments were put forward of state interference by the Ministry of Mines and Energy into Namcor's business. However the appeal judgement confirmed that the government acted lawfully and did not act arbitrary nor unreasonable in the termination of the mandate given to Namcor. Reference was made to article 27(2) of the Constitution which provides that the 'executive power of the Republic of Namibia shall vest in the President and the Cabinet'. Article 40 of the Constitution sets out the duties and functions of the Cabinet: these include the '*power to direct, coordinate and supervise the activities of parastatal enterprises*' such as Namcor.<sup>60</sup>

### ***3. The legal basis for the Namibian oil and gas licensing regime***

#### **3.1 National Law: The Petroleum Act 1991**

Reference was earlier made to the legal situation that applied to minerals (including oil and gas) in Namibia before independence in 1990, such as the mixture of German Colonial law and South African law.<sup>61</sup> The Mines, Works and Minerals Ordinance of 1968 provided for the exploration and production of all minerals (including oil and gas).<sup>62</sup> The Ordinance was repealed in 1991, after Namibia's independence, with the adoption of specific laws that deal with minerals and petroleum separately. The promulgation of the Minerals Act of 1990 and the Petroleum (Exploration and

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<sup>59</sup>See *Minister of Mines and Energy, etc (appellants) v Petroneft International Ltd, etc (respondents)*, Case No.:SA32/2011, Appeal Case, Supreme Court of Namibia, 21 June 2012

<sup>60</sup> Ibid, p. 14; see also Moller, 'Namcor and Namibia's Oil and Gas sector', Namibian Sun, 15 October 2010

<sup>61</sup> Supra note 35.

<sup>62</sup> For a brief overview of the application of South African law to Namibia see Geraldo, Nowases and Nandago, 'Researching Namibian Law and the Namibian Legal System', Hauser Global Law School Programme, January 2013 < <http://www.nyulawglobal.org/globalex/Namibia1.htm> > accessed 20 July 2013. In summary: As a former German colony, Article 22 of the Covenant of the League of Nations mandated South Africa in 1922 "to promote to the utmost the material and moral well being, and the social progress of the inhabitants of the territory". During that time South West Africa (pre-independence Namibia) was classified as a class C mandate and was subject to the legislative, administrative and judicial regulation by the Union of South Africa. The South African administration was based on a stable legislative framework which extended Roman Dutch law, as existing and applied in the Cape Province as at 1 January 1920, as the common law of South West Africa; see also Katjivivi P, 'A History of Resistance in Namibia', James Curry Publishers, London, 1988; and Dierks K, 'Chronology of Namibian History – From Pre-Historical Times to Independent Namibia', Namibia Scientific Society, Windhoek, 1999

Production) Act of 1991 made it possible for more private players to participate in the activities related to the exploration and exploitation of minerals and petroleum in the country. The new petroleum law aimed to attract initial investment in the sector from reputable experienced international oil and gas companies while maintaining both options for competition in the future and the fair distribution of economic rents to all stakeholders. The Petroleum Taxation Act 1991 provides for the levying and collection of petroleum income tax and an additional profits tax in connection with exploration, development and production operations.<sup>63</sup>

The legal basis for the licensing regime in Namibia can be found in the Namibian Constitution article 100 which declares that the ownership of natural resources belongs to the State. This includes land, water and natural resources below and above the surface of the land and applies to the continental shelf and areas within the territorial waters and the exclusive economic zone of Namibia. The 1991 Petroleum Act is the principal national legal instrument which provides for exploration and production of petroleum. The Act applies to both onshore and offshore activities and provides for the jurisdiction of national courts in relation to offences under this Act committed at sea within the territorial sea, the exclusive economic zone and the continental shelf. The Act is regarded as one of the key instruments of the national energy policy, even though the Act was already in existence at the time when an official energy policy was adopted in 1998. The 1991 Petroleum Act provides that all rights in relation to petroleum are vested in the State. This includes rights in relation to the reconnaissance or exploration for, production and disposal of, and the exercise of control over, petroleum vests, notwithstanding any right of ownership of any person in relation to any land under which petroleum is found. The Act provides for 'reconnaissance, exploration, production and disposal of, and the exercise of control over, petroleum'. In terms of the Act, the Government (through the Ministry of Mines and Energy) issues licences for reconnaissance which are usually non-exclusive and also licences that confer exclusive rights relating to the exploration and production of petroleum. Part IV of the Act provides for a prohibition on carrying out reconnaissance, exploration and production operations without licence. It also prohibits the transfer, grant, cession or assignment of a licence without ministerial

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<sup>63</sup> Petroleum (Taxation) Act 1991 (Act 3 of 1991)

approval. The next section highlights the licensing regime including the types of licences, bidding rounds and licensing terms.

### **3.2 Key features of the petroleum licensing system**

Namibia adopted the licensing system as its preferred arrangement with the private sector ‘within which both Government’s objectives and the investment goals of foreign oil companies can be reconciled’.<sup>64</sup> All rights in relation to the reconnaissance, exploration, production and disposal of petroleum are vested in the State and the Minister of Mines and Energy, acting on behalf of the State, is authorized to award licences to private entities.<sup>65</sup>

Many reasons could be put forward for Namibia’s adoption of the licensing system as opposed to the other well established petroleum arrangements (i.e. production sharing contracts or service contracts). These include the attitudes of the new Government to minimise state involvement in the extractive industries and to promote and attract foreign investment in the energy sectors. They reflect the need for experienced and well-funded oil companies to undertake the costly and highly technical exploration operations over large unexplored parts of the country, the deliberate small size of the national petroleum company and the lack of a local oil and gas industry.

The legal framework allows for international oil companies to enter into joint venture partnerships with local partners including the national oil company. This combination of state control over petroleum rights in the entire country and a licensing regime which allows for the involvement of private companies to undertake exploration and production of petroleum is a generally accepted model in the international petroleum industry.

The licensing system that prevailed before independence was mainly based on the 1968 Minerals Ordinance.<sup>66</sup> In terms of section 60 of the Ordinance, the Administrator of the territory of South West Africa (SWA), who was the official

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<sup>64</sup> The words of *Toivo Ya Toivo* Minister of Mines and Energy at the second reading in the Namibian Parliament of the Petroleum (Exploration and Production) Bill 1991, National Assembly, Windhoek, 27 February 1991, as quoted by S.K.Date Bah, ‘Promoting petroleum exploration in Namibia’, Resources Policy, Vol.20, No.4, 1994, pp.266-67

<sup>65</sup> Section 2, 1991 Petroleum Act

<sup>66</sup> Mines, Works and Minerals Ordinance (No.20 of 1968)

representative of South Africa, approved prospecting lease agreements. This lease agreement was based on a Model Exploration Agreement which was proposed by the government agency, SWAKOR in 1968.<sup>67</sup> The first formal exclusive right to mine for natural oil was given to SWAKOR by the Administrator.<sup>68</sup> One of the earliest prospecting and mining grants was issued for a 25 year period (from 1960 until 1985) to Etosha Petroleum Company (Proprietary) Limited and, accordingly, an exploration agreement was entered into between the Administrator and the company.<sup>69</sup> After independence, with the adoption of the 1991 Petroleum Act, a new licensing system and a new model petroleum agreement were introduced to regulate the reconnaissance, exploration and production operations in the country separately. It is important to note that only companies that could demonstrate acceptable international track records in exploration and production, with adequate financial and technical capacity to fulfil their work commitments and develop and produce their discoveries and operate according to standards based on international best practice will be awarded exploration and production licences.<sup>70</sup>

