MARINE POLLUTION CONTROL LEGISLATION

IN NAMIBIA

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EXECUTIVE SUMMARY

The Namibian economy depends, at least in part, on its marine resources. Continued sustainable exploitation of these resources relies, in turn, on a healthy marine environment and it is therefore imperative that Namibia implements effective marine pollution controls. Current legal control of marine pollution in Namibia does not adequately prevent degradation of marine resources, nor does it properly provide for effective remediation measures following marine pollution.

Domestic legislation which governs marine pollution in Namibia comes from a number of disparate sources; some have been adopted from South African legislation and others have been promulgated by the Namibian government following independence. Some of the Acts are contradictory and those that exist do not comprehensively control all sources of marine pollution. Further, while it is clear which Ministry is responsible for pollution of the sea, matters are less clear concerning the sea shore and internal waters. Legislation which is in existence could be better administered and enforced.

With regard to international law, Namibia is signatory to UNCLOS III, thereby incurring several legal obligations, some of which are not being implemented. There are several treaties to which Namibia is not a party but from which it could only benefit by signing and ratifying.

It is concluded that marine pollution control in Namibia is important but is currently not adequately addressed. Several recommendations are made with a view to improving those controls.
ACKNOWLEDGEMENTS

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* Marciel Yeater, of the United Nations Environmental Project, Nairobi;

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INTRODUCTION

The purpose of this report is to investigate the provisions of both domestic and international laws which impact on the control of pollution in the coastal waters and on the sea-shore of Namibia and to assess the manner and extent to which they control marine pollution. To the extent that they are not effective recommendations are made for their amendment or for the introduction of new legislation.

Apart from analysing the applicable law, an attempt has been made to assess various factual issues. The first is the extent and severity of Namibian marine pollution, the second relates to the non-legal mechanisms by which marine pollution is controlled. Finally the way in which marine pollution control legislation is dealt with at an institutional level is considered by defining the Ministry through which laws are administered and enforced.

TERMS OF REFERENCE

The terms of reference of this brief were to

1. consider the legal controls which operate in respect of both land and marine-based sources of marine pollution in domestic and international law; and

2. to make recommendations regarding more effective legal controls of marine pollution.

METHOD

The manner in which this brief was carried out was to:

1. review the history of Namibian law;
3.2 review domestic legislation;

3.3 review international legislation;

3.4 In addition, personal or telephonic consultations (or both) were held with officials of departments charged with the administration of domestic legislation. These include:

3.4.1 Messrs. J.I. Glazewski and P Tarr from the Ministry of Environment Affairs and Tourism;

3.4.2 Mr. R. Matsopolis from the Ministry of Water Affairs;

3.4.3 Mr. L.E. Moller from the Ministry of Mines and Energy;

3.4.4 Dr. D.W. Oelofsen from the Ministry of Sea Fisheries; and

3.4.5 Ms. L.N. Shapwa from the Ministry of Works, Transport and Communication.

The task was made somewhat complicated in that copies of some legislation (and in particular, subordinate legislation) were difficult to obtain. Where copies could be found, some had been manually updated, making them difficult to read and potentially inaccurate. Further, there is some uncertainty within some ministries as to which South African laws are applicable in Namibia, resulting in a situation where laws which are in fact not part of Namibian law are being enforced.
FACTUAL SITUATION

Marine pollution in Namibia is arguably not as serious a threat to the environment as it is in some countries where there is more shipping activity and where larger populations and a greater level of industrialisation has resulted in higher levels of land-based pollution and more significant discharges to sea, in terms of both the volumes emitted and the toxicity of the effluent.\(^1\) Namibian marine pollution, like that of other countries, comes from three main sources which will be described in turn. The laws which control them will be discussed below:

4.1 Marine-Based Sources of Pollution

4.1.1 Large Accidental Spills.

These occur relatively infrequently, in the order of one or two per year.\(^2\) In the period 1995/6 three fairly serious spills occurred in Namibian coastal waters as a result of shipwrecks.\(^3\) This compares fairly favourably with the South African situation, where tanker casualties resulting in different kinds of marine pollution occurred at an average of 11.4 per year during the period 1975 to 1990 and six annually between 1990 to 1996.\(^4\) Although relatively infrequent, their effects are

\(^1\) No statistics could be obtained concerning the impacts of either large spills or discharges to sea of other sorts on Namibian marine resources.

\(^2\) Telephonic conversation with Ms Shapwa, Ministry of Works, Transport and Communication 15 November 1996.

\(^3\) Telephonic conversation with Mr Tarr, Ministry of Environment Affairs and Tourism 15 November 1996.

