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Namibia's Legal Provisions Regarding Offshore Oil Drilling

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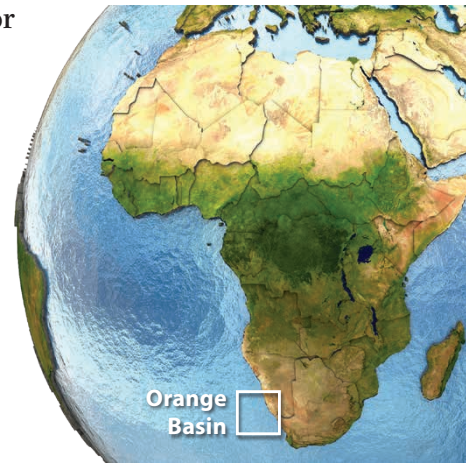
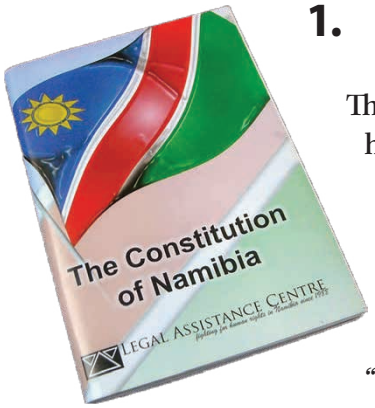
INTRODUCTION

Offshore drilling is the process of drilling holes into the seafloor in search of pockets of oil and natural gas (hydrocarbons) lying beneath it. From 2021 to 2023, five drilling campaigns by Shell (Lesedi-1X, La Rona, Graff-1 and Jonker-1X) and TotalEnergies SE (Venus-1X) discovered significant pockets of light oil with associated gas in the Orange Basin offshore Namibia (see report at Energy Capital & Power for example). **While promising various revenue streams for Namibia, offshore drilling and the use of hydrocarbons also pose immense risks for the country's environment and the local communities, given that these are two of the main causes of global climate change.**



In an attempt to mitigate these risks, Namibia's Ministry of Mines and Energy is developing a **local content policy** that will contain, among other measures, **a plan to expand legislation**. However, the local content policy is not legally enforceable, and judging from experience, it may take years for the planned legislation to be passed. In the meantime, offshore drilling is regulated by **general and national laws**. Current laws provide a general framework for all hydrocarbon operations and related legislation by embedding fundamental rights that protect natural resources, the environment and the Namibian people. The national laws, particularly the "Petroleum Laws" – the *Petroleum (Exploration and Production) Act, 1991* ("Petroleum Act"), the *Petroleum (Taxation) Act, 1991* (both as amended principally by the *Petroleum Laws Amendment Act, 1998*) and the *Model Petroleum Agreement 1998* – regulate the discovery, extraction and processing of hydrocarbons against the background of the general laws. The legislation envisaged by the local content policy would supplement these provisions. Presently, however, there is a lack of political will to ensure that the legal framework protects not only the country's revenue but also its people and environment.



1. GENERAL PROVISIONS

The *Constitution of Namibia*, and international agreements that Namibia has ratified, enshrine fundamental rights and regulate obligations of the State in respect of the protection of those rights. These general provisions are supported by several national policies concerning sustainable development, which is defined in the *Environmental Management Act 7 of 2007* as:

> *"human use of a natural resource, whether renewable or non-renewable, or the environment, in such a manner that it may equitably yield the greatest benefit to present generations while maintaining its potential to meet the needs and aspirations of future generations including the maintenance and improvement of the capacity of the environment to produce renewable resources and the natural capacity for regeneration of such resources; …"*

These general provisions constitute the standard against which Namibia's hydrocarbon legislation should be measured.

a) Constitutional Law

The *Constitution of Namibia* contains various fundamental **guidelines** for the State's dealings with hydrocarbons.