(a) *Types of licences*

In terms of section 9 of the 1991 Petroleum Act, the licence is the prerequisite to carry out reconnaissance, exploration and production operations in Namibia. Its importance is evident in that no one is allowed to extract any petroleum resource without a licence. This approach is similar to the UK system where the Crown owns all the petroleum in the UK (both onshore and offshore) and has the exclusive right to explore and exploit the oil and gas resources and anyone who carries out any exploration and exploitation activities without a licence from the Crown is interfering both with its property right and its exclusive privilege.<sup>71</sup> In terms of the Act no one

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<sup>67</sup> See text of the 'Model Agreement' in *Basic Oil Laws, South and Central Africa*, Supplements 17-25, Petroleum Legislation, Barrows, New York, 1969 (A-O)

<sup>68</sup> In terms of section 60(1) of the 1968 Ordinance; See *Basic Oil Laws, South and Central Africa*, Supplements 17-25, Petroleum Legislation, Barrows, New York, 1969 (B-O)

<sup>69</sup> 13 October 1960 until 20 June 1985 (No.M.4/4/90), Memorandum of Agreement in *Basic Oil Laws, South and Central Africa*, Supplements 26-33 (XXX), Petroleum Legislation, Barrows, New York, 1973 (A-O)

<sup>70</sup> 1998 Energy Policy (Exploration and production competence, p.31).

<sup>71</sup> The UK petroleum licences are awarded on the basis of the 1998 Petroleum Act; see Daintith and Willoughby, *Manual of United Kingdom Oil and Gas Law*, Sweet and Maxwell, London, 1984, p. 18; For details about the UK's Oil and Gas licensing system, see Department of Energy and Climate

may transfer a licence or grant, cede or assign any interest in a licence to any other person, or be joined as a joint holder of a licence otherwise than in writing and with the approval in writing of the Minister.<sup>72</sup> Applications for licences can only be made by companies and are submitted to the Ministry of Mines and Energy for evaluation.

The Petroleum Act provides for three types of licences.

- The reconnaissance licence that involves the gathering of seismic data is valid for two years, and can be renewed twice for two years each time.<sup>73</sup>
- The exploration licence allows for data gathering and the drilling of exploratory wells and includes (a) “geological, geophysical, geochemical, paleontological, aerial, magnetic, gravity or seismic surveys and the appraisal of such surveys and drilling for appraisal purposes”; and (b) “the study of the feasibility of any production operations or development operations” to be carried out in the licence area and of the environmental impact of such operations (Part VI). This licence is valid for four years and it may be extended for a further two periods of two years each.<sup>74</sup> In addition, the Minister can extend the exploration period for a further two years if he or she deems it in the interest of the development of the petroleum resources of Namibia.<sup>75</sup> The 1998 Petroleum Laws Amendment Act provides for an extension of the initial period of the exploration licence up to five years and a renewal period of up to three years.<sup>76</sup>
- A production licence allows for the extraction of the petroleum resource (Part VIII). The duration of this licence is for a period of not more than 25 years but it can be extended for a further period of 10 years.<sup>77</sup>

It is generally accepted that the Namibian licensing system is unique in Africa. Most African countries have adopted a production sharing regime as the main contractual arrangement between the state/national oil company and the international oil company for exploration and production activities (Southern African examples include Angola,

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Change (DECC) <<https://www.gov.uk/oil-and-gas-petroleum-licensing-guidance>> accessed 1 August 2013

<sup>72</sup> Section 9 (1)(b) of the 1991 Petroleum Act

<sup>73</sup> Petroleum Act 1991, section 23(1) [Part V deals with reconnaissance licences]

<sup>74</sup> Petroleum Act 1991, section 30(1)

<sup>75</sup> Petroleum Act 1991, section 30(2)(b)

<sup>76</sup> Petroleum Laws Amendment Act 1998, section 1

<sup>77</sup> Petroleum Act 1991, section 45(1)

Mozambique and Tanzania)<sup>78</sup> As earlier pointed out, the Namibian licensing approach (adopted under the 1991 Petroleum Act) is in line with the general practice of countries such as the United Kingdom which have adopted a licensing system for oil and gas exploration and production.<sup>79</sup> It therefore has strong similarity with the British system however there are also some notable differences (some of which are related to the size of licence blocks; licence periods; application procedures; requirement for a petroleum agreement; regulations; etc). The Act further provides for licence renewal, transfer and the assignation of licence interest which could only be carried out with the approval of the Minister (sections 11 and 12).

*(b) Licensing Blocks*

The 1991 Petroleum Act, under section 1 (2), defines the size of the licence blocks and provides that the Minister of Mines and Energy should prepare a map of Namibia showing these licence blocks. This licensing map is available at the offices of the Commissioner. As a consequence of this requirement, the 1999 Official Announcement for the Open Licensing system provided licence areas that are divided into blocks of 1° x 1° (approximately 10,000 km<sup>2</sup>) and 1° x 30' (approximately 5,000 km<sup>2</sup>).<sup>80</sup>

*(c) Licensing Rounds*

The Namibian government adopted a formal strategy set out in the 1998 Energy Policy to promote the petroleum potential of the unexplored Namibian territory through formal licensing rounds. This strategy was strongly influenced by international practice, because of the fierce competition amongst countries to attract the much needed investment in their sector and also because international oil

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<sup>78</sup> See Hammerson M, 'Production sharing contracts: an analysis of comparative practice in certain African jurisdictions', UNCTAD 11<sup>th</sup> Africa Oil & Gas, Trade & Finance Conference, Nairobi, Kenya, 23-34 May 2007

<sup>79</sup> For details about the UK's Oil and Gas licensing system, see Department of Energy and Climate Change (DECC) <<https://www.gov.uk/oil-and-gas-petroleum-licensing-guidance>> accessed 1 August 2013; The Netherlands also has a licensing system with reconnaissance, exploration and production licences, see Roggenkamp M, 'Oil and Gas: Netherlands Law and Practice', Chancery Law Publishing, London, 1991

<sup>80</sup> See the 'Official Announcement, Open Licensing System In Namibia, Invitation To Apply For Onshore/Offshore Licence Areas', Permanent Secretary, Simasiku, Ministry of Mines and Energy, Windhoek, 23 August 1999

companies were free to select the best investment opportunity for themselves.<sup>81</sup> Since independence, four licensing rounds have been held in Namibia (for both onshore and offshore acreage). These have been accompanied with promotional seminars to attract investors at venues including Windhoek (Namibia), Houston (USA) and London (UK).<sup>82</sup> However, due to the disappointing results of the third and fourth rounds, an open licensing system approach was officially adopted in 1999.<sup>83</sup> The new system allows companies to apply for licences at any time. The official announcement on the Open Licensing System explains the application procedures, bidding requirements, and evaluation of applications.<sup>84</sup> One of the MME's Energy Policy objectives is to "ensure that the process of bidding, and negotiating terms for exploration and production will be organised with the necessary degree of transparency, stability and flexibility to ensure that the exploration and production licences awarded are on competitive terms and that investment in the sector is maximised". The system proved to be successful in that soon after the Open Licensing System announcement, a high number of new licences were issued for both exploration and reconnaissance operations.<sup>85</sup> However, recently there have been announcements from the Government about the potential reintroduction of the fixed licensing rounds in addition to the open system.<sup>86</sup>