\(^4\) Smit, JJ "A South African Government Perspective to Tanker Safety, Pollution Prevention, Spill Response and Compensation." Paper delivered at International Seminar on Tanker Safety, Pollution Prevention, Spill Response and Compensation, Durban 7 November 1996. This significantly larger number of casualties on a coastline so close to Namibia's can be accounted for by greater volumes of shipping traffic off the South African coast, weather conditions and the existence of so-called abnormal waves on the south east coast. Smit op cit 3.
potentially extremely serious and adequate controls are therefore critical. In this context, from a legislation point of view, provision for the recovery of clean up costs are essential. At a practical level, there already exists an emergency response programme which is administered by the Government Action Control Group (GACG) under the auspices of the Ministry of Works, Transport and Communication, consisting of representatives of other ministries as well. Its purpose is to respond to all civil emergencies, of which oil spills are but one type. In 1994 GACG developed its oil spill contingency plan for the monitoring of such events and for the direction and, where necessary, the clean-up of the damage. This plan does not have the force of law and relies on the goodwill and cooperation of ship owner and or masters for its implementation. While it is likely that in most instances ship owner will comply with instructions issued in the event of a shipwreck or oil spill, the consequences of a failure to comply simply because there is no legal obligation to do so would be significant. It is therefore recommended that this plan be embodied in law, perhaps most appropriately by way of regulations promulgated under the Prevention and Combatting of Pollution of the Sea by Oil Act. Alternatively, the Minister could delegate his powers to GACG under section 29 of the Act. Finally, the matter may be addressed under new, broader pollution control legislation, if that is promulgated.

In addition to this plan, the Norwegian government recently donated to Namibia

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5 The legislative controls and powers of cost recovery which exist will be discussed below.

6 Including the Ministry of Environment Affairs and Tourism.

7 Arguably, this sort of directive falls into the category of so-called "soft law" as opposed to "hard law" of statute or regulation. It could be made hard law if the Minister were to issue directives in accordance with the plan under section 4 of the Prevention and Combatting of Pollution of the Sea by Oil Act 59 of 1985, as amended. See section 6.2.1.

8 Under section 28. This would, however, not address the problem of pollution by other substances, and for that reason it may be wiser to make regulations under a new, more wide-ranging pollution control Act.
some oil spill response equipment.  

4.1.2 Deliberate Discharges from Ships

These, though less dramatic than large spills, are cumulatively, responsible for a significant amount of marine pollution, although the extent of the problem is not clear. They occur either as a result of deliberate discharge or dumping of unwanted, land-generated toxic substances or through the pumping of bilges, washing of fuel tanks, the emptying of contaminated ballast tanks and other activities which may be regarded as incidental to the operation of vessels. The obvious difficulty of this problem is that no matter how comprehensive the legislation, it is difficult to police and to prevent at sea.

4.2 Land-Based Sources of Pollution

These include direct discharges to sea or indirect discharges through contaminated emissions to rivers or leakages to groundwater. Some of these activities are permitted in that they have been granted exemption from compliance with the Water Act. Other operations do not have valid exemptions. Generally, prosecution of such unlawful activities has been limited, enforcement agencies preferring to negotiate with offenders, job creation having been seen as more important than strict legal compliance. This attitude is, however, changing and a more confrontational approach is being adopted with two

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9 However, the primary function of this equipment is training of personnel. It is the view of Ms Shapwa that the equipment is relatively old and may not be all that effective in dealing with a large spill. (Telephonic conversation 15 November 1996.)

10 Ms Shapwa, telephonic conversation 15 November 1996.

11 54 of 1956. The Act makes pollution of all water an offence but allows non-compliance with purification standards with Ministerial consent (Section 21).
non-complying tanneries.\textsuperscript{12}

4.2.1 Direct Discharges into the Sea

These consist mostly of fish processing factories (some seven in all) which use either sea or fresh water in their operations and then discharge effluent into the sea. To the knowledge of the Ministry of Water Affairs, all have valid section 21 exemption permits. Their effluent is not considered to be extremely toxic.\textsuperscript{13}

4.2.2 Discharges into Rivers

Discharges into rivers are difficult to monitor, but affect both sea and fresh water quality. These discharges derive from both deliberate emissions and run off from riparian farms. Such water is contaminated by fertilizers and pesticides, and also contains soil particles washed into the rivers as a result of erosion. Officials from the Ministry of Water Affairs identify a lack of staff as the greatest hindrance to effective enforcement of the Water Act.

4.3 Mining Activities

The extent to which off-shore mining activities are creating a marine pollution problem is not clear. It is thought, at this stage, not to pose a serious threat\textsuperscript{14} and is, to a large extent, managed by the existence of petroleum agreements.\textsuperscript{15}

\textsuperscript{12} Personal conversation, Mr Matsopoulos, Minister of Department of Water Affairs 19 June 1996.

\textsuperscript{13} Mr Matsopoulos ibid.

\textsuperscript{14} Mr Moller, personal communication 18 June 1996.