Article 95 obliges the State to promote the *"Welfare of the People"*. In addition to occupational health and safety and education, this applies to *"(l) maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilization of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future [...]"*. Although state principles like this cannot be directly enforced in Courts, the Constitution obligates the Government to protect the environment by developing appropriate laws and policies and ensuring their enforcement. Additionally, **Article 101** entitles Courts *"to have regard to [state principles such as the protection of the environment] in interpreting any laws based on them"*. In relation to hydrocarbon operations, this means that the Government is held to identify the health and environmental risks that they pose, and to avoid their materialisation and prevent exploitation of the deposits by comprehensive regulations (LAC, "Namibia's environmental laws").

To ensure government compliance as well as to engage all Namibians in the duty to protect the environment, **Article 91** provides that one of the duties of the Ombudsman is *"to investigate complaints concerning the over-utilization of living natural resources, the irrational exploitation of non-renewable resources, the degradation and destruction of ecosystems and failure to protect the beauty and character of Namibia"*.

Article 100 stipulates that *"Land, water and natural resources 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 shall belong to the State if they are not otherwise lawfully owned"*. This allows the Government to require licenses for any hydrocarbon activities which then facilitate easier control over them, as well as to ask for financial compensation when transferring ownership to oil companies.

b) International Law

In addition to the Constitution, Namibia has ratified a number of international covenants and agreements that, according to Article 144 of the Constitution, also form part of the law of Namibia. Among them are several concerning environmental protection, such as the 1992 *United Nations Framework Convention on Climate Change* and the *Paris Agreement* of 2015. Furthermore, Namibia voted in favour of the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)* in 2007. The latter recognises the rights of indigenous peoples to the lands, territories and resources that they have traditionally owned, occupied or used. Based on these rights, any decision regarding these lands, territories and resources requires free, prior and informed consent by the rights holders. This means consultation and meaningful participation in all aspects of the project, from initial assessment and planning to monitoring and closure, without any form of coercion, before any authorisation is granted, and with full and accurate disclosure of information about the proposed developments in an accessible and understandable form (LAC, "Free, Prior and Informed Consent: ..."). As offshore drilling happens in fishing grounds and impacts the coastal regions, the principle of free, prior and informed consent applies to it and should be implemented through hydrocarbon legislation. But, since the UNDRIP is merely a declaration, it is not legally enforceable in any way.

c) Climate Change provisions

As one of the driest countries in sub-Saharan Africa, with irregular precipitation patterns, and about half of its population depending on subsistence agriculture, Namibia is highly vulnerable to the effects of climate change. In recent years already, the country has experienced both flooding caused by heavy rainfall, and droughts (World Bank,"Namibia Overview").

Namibia adopted a National Climate Change Policy (NCCP) in 2011. It aims to integrate climate matters into laws and other policies adopted before climate change was recognised as a global issue, and to provide a plan of action for the future. Based on the NCCP, climate matters have increasingly become a focus of, for example, Namibia's National Development Plans (NDPs). NDP5 (2017/18 – 2021/2022) was the first to set an intermediate emissions reduction target (greenhouse gas emissions reduction by 30%). This means that the country has a carbon budget to "spend" by allocating emission rights and commitments among carbon-emitting industries and their players.

At the international level, Namibia's President Hage Geingob signed the Paris Agreement in 2016. The overall goal of the Agreement is to limit the increase in the mean global temperature to 1.5°C or at least well below 2°C. To achieve this, worldwide emissions have to be cut by approximately 50% by 2030. Every five years the signing parties have to create a plan for "nationally determined contributions", detailing the efforts that they will undertake at national level to achieve these goals.

2. LEGAL PROVISIONS ADDRESSING HYDROCARBON OPERATIONS

To protect the environment and empower local communities, certain general legal provisions are implemented through various regulations and mechanisms in national laws. The Petroleum Laws directly address hydrocarbons – "petroleum" being another word for "crude oil". Additionally, in line with Article 95 of the Constitution, the Government has passed and amended various environmental laws. In regard to offshore drilling, the Environmental Management Act 7 of 2007 is the most relevant.