*(d) Improved licensing terms*

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<sup>81</sup> Various international organisations, actively sponsoring countries in the promotion and licensing of natural resources including the World Bank, Asian Development Bank, European Union, and the Commonwealth Secretariat (see Bunter M, *The Promotion and Licensing of Petroleum Prospective Acreage*, Kluwer Law International, The Hague, 2002, p.6)

<sup>82</sup> The first Round closed on 1 November 1991 and 19 applications were received, of which 5 exploration licences were awarded to Norsk Hydro, Shell, Chevron, Ranger and Sasol. The second Round closed on 30 November 1995, only 2 applications were received, and 2 licences were awarded to Shell Exploration and Production BV (SEPN) and Shell Namibia Exploration BV (SNE) <http://www.namcor.com.na> accessed 10 July 2013

<sup>83</sup> The third Round opened on 1 October 1998 and closed on 31 March 1999 with no new applicants due to the collapse of the oil price; the Open Round announcement was made on 23 August 1999 (see '*Official Announcement, Open Licensing System In Namibia: Invitation To Apply For Onshore/Offshore Licence Areas*', Permanent Secretary, Simasiku, Ministry of Mines and Energy, Windhoek, 23 August 1999

<sup>84</sup> *Ibid*

<sup>85</sup> In 2013, 53 exploration licences, 1 production licence, and 2 Coal Bed Methane licences have been issued to Namibian and international oil companies (See Namcor - Upstream Activities <<http://www.namcor.com.na/upstream-activities>> accessed on 31 July 2013

<sup>86</sup> See for example Roelf, 'Government wants oil bidding rounds again', *Namibian*, Windhoek, 7 November 2011; Sibeene, 'Plans to open EPLs for bidding', *Windhoek Observer*, March 2012

The 1991 Petroleum Act was amended by the Petroleum Laws Amendment Act of 1998 ('1998 Amendment Act') which introduced a number of changes to the licensing terms for potential applicants.<sup>87</sup> These include improvements to the fiscal terms (i.e. the royalty, petroleum income tax and additional profits tax, training fees and annual licence area rental fees).<sup>88</sup> The 1998 Amendment Act provides for a royalty of 5% and petroleum income tax (PIT) of 35%. It also provides for three tiers of additional petroleum tax (APT) of which the first tier is payable when the area earns a rate of return of 15%; the second and third tiers become active when profitability levels exceeds 20% and 25% respectively. The first tier rate is established by the legislation and the incremental second and third tier APT rates are biddable items. The agreed rates are set in the Petroleum Agreement between the Government and the company. Additionally, there are (escalating) rental fees for the exploration and production stages.<sup>89</sup> An annual training fee is a negotiable item as the licensees are required, under the Act, to spend a minimum annual amount specifically on the training of Namibians in petroleum or related fields.

### **3.3 The contractual framework for exploration and production of petroleum**

The 1991 Petroleum Act requires the government to enter into a petroleum agreement with the successful applicant for a petroleum licence.<sup>90</sup> Before the agreement is concluded an inter-ministerial Government Negotiating Team (GNT) chaired by the Ministry of Mines and Energy would evaluate the application. In its evaluation the GNT would consider the following negotiable items:

- the technical and financial capabilities of the applicant for ensuring safe and cost-effective exploration and production of petroleum in Namibia; and
- the applicant's willingness to perform a complete evaluation of the petroleum potential in the licence area within an agreed time frame. This would include the proposed minimum work programme and expenditure; and

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<sup>87</sup> Petroleum Laws Amendment Act 1998 (Act 24 of 1998)

<sup>88</sup> The Petroleum Laws Amendment Act, 1998 (Act 24 of 1998) also amended the Petroleum (Taxation) Act, 1991 (Act 3 of 1991)

<sup>89</sup> For example: N\$ 60 per km<sup>2</sup> is payable of the exploration area held during the first 4 years; N\$ 90 per km<sup>2</sup> payable during the next 2 years; and N\$ 120 per km<sup>2</sup> payable during the subsequent 2 years; N\$ 150 per km<sup>2</sup> is payable during any third extension; and finally N\$ 120 per km<sup>2</sup> payable for the production area

<sup>90</sup> 1991 Petroleum Act, section 13

- the economic terms offered in accordance with the bid requirements.<sup>91</sup>

After the evaluation, the applicant would then be invited to Windhoek for negotiations on the terms of the application. After the negotiations, the Agreement is then entered into between the successful applicant and the Minister of Mines and Energy; and the licence is issued by the Petroleum Commissioner.<sup>92</sup>

The Petroleum Agreement is based on a standardised Model Petroleum Agreement (MPA) which was first adopted by the Government in 1994 and revised in 1998. The MPA contains model clauses on a wide range of issues including environmental protection, abandonment of installations and the liability of licence holders for pollution of the environment. The agreement includes the basic terms and conditions relating to the market value of petroleum; the minimum exploration or production operations to be carried out; the minimum expenditure in respect of such operations. The MPA allows for the formation of joint ventures, and include terms and conditions that are considered standard in many countries.<sup>93</sup>

#### ***4. Regulatory approach to health, safety and the environment***

##### **4.1 Health and Safety regulations**

At the time of enactment of the 1991 Petroleum Act, there were no separate accompanying regulations for health and safety in the oil and gas industry. The first regulations for the health and safety of employees in the oil and gas industry were adopted in 1998 to complement the legal requirements of the 1991 Petroleum Act.<sup>94</sup> The 1998 Safety Regulations were developed by the Ministry of Mines and Energy in consultation with the Ministry of Labour, Ministry of Fisheries and Marine Resources and the Ministry of Environment and Tourism. The oil and gas industry represented

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<sup>91</sup> See 'Official Announcement, Open Licensing System In Namibia: Invitation To Apply For Onshore/Offshore Licence Areas', Permanent Secretary, Simasiku, Ministry of Mines and Energy, Windhoek, 23 August 1999

<sup>92</sup> Section 15 requires the Commissioner to keep a register of all licences (available for public scrutiny).