\textsuperscript{15} This is discussed in more detail below.
5. HISTORICAL AND LEGAL BACKGROUND

In order to assess the legal controls of marine pollution in both the international and domestic spheres it is important to understand some aspects of the legal history of Namibia. This has a bearing on the status and validity of Namibian Laws.

Namibia has, at various times since 1884, been occupied by Germany as colony, governed by the League of Nations through South Africa in terms of a mandate, administered directly by the United Nations, and finally, became independent in 1990. For the purposes of this report, only the period after German occupation will be considered.

From 1920, and acting under a mandate from the League of Nations, the South African Government administered the territory of Namibia and made domestic laws which were binding on Namibia. It also acceded to international treaties and conventions, some of which it specifically declared to be applicable in the then South West Africa.\(^{16}\) Thereafter, the United Nations, on 27th October 1966, passed General Resolution 2145 (XI) ending the South African mandate over the region. Acting in defiance of this resolution, the South African government continued to occupy Namibia. The legal implications of this historical development are important, particularly during the period of South Africa's unlawful occupation, since it is laws enacted during that period which largely govern marine pollution control in Namibia.

With regard to domestic legislation, it appears to be generally accepted that laws passed by the South African government during its unlawful occupation of Namibia during this period are binding on Namibia now, but there is no logical reason why that should be the case. Once South Africa's mandate was terminated on 27th October 1966, it had no legal right to promulgate laws in Namibia. The same applies to treaties. It is therefore arguable that laws passed after 1966 were in contravention of international law and therefore not binding in Namibia. Equally, it can be argued that any domestic legislation passed in South Africa and imposed on Namibia since 1966 is invalid. However, many laws passed

\(^{16}\) Independent Namibia: Succession to Treaty Rights & Obligations 28 - 29.
following that period are applied in Namibia and for the purposes of this report, it will be assumed that the *de facto* position is that these laws are valid.\textsuperscript{17}

In 1975 the Turnhalle Conference was held, resulting in a draft Constitution for Namibia. \textsuperscript{18} In 1977 the Constitution was amended, as a result of which the office of the Administrator-General was created. In addition, the Constitution provided that South African laws promulgated and amended from that time would only become applicable in Namibia if the Administrator-General specifically declared them to apply. South African laws so decreed still apply in Namibia unless repealed by the post-independence government.

Although not significant for the status of domestic legislation, it is important to bear in mind the involvement of the United Nations. Pursuant to the United Nations General Assembly Resolution 228 of 19 May 1967 the United Nations Council for Namibia (UNCN) was established. The council was given various powers, including the power to make treaties on Namibia's behalf.\textsuperscript{19} It did so in respect of several international conventions and treaties. For the purposes of establishing what the status of marine pollution law in Namibia is, the only relevant convention entered into by the UNCN on Namibia's behalf is the United Nations Convention on the Law of the Sea (UNCLOS).\textsuperscript{20} It was signed on 10 December 1982,\textsuperscript{21} ratified on 18 April 1983 and it entered into force

\textsuperscript{17} It is arguable that the failure of the post-independence government to declare them invalid has tacitly rendered them valid. However, in either case, it is not helpful to the Namibian legal system to invalidate a body of functioning law unless there are compelling reasons for doing so.


\textsuperscript{19} Independent Namibia : Succession to Treaty Rights & Obligations 40 - 41.

\textsuperscript{20} Known as UNCLOS III. All references in this report to UNCLOS shall mean UNCLOS III.

\textsuperscript{21} At Montego Bay, Jamaica.
on 16 November 1994.

5.1 Summary of Status and Validity of Domestic Laws in Namibia

5.1.1 Domestic legislation

It is convenient to categorise Namibian laws and their validity as follows:

Pre 1966: All South African laws promulgated apply and are de jure valid unless repealed by the post-independence Namibian government;

1966-1977 South African laws applied and are enforced unless repealed. Arguably they were not lawfully promulgated and are therefore invalid;

1977-1990 South African laws and amendments to earlier laws not applicable unless specifically declared so by the Administrator-General;

Post 21.3.1990 Namibian laws applied, together with all of the abovementioned body of law unless repealed.\(^{22}\)

5.2 Status of International Laws and Treaties

The application of international laws and treaties to Namibia is governed by the Vienna Convention and by the Constitution of Namibia.\(^{23}\)

\(^{22}\) Particular domestic laws relating to marine pollution control which are applicable are discussed in more detail below.

\(^{23}\) Government Gazette of Republic of Namibia no 2 Windhoek 21 March 1990. This topic is dealt with extensively in Szasz, PC "Succession to Treaties Under the
5.2.1 The Vienna Convention

Article 16 of the Vienna Convention on the Succession of States in Respect of Treaties,\textsuperscript{24} embodies the so-called clean slate principle, which provides that:

"A newly independent state is not bound to maintain, enforce or to become party to any treaty by reason only of the fact that at the date of succession of states, the treaty was in force in respect of the territory to which the succession of the states relates."\textsuperscript{25}

The effect of this is to allow states, on attaining independence, to choose by which, if any of the treaties or conventions formerly acceded to on their behalf, they wish to be bound.