a) Petroleum Laws

Among the Petroleum Laws, the Petroleum Act is the main instrument regulating hydrocarbon operations. It confirms that any exploration for hydrocarbons on Namibian land or in Namibian waters, and any development and production thereof, requires a licence issued under the Act by the Minister of Mining and Energy (MME). There are three types of licences: reconnaissance licences; exploration licences; and production licences. Through these licences, the drilling operations are subject to certain conditions. For the exploration and production licences, these conditions are stipulated in an agreement between the MME and the drilling operator, as outlined by the Model Petroleum Agreement. One objective of these conditions is to set out individual regulations to protect the environment and the local communities affected. However, since the Model Petroleum Agreement is a contract between the MME and the drilling operator, local communities as non-parties cannot enforce compliance. All applications for licences also require an assessment of how operations will impact the environment. According to section 16 of the Petroleum Act, should the site be on or close to cultivated land or land with other listed characteristics, the licensee needs

written permission from the land owner to begin operations. However, since offshore drilling does not happen on privately owned land, only section 16(1)(d) regarding operations interfering with fishing or marine navigation applies, meaning that only the Minister's permission is necessary.

To promote the integration of the Namibian people into the operations, and to ensure that a part of the revenue streams created by them – mainly wages and operational cost – are directed their way, section 14 of the Act sets out certain conditions to which all licence holders are subject. Operators have to: give preference of employment to Namibian citizens who possess appropriate qualifications; carry out training programmes to provide people with appropriate qualifications; make use of products, equipment and services which are available in Namibia; and support the development of such resource availability in Namibia.

Through the Petroleum Laws Amendment Act of 1998, provisions regulating the decommissioning of facilities used were added. They require the licencee to establish a trust fund after recovering 50% of the estimated recoverable reserves of the relevant production area. Through annual payments in the following years, money is accumulated to finance the decommissioning of the operation installations and the restoration of the environment (MME, "Services: Summary of Legal Terms").

Section 71 of the Petroleum Act holds that operators are liable when land or water is polluted through a spill or otherwise, or when any plant or animal life is endangered or destroyed or any damage or loss is caused to any person, including the State. They are responsible to report such occurrences and remedy them as necessary in accordance with good oilfield practices.

b) Environmental law

The Environmental Management Act 7 of 2007 seeks to ensure the consideration and assessment of the environmental effects of certain activities, such as offshore drilling, while facilitating the participation of affected parties in the process.

Under the Act, activities listed by the Ministry of Environment and Tourism require an Environmental Clearance Certificate (ECC). To obtain an ECC, the proponent first has to file an application with the Environmental Commissioner, and then prepare a project proposal. The proposal preparation process has to include a public consultation of interested and affected parties. According to the Regulations made in terms of section 56 of the Act, "*an interested and affected party in relation to the assessment of a listed activity includes any person, group of persons or organization interested in or affected by an activity; and any organ of state that may have jurisdiction over any aspect of the activity*". This has been interpreted broadly in the past, with lists of interested and affected parties for offshore drilling ECCs naming representatives of organisations such as the WWF, GIZ and Fridays for Future, as well as local businesses and community members of coastal towns (TotalEnergies, "Public Consultation Information"). The proponent has to notify the interested and affected parties by, inter alia, "*advertising the application once a week for two consecutive weeks in at least two newspapers circulated widely in Namibia*". They then have to hold public consultations in which they inform the interested and affected parties about the project, discuss concerns, register all parties on a list, give the parties an opportunity to comment, and keep a record of all comments. The comments have to be included in the project proposal for the Environmental Commissioner's consideration. This process is meant to ensure the inclusion of local communities in the decision-making regarding activities that pose significant risks to their lands.

After receiving the proposal, the Commissioner either grants the ECC or deems an Environmental Impact Assessment (EIA) necessary for further consideration of the potential effects of the planned activity. Since offshore drilling entails extensive environmental risks, it generally requires an EIA (see MET for detailed information about EIAs). The EIA entails further scoping and investigation, the findings of which are summarised in a final report, and this report determines whether or not the ECC will be issued. However, the issuing of the ECC can also be made dependent on the conclusion of an environmental agreement in which the proponent commits to certain measures to prevent environmental damage. Any interested or affected party aggrieved by a decision of the Environmental Commissioner can appeal to the Minister of Environment and Tourism.