<sup>93</sup> For a copy of the MPA see Ministry website <<http://www.mme.gov.na>> accessed 12 August 2013

<sup>94</sup> 1998 Petroleum Health and Safety Regulations, 'Regulations relating to the Health, Safety and Welfare of persons employed, and protection of other persons, property, the environment and natural resources, in, at or in the vicinity of exploration and production areas', Government Gazette No.190, Windhoek, 23 September 1998. The Regulations were adopted in terms of section 76 A of the Petroleum Act by the Ministry of Mines and Energy (after consultation with the Ministries of Fisheries and Marine Resources and Environment and Tourism)

by the Namibian Offshore Operators Association (see later) and other stakeholders also participated in the consultation process. In line with the international practice of offshore safety regulation (notably the UK and Norway) to move away from detailed prescriptive regulations, influenced mainly by the recommendations from the 1988 Piper Alpha disaster in the North Sea, the Namibian Regulations include goal-setting (as opposed to prescriptive) requirements on health, safety and environment with which the operators of offshore installations have to comply.<sup>95</sup> At this stage it merely sets out a framework that provides for the general duties and responsibilities of the operators including the establishment of an internal control system; the registration and location of installations; marking, testing, inspection and control of installations. There are also requirements relating to installations, equipment and facilities, machinery, electricity, fires and explosives, transport, subsea operations, emergency preparedness, pipelines and safety zones around installations. At this stage the Namibian safety regulations are still very sketchy, general and untested and they are not as detailed as other producing countries. The Regulations apply to all petroleum activities within the territorial sea, the exclusive economic zone and on the continental shelf of Namibia.<sup>96</sup>

The Regulations provide (in Part 2) for the general duties and responsibilities of operators i.e. the Operator has the main responsibility for health, safety and welfare of persons employed or performing work, and for the protection of other persons, property, the environment and natural resources, in, at or in respect of any area where petroleum activities are carried out. The operator is responsible for identifying any health hazards and evaluating the risks associated with any work performed during oil and gas operations (and for the prevention of exposure of its employees to unacceptable levels of risk).

Part 3 of the Regulations provides for an internal control system. The operator is responsible for the establishment of an internal control system to ensure that petroleum

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<sup>95</sup> The *Piper Alpha* accident happened during April 1988 in the UK North Sea in which 167 people died after a gas leak resulted in a fire and explosion and the complete destruction of the installation (most victims suffocated in the toxic fumes). See *Piper Alpha oil rig ablaze*, BBC News, 6 April 1988 at <[http://news.bbc.co.uk/onthisday/hi/dates/stories/july/6/newsid\\_3017000/3017294.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/july/6/newsid_3017000/3017294.stm)> accessed 10 August 2013. The Cullen Report and Recommendations were adopted as the offshore safety regulations in the UK, See Oil and Gas UK, *Piper Alpha: Lessons Learnt*, 2008 <<http://www.oilandgasuk.co.uk/cmsfiles/modules/publications/pdfs/HS048.pdf>> accessed 12 August 2013 .

<sup>96</sup> Regulation 2, Health and Safety Regulations 1998

activities are carried out in a proper and safe manner. The internal control system requires the operator to ensure that all employees within the organisation have access to, and are familiar with the regulations and are aware of the hazards connected with any work to be performed, and conversant with the safety measures to be taken or observed to obviate such hazards.

In addition to the above Safety regulations, the Petroleum Act provides, under Section 21, for Directions in order to ensure good oilfield practices. It allows the Minister to issue notices on the basis of good oilfield practices to companies. These notices give directions on a number of issues including the safety, welfare and health of persons employed in or in connection with reconnaissance, exploration, and production operations and the conveyance of petroleum<sup>97</sup> Failure to comply with the Ministerial notice is an offence and is punishable by the national courts (which could impose a fine or imprisonment).

## **4.2 Environmental regulation of oil and gas activities**

The environmental impacts of oil and gas related developments are regulated by a number of cross-sectoral laws involving the interaction of the Ministry of Mines and Energy and various line ministries which are involved in the evaluation of environmental impact assessments (EIA) for activities in the environment. The Environmental Management Act of 2007 provides for the promotion of the sustainable management of the environment and the use of natural resources by establishing principles for decision making on matters affecting the environment; the appointment of the Environmental Commissioner and environmental officers; and to provide for a process of assessment and control of activities which may have significant effects on the environment.<sup>98</sup> Responsibility for the management of impact of mining and petroleum exploration and production activities on the environment is shared between the Ministry of Mines and Energy (MME), the Ministry of Environment and Tourism (MET), the Ministry of Fisheries and Marine Resources (MFMR) and the Ministry of Agriculture, Water and Rural Development (MAWRD). With regard to the onshore environment, MAWRD and MET are responsible for controlling pollution of the land environment (including marine pollution from

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<sup>97</sup> 1991 Petroleum Act, section 21(1)(l)

<sup>98</sup> The Environmental Management Act, 2007 (Act No. 7 of 2007) came into force on 6 February 2012.

onshore activities).<sup>99</sup> The Namibia Ports Authority (Namport) is responsible for the operation of the ports and together with the MFMR and MAWRD; it is also responsible for the regulation of pollution in all the Namibian ports.<sup>100</sup> The Environmental Management Act provides for the co-ordination and harmonisation of environmental policies and plans of relevant ministries to minimise duplication and to ensure consistency (for example the involvement of the ministries responsible for fisheries, mines and energy, and the environment over offshore oil and gas activities).<sup>101</sup>

The 1998 Energy Policy acknowledges the interaction between the energy sector and the environment and also that energy related activities (from investigation through production to consumption) can impact on the environment. It further commits the Government, to coordinating and working with the other relevant government bodies, such as MET and MFMR with regard to requiring and enforcing EIAs for all major energy-related projects, policies and programmes that have a potential impact on the natural environment. It also commits the Government and associated Ministries to take account of environmental and social costs of new energy projects when deciding about such projects.

Section 12 of the 1991 Petroleum Act empowers the Minister, when considering a licence application, to require the applicant to carry out environmental impact studies concerning their proposed upstream operations within their licence area.<sup>102</sup> It provides for the control of environmental pollution caused by such activities. Section 71 provides for the 'Liability of holders of production licences for pollution of environment or other damages or losses caused'. Additionally, in terms of the Environmental Management Act any person who causes damage to the environment must pay the costs associated with rehabilitation of damage to the environment and to

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<sup>99</sup> Water Act, 1956 (Act No. 54 of 1956)

<sup>100</sup> All Ports have their own local oil spill contingency plan that fall under the National Oil Spill Contingency Plan (NOSCP) that was established by the Directorate of Maritime Affairs of the Ministry of Works, Transport and Communication produced the NOSCP with the assistance of the International Maritime Organisation (IMO) in September 2007  
<[http://www.itopf.co.uk/\\_assets/country/namibia.pdf](http://www.itopf.co.uk/_assets/country/namibia.pdf)> accessed 1 July 2013

<sup>101</sup> Section 23, Environmental Management Act of 2007

<sup>102</sup> The Environmental Management Act provides for environmental impact assessments including procedures for the application environmental clearance certificates (see Part VII (Environmental Assessment); Part VIII (Environmental Assessment Process); and Part IX (Special Provisions Relating to Environmental Assessments)).

human health caused by pollution, including costs for measures as are reasonably required to be implemented to prevent further environmental damage.<sup>103</sup>

As stated above, in terms of section 21, the Minister can also issue Directions in order to ensure good oilfield practices on the conservation of petroleum resources; the prevention of the waste of such resources; the prevention of the spilling of water or drilling fluid or water and drilling fluid or any other substance extracted from a well drilled for purposes or in connection with reconnaissance operations, exploration operations or production operations, or used in relation to the drilling of such a well.