5.2.2 Constitution

In establishing Namibia's response to the options embodied in the Vienna Convention, it is necessary to examine the Constitution of Namibia. Its relevant provisions are:

Article 143 which provides that

all existing agreements binding on Namibia shall remain in force

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\textsuperscript{24} Namibian Constitution" in Namibia: Constitutional and International Law Issues op cit 65. What follows is a distillation of the most important principles only insofar as they relate to marine pollution prevention in Namibia.

23 August 1978.

\textsuperscript{25} A principle which was unanimously approved by the states participating at the United Nations Conference approving the Vienna Convention on succession to treaties. It has also been argued in Independent Namibia (Succession to Treaty Rights and Obligations 5) that it is a rule of customary law, consistent with the principles of sovereign equality and self-determination."
unless and until the National Assembly acting under Article 63 (2) (d) otherwise decides.

Section 144 goes on to say that:

Unless otherwise provided for in this Constitution or an Act of Parliament, the general rules of public international law and international agreements binding on Namibia under this Constitution shall form part of the law of Namibia.

The effect of these provisions is that international agreements made by previous regimes will be binding unless the National Assembly, exercising its powers under Section 63 (d) decides not to succeed to such international agreements. It has, to date, not stated an intention not to be bound by any international conventions or treaties entered into on its behalf either by the South African government or the United Nations.

The matter seems slightly clouded by the provisions of Section 145 which states that:

"1. Nothing contained in this Constitution shall be construed as imposing on Namibia:

(a) any obligation to any other state which would not have otherwise existed under international law;

(b) any obligations to any person arising out of the Act or contract of prior administrations which would not otherwise have been recognised by international laws as binding on the Republic of Namibia."
2. Nothing contained in this Constitution shall be construed as recognising in any way the validity of the administration of Namibia by the Government of the Republic of South Africa or by the Administrator General appointed by the Government of the Republic of South Africa to administer Namibia.

However, it is possible to reconcile the provisions of sections 143 and 144 with the above section by regarding section 144 as a restatement of international law. Section 143 declares Namibia's position on its rights under the Vienna Convention. For the purposes of this report it is relevant only to recall that UNCLOS is applicable to Namibia and the government, having stated no intention not to be bound by it within a reasonable period after independence, must consider itself to be bound and can be so regarded by other states.
6. EXISTING DOMESTIC LAW

6.1 Introduction

In considering the controls which operate in domestic law, the focus has been divided into laws which regulate marine-based, off-shore exploration and land-based sources of pollution and will be dealt with in that order. However, before considering individual laws, it is important to understand the areas of land and sea in which each of them is applicable. These regions are defined in both Namibian and international law.

Article 100 of the Namibian Constitution declares 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 where it is not otherwise lawfully owned."

Embodying some of the concepts defined in UNCLOS, the Namibian Territorial Sea and Exclusive Economic Zone of Namibia Act defines the following:

6.1.1 The exclusive economic zone: the sea outside of the territorial sea but

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26 This is also important from and administrative point of view since different Ministries are responsible for portions of the sea and sea shore.

27 And in particular, in UNCLOS

28 Which itself, in this regard, simply codifies customary international law.

29 No. 3 of 1990, together with the Territorial Sea and Exclusive Economic Zone of Namibia Amendment Act 30 of 1991.
within a distance of two hundred nautical miles from the low water line\textsuperscript{30}

6.1.2 The contiguous zone: the sea outside of the territorial sea but within a
distance of twenty four nautical miles from the low water line\textsuperscript{31}

6.1.3 The territorial sea of Namibia: the sea within a distance of 12 nautical
miles from the low water mark,\textsuperscript{32}

6.1.4 The internal waters: the waters landward from the low water line\textsuperscript{33}

The Act goes on to declare the application of all Namibian laws relating to "the
exploitation, exploration, conservation or management of the natural resources of
the sea, whether living or non-living shall apply within the exclusive economic
zone\textsuperscript{34}, and that Namibia shall have the right to exercise any powers it considers
necessary to prevent, amongst other things, contravention of any law relating to
the natural resources of the sea.\textsuperscript{35}

Within the abovementioned defined areas, certain statutes apply. Of those which
deal with sea-based activities which impact on marine resources, most of these are
concerned with oil pollution by ships. They include the Preventing and Combatting
of Pollution of the Sea by Oil Act,\textsuperscript{36} the Prevention and Combatting of Pollution