3. CRITIQUE OF CURRENT FRAMEWORK

In spite of these regulations and mechanisms, the legal provisions have proven to not be effective enough to ensure compliance with the framework of fundamental rights.

A large portion of environmental risks of offshore drilling does not stem from accidental major oil spills. There is a significant amount of pollution, such as air pollution from ships and machinery, underwater noise pollution through seismic mapping, and water pollution at the drilling hole and the surrounding area through spilling and drilling residue, that cannot be avoided (Chesapeake Bay Foundation, *Frontiers in Environmental Science*). While an assessment of this pollution to minimise it is commendable, the issuance of an ECC bears the risk of providing a false sense of security that no environmental harm at all will be done, which can never be the case, thus it is important that operators are held liable by the law for any pollution caused. At the same time, certain damage to the environment is likely to be irreversible (e.g. fish moving to other waters amid polluted waters) or not financially viable. This becomes clear in the UNEP report which estimates that a clean-up of the Ogoniland region in Nigeria where Shell has been operating for years would cost US$5 billion in the first five years alone. Liability after the risks have materialised is therefore only a partial solution.

Additionally, the current laws place many responsibilities in the hands of licencees (the licence holder), the majority of whom are big oil companies. While this is comprehensible from a financial point of view, as it means that licencees have to take on all costs (direct and indirect), it affords them too much power in the process, which threatens actual liability for pollution remedies, especially in the case of a major spill. Hydrocarbon companies like Shell have been caught misrepresenting the extent of spills, and have denied their responsibility for them, instead blaming illegal activities of local communities (Amnesty International, "Court documents expose Shell's false claims on Nigeria oil spills"). Relying on a licencee's cooperation for environmental protection bears a strong risk of a polluted environment with no one but local communities there to face the consequences.

Unfortunately, the Ombudsman's role as "Namibia's environmental 'watchdog'" (LAC, "Namibia's environmental laws") is relatively unknown. Since this means that only a few complaints regarding environmental issues are raised with the office, this mechanism cannot develop its full effect.

At the same time, local communities are barely included in the processes of offshore drilling. The planned training and support programmes for the Namibian population are commendable, but there is a lack of regulation to ensure that they reach the affected communities. In the licensing process, because offshore drilling does not technically happen on their land, the consent of local communities is not necessary under the Petroleum Act; it is replaced by government consent,

despite the impacts on the population of the coastal region (e.g. pollution and decline in both tourism and the fishing industry). Without the necessity of consent, the principle of free, prior and informed consent is not upheld in respect of the coastal waters and land.

Thus the only mechanism allowing for participation and consideration of the concerns of local communities is the consultation meetings for interested and affected parties required in the ECC process. However, the tasks of notifying parties about the project and organising meetings lies with the ECC proponent. Without the requirement of consent by local communities, the mechanism is prone to circumvention. ECC proponents have been accused of insufficient notifications, e.g. when Canadian oil company Reconnaissance Energy Africa (REN) was granted an amended ECC to drill new exploration wells in the Kavango Basin. A notification about hearings regarding the application for the ECC was issued in newspapers as per the regulation, but was printed only in English newspapers, which the local communities generally neither read nor have access to (*Ncumcara Community Forest Management Committee and Others v Environmental Commissioner and Others*). Thus the affected parties learnt of the ECC only after it was granted. Another ECC for 2D seismic mapping was granted to REN during COVID-19 curfews, making it impossible for activists and community members to attend consultation meetings (Frack Free Namibia). In *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others*, the South African High Court confirmed that such restricted access means that the requirement of consultation is not fulfilled. In the case before the Court, Shell, like REN, had posted notifications only in English and Afrikaans newspapers, and had set up a website, even though, according to the Court, "*there is no gainsaying*" that the local communities mostly speak Xhosa and do not have access to the newspapers in question or the internet (para. 99). The Court ascertained that "*meaningful consultations consist not in the mere ticking of a checklist, but in engaging in a genuine,* bona ide *substantive two-way process aimed at achieving, as far as possible, consensus, especially in relation to what the process entails and the import thereof* " (para. 95). It also underlined that such meaningful consultation needed to include all community members, not just the leaders or Traditional Authorities (para. 92).