The environmental provisions in the Model Petroleum Agreement are noteworthy. The Agreement requires the carrying out of an environmental impact assessment prior to the commencement of exploration operations and also prior to the commencement of production operations. Clause 11 of the Agreement requires the license holder to comply with the following environmental requirements to:

minimise environmental damage to the licence area and adjoining or neighbouring lands; to take into account the international standards applicable in similar circumstances and the relevant environmental impact study carried out in accordance with the agreement; to carry out a baseline study to determine the prevailing situation relating to the environment, human beings, wildlife or marine life in the licence area and in the adjoining or neighbouring areas at the time of the studies; and to establish what the effect will be on the environment, human beings, wildlife or marine life in the licence area in consequence of the petroleum operations; and to submit for consideration by the parties measures and methods for minimising environmental damage and carrying out site restoration in the licence area.<sup>104</sup>

Furthermore, the 1998 Health and Safety Regulations require operators, with due regard to good oil field practices, to provide such funds and take any such measures as may be necessary so as to ensure the protection of the environment and natural resources in, at or in the vicinity of such area from hazards arising from petroleum activities. It also requires operators to carry out any environmental impact assessment studies provided for in the Petroleum Agreement. Regulation 74 requires the operators of petroleum exploration and production licences, in the event of any pollution by the spilling of petroleum arising from the petroleum activities, to ensure compliance with

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<sup>103</sup> Section 3 (2)(J), Environmental Management Act, 2007

<sup>104</sup> 1998 Model Petroleum Agreement, clause 11

their oil spill contingency plan and to ensure that the pollution of the environment and the coast line are prevented, or limited if it is not possible to prevent such pollution.

Finally, the Draft Gas Bill also provides for a national gas regulator to ensure safety, efficiency and environmental responsibility in the transportation and distribution of natural gas (see later discussion on gas regime).

### **4.3 Decommissioning of offshore installations**

The decommissioning of offshore installations poses a number of challenges for both governments and industry. These include the cost of removal, the availability of appropriate technology to carry out the decommissioning and issues of residual liability.<sup>105</sup> There are various legal and regulatory precedents available for newer oil producing countries that have so far not have had to deal with this yet unavoidable and potentially controversial issue.<sup>106</sup> The US Gulf of Mexico and the UK North Sea, where decommissioning has been taking place over the last decade involve all types of installations, and provide particularly useful examples for Namibia to consider when designing its own decommissioning regime.<sup>107</sup>

#### *(a) The legal framework*

Namibia's international obligations on the decommissioning of offshore installations have their origins in the 1982 United Nations Convention on the Law of the Sea (UNCLOS). Namibia, at the time represented by the UN Council for Namibia signed up to the Convention on 10 December 1982 (well before it entered into force in 1994). Namibia was the fifth country to ratify it on 18 April 1983. In terms of the Namibian Constitution all existing international agreements before independence, including UNCLOS, continued to be in force after independence of Namibia in 1990.<sup>108</sup>

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<sup>105</sup> See Moller L, 'UN Law on the decommissioning of offshore installations', Oil and Gas Decommissioning: Law, Policy and Comparative Practice, Globe Law and Business, London, 2013, pp.33-43

<sup>106</sup> See for example the 'World Bank Report: Towards sustainable decommissioning and closure of oilfields and mines – A toolkit to assist government agencies', World Bank Multi-Stakeholder Initiative, March 2010 <<http://web.worldbank.org>> accessed 20 July 2013

<sup>107</sup> See Moller L, 'The Cost of Decommissioning: Government and Industry Attempts at Addressing Decommissioning Liabilities', OGEL 4 (2007) <[www.ogel.org](http://www.ogel.org)> accessed 7 July 2013

<sup>108</sup> See articles 143 and 144, Namibian Constitution, 1990

Article 60(3) of UNCLOS states:

Any installations or structures which are abandoned or disused shall be removed to ensure safety of navigation, taking into account any generally accepted international standards established in this regard by the competent international organisation. Such removal shall also have due regard to fishing, the protection of the marine environment and the rights and duties of other States. Appropriate publicity shall be given to the depth, position and dimensions of any installations or structures not entirely removed.<sup>109</sup>

The competent international organisation for this purpose is the International Maritime Organisation (IMO) which, in 1989, adopted the IMO Guidelines and Standards which set out minimum global standards for the removal of offshore installations. Even though the Guidelines and Standards do not have the status of international law, and are therefore not binding on states, they are still very relevant to Namibia.<sup>110</sup>

The principal legislation with regard to decommissioning is the Petroleum Act 1991 (as amended in 1998). The 1991 Petroleum Act contains general rules on the removal of property, such as installations, from a licence area. Initially the Act did not require a detailed decommissioning regime. Section 46 (2) (i) (vi) merely required (as part of the application for a production licence) a proposed programme of production operations and the processing of petroleum: including the prevention of pollution, the dealing with waste, the safeguarding of natural resources, the reclamation and rehabilitation of land disturbed by way of production operations and the minimisation of the effect of such operations on land adjoining the production area. Thus, Part XA of the 1998 Petroleum Laws Amendment Act brought in a more focused regime for the decommissioning of installations. It provides for the removal of all onshore and offshore installations, equipment, pipelines and other facilities that are not used for exploration operations.<sup>111</sup>

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<sup>109</sup> UNCLOS 1982, article 60(3)

<sup>110</sup> See 'IMO Guidelines and Standards for the Removal of Offshore Installations and Structures on the Continental Shelf and in the Exclusive Economic Zone', 1989 IMO Assembly [Res. A.672 (16) SC 57/27 Add.2], 19 October 1989

<sup>111</sup> The Petroleum Laws Amendment Act, 1998 (entered into force on 4 September 1998)

If a licence has been cancelled, or has expired, or has been relinquished, the Minister may issue a notice, for decommissioning, to the licence holder. The notice will require the removal of installations, the plugging of wells, and the performance of any other actions necessary for the conservation and protection of any natural resources in the area. The Minister has the discretion to specify further steps regarding this matter if he or she deems them necessary. The Act further contains actions in the case of failure or contravention of the notice by the licence holder. These include the sale at public auction of any goods recovered from the licence holder and the deduction (from the proceeds of the sale) of the costs incurred by the government in respect of the removal or the actions and steps required by the Minister concerning the removal. The licence holder shall be guilty of an offence and liable on conviction to a fine if he contravenes or fails to comply with the notice.

The Model Petroleum Agreement requires the company (on expiration or termination of the agreement or on relinquishment of part of the licence area) to remove or deal with all equipment and installations from such licence area or relinquished area to the extent and in the manner agreed with the Minister in terms of the Decommissioning Plan approved by the Minister pursuant to section 68A (2) of the Petroleum Act.<sup>112</sup>

Further practical guidance for the decommissioning of offshore installations is contained in the 1998 Petroleum Regulations. Regulation 15 deals with the location of installations. The operator is obliged to report to the Commissioner when an installation is no longer in use. The decommissioning or abandonment should then be carried out in accordance with the Petroleum Act. The Regulations do not require the complete removal of offshore installations. The operator should remove the installation, structure and equipment, and give publicity of the depth, position and dimension of any structure which is not entirely removed. The regulations require that all abandoned wells should be plugged and closed off. It also requires that the environment should be restored in the case of the removal of onshore installations.