\textsuperscript{30} Section 4(1).
\textsuperscript{31} Section 3A.
\textsuperscript{32} Section 2 (1).
\textsuperscript{33} Section 3 (1).
\textsuperscript{34} Section 4 (3) (a).
\textsuperscript{35} Section 4 (3) (b).
\textsuperscript{36} South African Act 6 of 1981.
of the Sea by Oil Amendment Act\textsuperscript{37} and the Merchant Shipping Act.\textsuperscript{38} Aside from those Acts which focus on ship generated marine pollution, there are also laws which deal with offshore exploration which may impact on marine pollution. These include the Petroleum (Exploration and Production) Act,\textsuperscript{39} and the Minerals (Prospecting and Mining) Act.\textsuperscript{40} Finally, laws controlling land based pollution are considered. Each of these will now be dealt within turn:

6.2 \textbf{Laws Which Control Marine Based Pollution}

6.2.1 Prevention and Combatting of Pollution of the Sea by Oil Act

This Act which is administered by the Ministry of Works, Transport and Communication, criminalises the discharge of oil from a ship, tanker or offshore installation unless the discharge was made for the purposes of saving life, securing the safety of the vessel or installation or to prevent damage, or where the oil escaped from the vessel or installation as a result of damage to the vessel or installation or leakage, provided that reasonable steps were taken to prevent or reduce the escape of oil. The discharge of a solution containing oil is also criminalised.\textsuperscript{41}

\textsuperscript{37} Namibian Act 24 of 1991.

\textsuperscript{38} South African Act 57 of 1971.

\textsuperscript{39} Namibian Act 2 of 1991.

\textsuperscript{40} Namibian Act 33 of 1992.

\textsuperscript{41} Although it is probable that section 2(3) of the Act, creating a presumption that any mixture discharged from a ship and containing oil containing oil comprised at least one hundred parts of oil per million, is unconstitutional under Article 12(d) of the Namibian Constitution.
The Minister\textsuperscript{42} is empowered to prevent the pollution of the sea through oil discharge by issuing directions to the Master and owner of a ship.\textsuperscript{43} In addition, the Minister is empowered to take measures (including the destruction, burning or disposal of oil in order to prevent marine pollution and may recover from the owner the costs or portion thereof for that preventative action.\textsuperscript{44} Section 10 limits liability in certain specified circumstances. The Act also makes compulsory the taking out of insurance against liability for loss, damage or costs in respect of tankers carrying more than 2000 long tons of oil in bulk as cargo\textsuperscript{45} and empowers the Minister to detain ships where the owner has failed to pay costs incurred in clean-up or has failed to furnish a guarantee or deposit to secure those costs.

The Act\textsuperscript{46} makes provision for fines ranging from 10 000 to 200 000 Namibian dollars for contraventions of the Act. Significantly, the Minister is empowered to exempt any ship or class of ships or tankers or any offshore installation from any or all of the provisions of the Act. Also important is the provision for a state revenue fund into which, amongst other things, fines recovered, are paid and may be used for the purposes of research, defraying expenses incurred in preventing or removing pollution of the sea by oil and the like.

This Act is useful in allowing the Minister to deal with casualties and to recover the costs for clean up. It is fairly comprehensive in its prohibition of the release of oil and sanctions it only in particular, extreme, circumstances. It is not

\textsuperscript{42}\ The definition of whom has been changed by the Namibian Prevention and Combatting of Pollution of the Sea by Oil Amendment Act, 24 of 1991, to mean the Minister of Works, Transport and Communication.

\textsuperscript{43}\ Section 4.

\textsuperscript{44}\ Section 5 read with Section 9. Section 9 (4) also makes provision for joint and several liability for costs where more than one vessel or installation is involved in an incident which causes marine pollution by oil.

\textsuperscript{45}\ Section 13.

\textsuperscript{46}\ And more significantly, the Namibian Amendment.
recommended that it be repealed.

6.2.2 The Merchant Shipping Act

The Merchant Shipping Act is applicable in Namibia. However, the only chapter which is of relevance to marine pollution control is Chapter V which deals with the safety of ships and life at sea. This Act makes provision for the construction of ships, the detention of unseaworthy ships,\textsuperscript{47} the obligation to assist ships in distress\textsuperscript{48}, controls the transportation of dangerous goods.\textsuperscript{49} Its enforcement is the responsibility of the Ministry of Works, Transport and Communication.

Further, the Act incorporates some of the obligations of the International Convention of Safety of Life at Sea (SOLAS)\textsuperscript{50} to which Namibia is not a party.\textsuperscript{51}

Because its primary focus is the regulation of merchant shipping in general terms and its regulation of marine pollution (by the implementation of safety standards) is largely incidental, it is necessary that the Act not be repealed.

\textsuperscript{47} Section 243.

\textsuperscript{48} Section 234.

\textsuperscript{49} Section 235. Liability for loss or damage imposed in terms of Section 255 to 263 relates to that of the vessels, cargo or freight and therefore only has indirect implications for marine pollution.

\textsuperscript{50} London 1974, although the first international conference on the subject was held in 1914.