However, with hydrocarbon companies still disregarding due process, local communities are often left with no option other than to take legal action against ECCs and hydrocarbon licences after they have been granted. In doing so, they still face several obstacles.

Under the Environmental Management Act, communities are first directed to the Minister of Environment and Tourism to appeal the issuance of the ECC by the Environmental Commissioner. However, upon the filing of such an appeal, the power to order a stop of ongoing operations under the ECC remains at the Minister's discretion. Thus, the environment may already be significantly harmed while the appeal decision process is ongoing. In *Ncumcara Community Forest Management Committee and Others v Environmental Commissioner and Others*, having learnt of the granting of the ECC only when the drilling began, the applicants issued an appeal to the Minister. However, within the first five days the Minister did not respond or order a stop of REN's operations, despite reference to the urgency of the matter. Hence the applicants sought from the Court an urgent interim interdict to halt the operations, but the Court found that it did not have jurisdiction in the narrower sense, since section 50 of the Environmental Management Act reserves for the Minister the right to decide on the appeal. The Court considered intervention to be possible only if the Minister refused to make any decision or had already come to one. It also questioned the urgency of the matter before the Court, holding that the argument for urgency had to be separate from the argument for an interim interdict. The judgement meant that the local communities were defenceless in the face of the ongoing drilling operations.

To date (Dec 2023) no ruling on the appeal of the communities has been made by the Minister .
In a similar matter, *Natural Justice, Centre for Strategic Litigation and Others v Tanzania and Uganda*, the applicants are challenging the construction of the East African Crude Oil Pipeline until the environmental, social and climate justice concerns raised about the project are adequately considered by the East African Court of Justice. However, hearings of their temporary injunction were delayed by over two years until April 2023 by a filing of the respondents questioning the Court's jurisdiction (Natural Justice). Meanwhile the project could progress and people were resettled (EACOP).

Another issue is the question of *locus standi*. In *Ncumcara Community Forest Management Committee and Others v Environmental Commissioner and Others*, even though the Court ultimately did not decide on the matter, it expressed that it was leaning towards agreeing with the respondents' argument that the Community Forest Management Boards had no *locus standi* since they were not legal entities. If confirmed, this would mean a restriction of the access to justice for local communities, because the high costs of legal proceedings and the required coordination make filings by several individual persons a more difficult undertaking.

In conclusion, Namibia's legal provisions concerning offshore drilling are not adequately ensuring the protection and participation of local communities and the environment in which they live. While the Constitution, government policies and international law provide for an encouraging basis, they all share the same weakness: they are not enforceable by local community members. While Article 101 of the Constitution requires the Government to give effect to the fundamental objectives of the Principles of State Policy, and courts to interpret laws in light of these principles, the broad definitions of terms such as "sustainable development" reduce them to elusive concepts.

Finally, no matter how well legal provisions can ensure the upholding of the rights of the local communities and prevent short-term damage to the environment, the effects of climate change cannot be regulated. The only way to prevent its progression and the ensuing deterioration of the quality of life for all living beings in Namibia is legislation that could possibly reduce the acceleration of climate change. Fossil fuel emissions are proven to be the dominant cause of global warming. In 2018, 89% of global CO_2 emissions came from fossil fuels and the fossil fuel industry (Client Earth). In the long run, allowing the expansion of the hydrocarbon energy industry by issuing more licences under the Petroleum Act will make it impossible for Namibia to uphold the goals and obligations set out in its international and national climate policies. These goals include but do not limit the 2030 goal to reduce greenhouse gas emissions by 91% against business as usual within the Nationally Determined Contribution policy under the Paris Agreement or the carbon emission target in NPD5. By undermining climate change mitigation, and in view of Namibia's vulnerability to climate change, offshore drilling poses a threat to fundamental rights such as the right to an adequate standard of living, the right to equal distribution of food, the right to access safe drinking water and sanitation, and the right to health. The question arising: *Are the temporary gains that the hydrocarbon industry promises really worth the long-term consequences?*

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