*(b) Decommissioning Plan*

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<sup>112</sup>See 1998 Model Petroleum Agreement, clause 11

It is common practice in the international industry for the submission of decommissioning plans to the host government for approval, by those companies that have been exploiting the oil and gas resources in the host country.<sup>113</sup> However there are still differences in the practice of the timing of submission of the plan, the contents of the plan, the extent of the financial liability of relevant parties and the regulatory and contractual requirements (i.e. the differences between licensing and contractual systems in dealing with the decommissioning obligations). In Namibia, the 1998 Amendment Act provides for the submission of a decommissioning plan subject to the satisfaction of the Minister of Mines and Energy (in consultation with the Ministries of Fisheries and Environment and Tourism) together with an application for a production licence.<sup>114</sup> The “Decommissioning Plan” as defined in the Model Petroleum Agreement means the package of measures proposed by the Company under section 46(2)(viA) of the 1991 Petroleum Act to be taken after cessation of production operations to remove or otherwise deal with all installations, equipment, pipelines and other facilities, whether on shore or off shore, erected or used for purposes of such operations and to rehabilitate land disturbed by way of such operations. It also includes any revisions of the Plan as required under section 68A of the 1998 Petroleum Laws Amendment Act, and the approval or any subsequent revision by the Minister.<sup>115</sup>

The 1998 Petroleum Laws Amendment Act requires separate decommissioning plans in respect of separate production areas (i.e. any area outside a production area where activities in connection with the production operations in such production area are being carried out). The plan requires the approval of the Minister (acting in consultation with the Ministers responsible for environment, fisheries and finance). The following items need to be addressed in the plan: the estimated time at which such decommissioning would occur; the extent of such decommissioning; the manner in which such decommissioning would take place; the estimated cost of such decommissioning; and such other measures or information as the Minister may determine.

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<sup>113</sup> See for example the international practice of decommissioning in various countries in *Oil and Gas Decommissioning: Law, Policy and Comparative Practice*, Hammerson M (Ed), Globe Law and Business, London, 2013

<sup>114</sup> Section 4 amended section 46 of the 1991 Petroleum Act

<sup>115</sup> See 1998 Model Petroleum Agreement, clause 1 (definitions)

*(c) Review, revision or amendment of decommissioning plans*

The holder of a production licence is required to review and, if necessary, revise the decommissioning plans one year before the estimated date on which 50 per cent of the estimated recoverable reserves of petroleum in the production area would have been produced.<sup>116</sup> The reviewed or revised plan will need to be resubmitted for Ministerial approval (again in consultation with the Ministries responsible for the environment, fisheries and finance). The Minister could refer the plan to the licensee for such amendments as the Minister may deem necessary. If the licensee fails to make the necessary changes the Minister could impose the changes and recover the costs from the licensee. The licensee could request expert determination if not satisfied with the decisions of the Minister concerning the required review or amendments.

*(d) Decommissioning Trust Fund*

The 1998 Petroleum Laws Amendment Act section 68B sets out detailed financial provisions concerning the decommissioning of onshore and offshore facilities after production activities. The production licence holder is liable for the cost of the decommissioning and is required to establish a trust fund for that purpose after 50% of the estimated recoverable reserves of the relevant production area has been produced. Thereafter the holder is required to make annual payments into the fund on the basis of a specified formula based on the levels of production, as may from time to time be determined by the Minister by notice in the Government Gazette. After the deductions of the costs of administering the fund, the money is used mainly to finance the decommissioning of the petroleum installations used to produce the petroleum from the relevant field. The payments made by the holder into the fund are deductible in the computation of the petroleum income tax and the additional profits tax. Separate trust funds are required for decommissioning outside the production area where facilities are used in connection with the production operations of the holder of the production licence in question.

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<sup>116</sup> Petroleum Laws Amendment Act 1998, Part XA

The Minister's approval (after consultation with the Minister of Finance) is required for the trust deed that set up the trust fund including the appointment and functions of the board of trustees and the winding up of the trust fund. The board of trustees is responsible for the management of the fund and the trustees are nominated by the Minister and the licence holder, with the chairperson nominated by the Minister. The main responsibilities of the board of trustees are: to open an account at a reputable financial institution (to be approved by the Minister after consultation with the Minister responsible for finance); to review the state of the trust fund annually; to determine the amount to be deposited into the trust fund each year; and to provide an annual report on the state of the fund to the Minister. The setting up of the trust fund is also required under the Model Petroleum Agreement and the fund is exempt from any tax or levy on income.<sup>117</sup> However, any surplus amounts in the trust funds after completion of the decommissioning process are subject to tax (Part IIIA section 22A).

## ***5. A new regime for the gas sector***

### **5.1 The Kudu Gas Field**

A major gas discovery which was made in 1974 lies approximately 170 km west of the southern diamond-mining town, Oranjemund, on the Namibian continental shelf, in water depth of 170 metres.<sup>118</sup> The gas is described as 96% methane, sweet and dry. The first well, which resulted in the discovery of the gas field (Kudu 9-A1), was drilled by Chevron and Soekor in 1974, offshore Namibia. Further successful appraisal wells were drilled in 1987 (Kudu-2) and 1988 (Kudu-3) by the Suidelike Olie-Eksplorasiekorporasie (SWA) (Eiendoms) Beperk (SWAKOR). The Kudu-3 well proved the existence of a major gas field. After independence, an exploration licence was issued to Shell (operator) and its partners Energy Africa and Texaco over the Area 2814A in which the Kudu Gas Field is located. In terms of the Petroleum Act, 1991, a 'petroleum field' was declared over the Area because of the successful Kudu 4 well, which confirmed substantial amounts of economic viable gas in place. The field reserve was then estimated as 1.3 trillion cubic feet (tcf) proven and the potential was said to be more than 20 tcf (since been put at 9.98 tcf ). Further wells

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<sup>117</sup> Model Petroleum Agreement 1998, Clause 11(17); See also Section 68C of the Petroleum Amendment Act 1998

<sup>118</sup> For an overview of the Kudu Gas Field see Namcor (upstream) <<http://www.namcor.com.na/kudu>> accessed 12 July 2013

were drilled in 2002 however the drilling results were not as expected by Shell and they decided to relinquish their licensing interest. Although ChevronTexaco acquired Shell's interest they also withdrew in 2003 from the licence leaving Energy Africa with 100% interest in the licence of which they transferred 10% to NAMCOR. In May 2004, Energy Africa was then acquired by Tullow Oil and the exploration licence was then upgraded to a Production Licence 001 in 2005. In 2007 Itochu farmed-in to the licence and obtained 20% of the licence interest. The new consortium of Tullow Oil (70%); Itochu (20%) and Namcor (10%) then drilled a further appraisal well in 2007. However the negotiations for a gas to power project were not successful for many reasons. This resulted in the involvement of The Russian Company, Gazprom in the project in 2009 (in support of the Ministry and Namcor) however they have since withdrawn from the project.