\textsuperscript{51} This is discussed in more detail in the section on international law.
Dumping At Sea Control Act\textsuperscript{52}

This Act\textsuperscript{53} is regarded as being applicable in Namibia and is in fact enforced by the Ministry of Works, Transport and Communication.\textsuperscript{54} However, no proclamation by the Administrator-General declaring its applicability in Namibia was ever made and its enforcement, in strict legal terms, is \textit{ultra vires}.

The Act is of limited use in preventing marine pollution. It prohibits the dumping (which is broadly defined as disposal with intent) at sea of scheduled substances including poisons and toxic substances (in the absence of a permit from the Minister). Aside from the absence of a complete prohibition of dumping of these substances, the Act excludes from the definition of dumping the disposal into the sea of any substance incidental to the so-called normal operations of a vessel, aircraft or man-made structure or the discharge of wastes arising from off-shore exploration. The Act therefore sanctions two of the most significant sources of marine pollution. It is consequently recommended that it not be adopted and that more stringent requirements for dumping be embodied in a new law controlling this activity. Further, it is conflict with the Prevention and Combatting of Pollution of the Sea by Oil Act which prohibits such conduct.

6.3 Laws Which Control Marine Pollution Caused by Off-Shore Exploration

Marine pollution caused by offshore exploration is governed by the Petroleum (Exploration and Production) Act (referred to as "the Petroleum Act") and the Minerals (Prospecting and Mining) Act (referred to as "the Minerals Act").

\textsuperscript{52} 73 of 1980.

\textsuperscript{53} Which embodies the definitions and some of the obligations of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London 1972) to which Namibia is not a party.

\textsuperscript{54} Personal conversation with Ms Shapwa 19 June 1996.
The Petroleum Act

The Petroleum Act controls the reconnaissance, exploration, production and disposal of petroleum, the definition of which substance includes solid or liquid hydrocarbon or combustible gas existing in the natural condition in the earth’s crust. The Act precludes reconnaissance, exploration or production operations for the purposes of petroleum recovery upon any land without a licence. 55

Importantly, the definition of land includes the sea-bed, the exclusive economic zone and the continental shelf. 56 The Minister is obliged, prior to the issuing of a licence, to enter into an agreement with prospective exploiters of petroleum. 57 In terms of the Act, the agreement must include the manner in which reconnaissance, exploration and production operations shall be carried out. The Ministry of Mines and Energy which administers the Act, routinely enters into such agreements with holders of exploration licences. Clause 11 of those agreements deals with environmental protection and obliges a licence holder to conduct its operations in a manner likely to conserve Namibia’s natural resources and to protect the environment, to employ the best available techniques in accordance with good oil field practices in order to prevent environmental damage and to implement proposals contained in the development plan concerning pollution and the safeguarding of natural resources. The development plan is effectively an environmental impact assessment.

The Minister is empowered to revoke a licence. The conditions under which that may be done would include a failure to comply with the terms and conditions of that licence and, therefore, the terms of the applicable petroleum agreement.

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55 Section 9 (1) (a).
56 Section 1.
57 In terms of Section 13 (1). It is known as a Petroleum Agreement.
Accordingly, if a company fails to comply with its environmental obligations, the Minister would be entitled to revoke the licence. The Minister is also empowered to direct a licence holder concerning the conservation of natural resources and prevention of waste of those resources\(^8\) and the prevention of the spilling of water or drilling fluid.\(^9\) Section 38 of the Act imposes obligations on licence holders to prevent pollution in the carrying out of its activities.\(^{50}\)

If, in the course of production operations, petroleum or other substances are spilled into the sea, thereby polluting the sea or any plant or animal life the licence holder is obliged to report the spillage, pollution, loss or damage and, at its own cost, take remediation steps. If the licence holder fails to do so, the Minister may order it to do so, failing which the Minister may cause those steps to be taken and to recover the costs from the licence holder.\(^{51}\)

Fines for contraventions of this Act are imposed subject to a maximum of R20000,00; imprisonment may not exceed five years.

The Act, read together with Petroleum Agreements entered into in terms of the Act, appear to control effectively marine pollution by off-shore exploration for petroleum. Officials within the Ministry of Mines and Energy confirm this view.\(^{62}\) Its only obvious shortcoming is that it does not able the Minister, if he or she reasonably believes that the environment will come to some harm as a result of exploratory activities, to prevent them. He or she must wait until such harm has occurred before remedial steps can be taken. It is therefore recommended that an amendment be made to section 71 of the Act to empower the Minister to take

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\(^{58}\) Section 21 (1) (b).

\(^{59}\) Section 21 (1) (d).

\(^{60}\) Section 38 (1) (a) and Section 38 (2) (a), (b) and (f).

\(^{61}\) Section 71.

\(^{62}\) Mr L Moller, personal communication, 19 June 1996.
6.3.2 The Minerals Act

The Minerals Act governs the prospecting for or exploitation of minerals occurring in, on or under land. The definition of mineral includes any liquid, solid or gaseous substance but excludes water not taken from land or sea for the extraction of minerals, petroleum (as defined in the Petroleum Act), soil, sand, clay, gravel or stone in specified circumstances.

Much like the Petroleum Act, the Minerals Act makes provision for the entering into of a mineral agreement.\textsuperscript{63} In applying for a mining licence, an applicant is obliged to give (the Ministry of Mines and Energy) details of the anticipated affects of proposed prospecting and mining operations on the environment as well as the proposed minimisation or prevention steps.\textsuperscript{64} The Act empowers the Minister to give direction to mineral licence holders in relation to the protection of the environment\textsuperscript{65} and the conservation of natural resources and the prevention of the waste of such resources.\textsuperscript{66} Should the mineral licence holder fail to comply with those directions, then the Minister is empowered to take the steps and recover the cost from the licence holder. The Act therefore allows the Minister to take pre-emptive steps if he or she has a reasonable apprehension that prospecting activities will cause harm. The only shortcoming of the Act is that those powers are restricted to mineral licence holders only. If an illegal operator is carrying on activities the Minister may not issue the same directives, nor may he or she recover the costs of remediation, except, perhaps, under common law. While the

\textsuperscript{63} In terms of Section 49 of the Act.
\textsuperscript{64} Section 91 (f) (ii) and (iii).
\textsuperscript{65} Section 57 (1) (b).
\textsuperscript{66} Section 57 (1) (c).
Act criminalises prospecting activities in the absence of a licence and provides for a meaningful fine for such activities, the restriction of Ministerial powers is one which is recommended be removed by an amendment to section 57 of the Act. Aside from that problem, the Act, together with agreements in terms of section 49, appears to be an effective control of marine pollution through off-shore minerals exploration and exploitation. This view was confirmed by an official.\textsuperscript{67}

6.4 Laws Which Control Marine Pollution from Land Based Activities

6.4.1. The Water Act

Marine pollution as a result of land-based activities is governed, somewhat inadequately, by the Water Act, which is administered by the Ministry of Water Affairs.\textsuperscript{68} The Act is one inherited from South Africa and is based on English law. It allows for private ownership of water and privileges the rights of riparian owners; both notions are explicable in English conditions but wholly inappropriate in a country as arid as Namibia.

As far as water quality is concerned, the Act criminalises the wilful or negligent pollution of public or private water, including underground water or sea water in such a way as to render it unfit for the purpose for which it is ordinarily used, or for the propagation of fish or aquatic life or for recreational or other legitimate purposes.\textsuperscript{69} However, the Act empowers the Minister to grant an exemption to a person using water for industrial purposes (not defined in the Act) from compliance with water quality standards,\textsuperscript{70} thereby rendering lawful the discharge of unpurified waste water for waste into a public stream or the sea. Clearly this

\textsuperscript{67} Mr L Moller, personal communication 19 June 1996.

\textsuperscript{68} South African Act 54 of 1956.

\textsuperscript{69} Section 23(1)(a).

\textsuperscript{70} Section 21(5)(a).
has an impact on marine water quality.

The use of water, including sea water, for industrial purposes is governed by Section 21 of the Act. The definition of industrial purposes includes, amongst other things "use for manufacture, mechanical or mining purposes." Although it is not entirely clear whether this would include fish processing operations, this is probably the case. Section 21 requires that any person using water including sea water for industrial purposes is obliged to purify that water, effluent or waste so as to conform with prescribed requirements.\(^{71}\)

Recognising the inadequacy of the Water Act, several initiatives have been taken by the Ministry of Water Affairs to address this problem. Although a new Water Act has been drafted, it is apparently considered unsuitable and will probably not be used.\(^ {72}\) A subsequent draft is currently being prepared in order to take into account more appropriate legislation for Namibia. Particularly important are recommendations that the definition of industrial activity is clarified, that industrial effluent discharges standards be applied to waste discharged to rivers and the sea and that these standards be considered against the ambient water quality in the area. It is further recommended that the Minister be given powers to direct clean up of pollution of all water and that those powers apply retrospectively.\(^ {73}\)

6.5 Other Domestic Laws Which Control Marine Pollution

6.5.1 The Sea Fisheries Act\(^ {74}\)

The Sea Fisheries Act is principally concerned with the orderly exploitation of

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\(^{71}\) Unless an exemption under section 21(5)(a) has been obtained.

\(^{72}\) Personal communication with Mr R Matsopolis 19th June 1996.

\(^{73}\) In much the same way that Section 22A of the South African Water Act operates.