Many questions have been raised about the slow pace of the development of the gas field that was discovered in 1974 (almost 40 years ago). However it seems that the project will soon be developed.<sup>119</sup> In the past, a number of plans were presented to the government on the development of the gas field. These included a Floating Liquefied Natural Gas (FLNG) facility, the transportation of gas via an offshore pipeline from the field to the Namibian coast and a 750mw gas power plant on land.<sup>120</sup> Furthermore, alternative gas pipelines to the markets along the west coast of South Africa were also proposed as part of the development: i.e. an offshore gas pipeline that runs directly from the field to the markets. An alternative proposal was for an onshore pipeline from Namibia to South Africa which would supply gas to a larger power station (e.g. 1000mw) in Cape Town and to further industrial projects at Saldanah Bay. Subsequently, a Bilateral Gas Trade Agreement between Namibia and South Africa to facilitate the trade of gas between the two countries was negotiated and signed in 2003 (see later discussion).

More recently, on 8 March 2013, a Project Development Agreement (“PDA”) including a Gas Sales Agreement Term Sheet (“GSA Term Sheet”) was signed by the

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<sup>119</sup> See ‘Kudu Gas Power project gains momentum’, Namib Times, 3 May 2013; see also ‘Negotiations on Kudu Gas Project in final stages’, Republikein, 14 November 2011.

<sup>120</sup> See Tullow and Namcor presentation: ‘Kudu Gas Project’, Fossil Fuel Foundation Colloquium Natural Gas –Southern Africa, Johannesburg, 20 September 2006; see also See Moller, *The Kudu Gas Project: Namibia*, 6<sup>th</sup> Annual Indaba, Africa Upstream, Global Pacific & Partners, 13 October 1999, Cape Town, South Africa

‘Upstream Parties’ Tullow, NAMCOR and Itochu, and the ‘Downstream Parties’: KuduPower and NamPower.<sup>121</sup> The main purpose of the gas field development is to transport it via pipeline to Oranjemund, the closest onshore town for the generation of electricity at an 800 mega watt (mw) gas power plant (which is to be constructed and run by the electricity utility NamPower).

## 5.2 The Gas law

As indicated above, Namibia possesses proven gas reserves but it does not have a domestic gas market. There is no established gas industry which would be capable of developing and marketing the gas. It was shown earlier that the potential market for Namibian gas is its neighbour, the RSA. The Government’s immediate objective is therefore to attract the necessary investment to build an infrastructure as the basis for a local industry and to export some of the gas to South Africa’s industrial markets.<sup>122</sup> Thereafter, investment would be geared towards the establishment of internal markets for gas within Namibia. In order to achieve these objectives a new Gas Bill was formulated in 2001 which sets out the basic rules for such investment and the practical institutional framework for implementation.<sup>123</sup> The law proposes to regulate the downstream activities of transportation, storage, distribution and marketing of gas. It does not apply to the activities of exploration for or production of natural gas which are already covered by the Petroleum (Exploration and Production) Act 1991. The purpose of the gas law is to promote the establishment of a gas transportation and distribution network in Namibia for domestic supply and for export on the basis of a licensing framework for the downstream gas industry. The gas law also proposes the establishment of a national gas regulator to monitor the performance of licence conditions and promote reliability of service. The form and indemnity of the gas regulator would only be established once the Gas Bill becomes an Act of Parliament. An opportunity therefore exists for government to decide whether the gas regulator will be set up as a separate entity, or whether it may be more efficient for Namibia to include this function in the organisation of one single national energy, oil and gas

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<sup>121</sup> For an overview of the Kudu Gas Project, see Nampower, *Kudu Power Project Update*, March 2007, Namibia <<http://www.nampower.com.na/docs/Kudu%20Power%20Project%20Update%20-%20March%202007.pdf>> accessed 20 July 2013; see also See ‘Kudu Gas Power project gains momentum’, Namib Times, 3 May 2013

<sup>122</sup> See the 1998 Energy Policy (White Paper) Ministry of Mines and Energy <<http://www.mme.gov.na/energy/policy.htm>> accessed 12 July 2013

<sup>123</sup> The draft Gas Bill was adopted as a working document in 2000 by the Ministry of Mines and Energy <<http://www.mme.gov.na/legal.htm>> accessed 7 August 2013

regulator. The gas law further aims to ensure safety, efficiency and environmental responsibility in the transportation and distribution of natural gas. The law would facilitate investment in pipeline infrastructure by private, public, municipal and mixed owned enterprises. It would promote a competitive market in gas in the long term, and stimulate cross-border trade in gas between Namibia and its neighbours.

### **5.3 Gas Trade Agreement with South Africa**

In preparation for the production, transportation and utilisation of the gas from the Kudu gas field, a Bilateral Gas Trade Agreement (BGTA) between Namibia and South Africa was negotiated and signed by the two Governments in 2003.<sup>124</sup> The purpose of the BGTA is to facilitate the trade of gas between the two countries and to determine the mutual commitments and responsibilities of the two Governments. This is in line with the energy policies of the two countries, which include the development of gas resources. The policies propose the development of an open and competitive market for natural gas, and the development of an open and competitive environment for the exploration and development of natural gas reserves and the production and supply of natural gas. The policies also adopted the principle of third party access to the uncommitted capacity of transmission pipelines on non-discriminatory and commercially reasonable terms as soon as is commercially viable. It is however up to the potential transportation customers and the pipeline owners to agree on the terms of access. In line with the energy policy, the BGTA is therefore the framework in which the development of any pipeline between the two countries may be undertaken. It covers a range of issues, which need the agreement of the two Governments and include the route, inspections and tariffs. The BGTA also provides an opportunity for the Governments to harmonise their laws and regulations on health, safety and environment issues, technical standards and specifications applicable to pipelines, in accordance with accepted international standards. The relevant authorities of each Government are responsible for the exercise of police, immigration and customs control and the physical protection of the pipeline that are deemed necessary. The BGTA is valid for twenty five years after the date of initial transportation of the gas by the pipeline. The BGTA established the Namibia/South Africa Joint Gas

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<sup>124</sup> The Agreement was signed on 1 August 2003, Windhoek, Namibia (see Dentlinger, 'Namibia, SA agree on gas shipments' The Namibian newspaper, Windhoek, 4 August 2003

Commission, consisting of four members, two members appointed by each Government, to facilitate the implementation of the Agreement.<sup>125</sup>

## ***6. Development of a local oil and gas industry***

### **6.1 Training and Employment**

The training and employment requirements of oil companies in Namibia are taken serious by the government. All licensees are required to make annual contributions to the Petroleum Training and Education Trust Fund (Petrofund) which was formed in 1993 in order to offer training in the fields of science and information technology.<sup>126</sup> The Act also provides for agreements between the Minister and licensees for the implementation of training programmes. The 1991 Petroleum Act requires that a licensee employ Namibian citizens with appropriate qualifications and carry out training programmes to encourage and promote the development of such citizens in such person's employment.<sup>127</sup>

On a broader scale, the government has adopted various initiatives at redressing some of the past discriminatory practices (in the employment and training of Namibians) that prevailed under the South African administration period before independence.<sup>128</sup> The Affirmative Action (Employment) Act 1998 requires that companies (including oil and gas companies) employing twenty five people or more must provide regular progress reports to the Employment Equity Commission on demographics, promotion, mentorship, understudies and staff development.<sup>129</sup> Furthermore, in 2011 the government adopted a framework on Equitable Economic Empowerment which contains policies that are required to achieve greater equity in society including an obligation of the private sector to employ and empower previously disadvantaged Namibians in most economic sectors.<sup>130</sup> The framework is based on the Namibian

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<sup>125</sup> See National Assembly Question 2634: from Mr J F Smalle (DA) to the Minister Of Energy, Republic of South Africa on gas trade with neighbouring countries at, RSA Parliament <<http://www.energy.gov.za/PQS/2012/na/National%20Assembly%20Question%202634.pdf>> accessed 1 August 2013

<sup>126</sup> Petroleum (Exploration and Production) Amendment Act, 1993 (No. 2 of 1993)

<sup>127</sup> Section 14 of the 1991 Petroleum Act

<sup>128</sup> See earlier discussion on history of Namibia.

<sup>129</sup> The Affirmative Action (Employment) Act 1998 (Act 29 of 1998)

<sup>130</sup> The New Equitable Economic Empowerment Framework (NEEEF), 2011, Government of Namibia: NEEEF encourages the private business sector to become more equitable and to make a greater contribution towards national economic empowerment and transformation. It is based on voluntary business practice. It promotes transformation in business through five empowerment pillars: ownership,

Constitution, articles 23(2) and 95(a) which mandates Parliament to enact legislation to provide for the advancement of persons within Namibia who have been socially, economically and educationally disadvantaged by past discriminatory laws or practices; and enact legislation to ensure equality of opportunity for women.

The MPA furthermore provides for the employment and training of Namibian citizens and the use of local Namibian goods and services. The company is obliged to employ Namibian citizens with appropriate qualifications and to provide training and education for Namibians through annual contributions to the Petrofund.<sup>131</sup> Additionally, the company is also required to provide for in-house training of Namibian citizens in the field of natural science, engineering, technology, accounting, economics and law as related to oil and gas exploration and production to expose them to petroleum industry practice and operations. In terms of the MPA the Company is obliged to use and purchase goods supplied, produced and manufactured in Namibia whenever such goods can be obtained at competitive prices; and to make maximum use of Namibian contractors in Namibia where services of comparable standards with those obtained elsewhere are available from such contractors at competitive prices and on competitive terms. It is obliged to co-operate with local Namibian companies to enable them to develop skills and technology to service the petroleum industry.

## **6.2 Industry Representative Body**

All licensee companies in Namibia have organised themselves into the Namibian Petroleum Operators Association (NAMPOA). NAMPOA consists of members of the operating companies in Namibia. It was established in 1993 by the first licensees after Namibia's independence: Norsk Hydro, Sasol, Chevron, Shell and Ranger; and the changing membership includes all past licence holders, including Texaco, Energy Africa and Vanco, and current licence holders.<sup>132</sup>

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management control and employment equity, human resources and skills development, entrepreneurship development and community investment – for a copy of the Framework see <[http://209.88.21.36/opencms/export/sites/default/grnnet/OPMv2/DocArchive/StatutesBills/NEEEF\\_final.pdf](http://209.88.21.36/opencms/export/sites/default/grnnet/OPMv2/DocArchive/StatutesBills/NEEEF_final.pdf)> accessed 12 July 2013

<sup>131</sup> See Petrofund at <[http://www.petrofund.org/who\\_we\\_are.html](http://www.petrofund.org/who_we_are.html)> accessed 3 September 2013

<sup>132</sup> See Exploration History <[http://www.namcor.com.na/exploration\\_history.htm](http://www.namcor.com.na/exploration_history.htm)> accessed 15 July 2013

All members of NAMPOA are members of the group of independent board of trustees that governs the Petrofund, which also comprises representatives from MME, NAMCOR and the Ministry of Education.<sup>133</sup>

### **6.3 Namibian Oil and Gas Industry**

A number of local and international oil and gas companies have been issued licences to explore the offshore and onshore frontiers of Namibia. The international companies have entered into joint venture agreements with local Namibian companies including NAMCOR.<sup>134</sup>

Since the independence in 1990, the industry has grown rapidly mainly with the international oil companies taking the lead in exploring the onshore and offshore areas. A local industry has emerged recently with increased Namibian interest and participation.<sup>135</sup> During July 2011 in a ministerial briefing to parliament the Minister of Mines and Energy reported of an increase in exploration activities.<sup>136</sup> The legal and regulatory framework (notably the 1991 Petroleum Act) which Namibia designed after independence (and is still evolving) has certainly created more opportunities for both local and international companies to participate at all levels in the oil and gas industry. In order to *Namibianise* the oil and gas sector, various initiatives were recently introduced by government to ensure that Namibians are not left out of the industry by the connivance of some powerful international oil and gas companies and a privileged local elite. These include the legal requirements under the 1991 Petroleum Act, the 1998 Affirmative Action Act, the 2011 NEEEF and the MPA to employ and train local citizens and to make use of local goods and services. However as was pointed out earlier, there are already some very useful lessons that Namibia could learn from well established producing countries in the region and internationally in dealing with some of these emerging issues and challenges that are so pertinent in the development of a local oil and gas industry.

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<sup>133</sup> Supra note 125.

<sup>134</sup> See map of licensees <<http://www.mme.gov.na/energy/upstream.htm>> accessed 17 July 2013

<sup>135</sup> See 'Oil investors increasingly keen on Namibia', *Namibian*, Windhoek, 7 November 2011; Jo-Maré Duddy, 'Namibia's 'oil elephants' could stampede economy', *Namibian*, Windhoek, 23 August 2011

<sup>136</sup> See Ministerial statement on petroleum exploration activities 2011/2012, supra note 31

## ***7. Conclusion***

The legal and regulatory framework of Namibia shows that a number of crucial areas have been addressed to a reasonable degree of success including the setting up of an effective legal and regulatory framework, the management and administration of the policy and law, the licensing system, the regulation of offshore health, safety and environmental issues, including decommissioning, etc. The Namibian legal framework shows that the country successfully introduced a policy, laws and regulations to manage, regulate, develop and promote the exploration and exploitation of the oil and gas resources of the country. It is clear from the discussion that Namibia has incorporated international approaches in providing for a manageable licensing system and effective legal and regulatory regime to ensure that oil and gas operations comply with health, safety and environmental requirements (including the decommissioning of installations at the end of their operations). Additionally, the overall geological potential, the favourable investment climate and political stability prevailing in Namibia and the region are attracting a large number of international oil and gas companies to the country. However, now that an effective legal framework for exploration and production has been put in place, the next phase of the industry i.e. production phase still needs to be fully embraced with the development of the Kudu gas field and other discoveries. This phase may well prove to be more challenging and it would certainly require reviewing and adaptation of the existing framework as the industry evolves. Lessons on various aspects of the international oil and gas industry including the benefits and challenges from oil and gas production, the impacts on the environment and communities, issues of transparency and accountability, issues of socio economic impacts, local content, community involvement and political risk (to name but a few) that are so prevalent in other parts of the world (i.e. West Africa, Gulf of Mexico, North Sea, European Union) and also the newly oil and gas producing countries in South-eastern Africa may prove to be very useful for Namibia. *Aluta continua!*