\(^{74}\) 29 of 1992.
marine resources. It does, however, deal in passing with marine pollution in that it empowers the Minister to make regulations concerning the regulation or prohibition of the dumping into the sea of specified substances or materials or substances or materials not complying with specified requirements or having specified properties. The Minister has not, at the time of writing, made any such regulations. In addition, it criminalises the discharge or dumping of anything which is injurious to fish, fish food or aquatic plants.

The control of marine pollution under this Act is incidental rather than primary. One shortcoming is that it does not allow the Minister to take steps to prevent injury to fish, fish food or aquatic plants. If the Minister take remedial steps then the amount which he or she can recover in respect of these costs is limited to the three times the monetary value of the criminal act which may not cover the costs of the harm. It is therefore recommended that the Act be amended to allow the Minister to recover the actual costs. Further, it is recommended that reference be made not simply to fish, fish food or aquatic plants but to the marine environment.

6.5.2 Sea-Shore Act

The Sea-Shore Act deals with the development and use of the area defined in the act as the sea shore. It does not address the question of marine pollution on the sea-shore or internal waters such as estuaries, nor does it identify the agency responsible for emergency response or clean-up as a result of pollution of that area. This is clearly a problem which needs to be addressed in new or amended legislation.

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75 Section 32 (1) (x).
76 Section 33(1)(h).
77 No. 21 of 1935.
6.5.3 Sea-Shore Ordinance

Aside from national Acts which govern marine pollution, there also exists a little known and seemingly poorly enforced Sea-Shore Ordinance.\textsuperscript{78} It presumably falls within the jurisdiction of the Directorate of Environment Affairs\textsuperscript{79} and makes provision for the definition of the seashore, high water and low water marks, as well as a three mile limit.

In terms of this Ordinance, the Administrator (as he then was) was empowered to make regulations concerning the use of the seashore, the prevention or the regulation of the deposition or discharge on the seashore or in the sea within a three mile limit "offal, rubbish or anything liable to be a nuisance or a danger to the health of the public"\textsuperscript{80} The same section also empowers the Administrator to make regulations concerning the control of the seashore and the seabed within the three mile limit.

As far as has been established, no such regulations were ever made.

No mention is made in this Ordinance concerning pollution of the sea-shore or of inland waters such as estuaries. These difficulties would be addressed by the amendments to the Sea-Shore Act suggested in paragraph 6.5.2. This Ordinance could then be repealed.

6.6 Draft Legislation Which Impacts on Marine Pollution

At the time of writing there exists a draft Environmental Management Act. It deals in

\textsuperscript{78} No. 37 of 1958.

\textsuperscript{79} Although no one in the directorate could confirm that.

\textsuperscript{80} Section 3 (1) (d).
general terms with the sustainable use of natural resources, maintenance of biodiversity and the protection of ecological processes as a matter of policy.\textsuperscript{81} However no reference is made to sea water or marine life in the principles of environmental management.\textsuperscript{82} The Environmental Board\textsuperscript{83} whose tasks include the co-ordination of pollution monitoring, is not charged with the protection of the marine environment or empowered to take steps which would have that effect.\textsuperscript{84} The composition of the Board\textsuperscript{85}, an inter-ministerial grouping, makes no reference to a representative from the Ministry of Works and Transport, the line function Ministry charged with the administration of most acts which control marine pollution. It is recommended that the final draft of the Act be amended to address these oversights.

6.7 Enforcement and Inter-departmental Co-operation

Almost all of the officials interviewed felt that laws controlling marine pollution are not well-enforced in Namibia. They cited, as reasons for this, both a lack of enforcement staff and a reluctance to prosecute. Prosecutions have seldom been initiated because offenders are seen to be providing jobs. Where they have been launched, it is thought that overworked prosecutors do not always have the specialist expertise to obtain convictions. These problems all relate to economics and the allocation of funds. Greater budgetary allowances must be made available for environmental protection generally.

Greater co-operation between different responsible Ministries in enforcing the laws would assist the situation. A single incident (such as an oil spill) may be an issue which falls within the jurisdiction of the Ministries of Transport and Water when the oil was on the sea and within the Ministry of the Environment's area of responsibility once on the beach.

\begin{itemize}
\item Section 7(1)(a)
\item Section 8
\item Established under Section 15
\item Section 15
\item Section 16
\end{itemize}
However, aside from the existence of the emergency response plan (of which not all of the officials spoken to were aware) none of the representatives of Ministries spoken to could say that there was good communication or co-operation between Ministries although, encouragingly, all hoped that greater communication and co-operation could be achieved in the future.

6.8 Summary of Recommendations Regarding Domestic Legislation

A number of recommendations have been made in this section concerning the amendment or repeal of existing or the drafting of new legislation. A summary of these is as follows:

6.8.1 The emergency response plan should be given the force of law;

6.8.2 There is a need to address the question of dumping at sea. This problem is exacerbated by the fact that the Dumping at Sea Act is not in fact in force, that even if it were it contradicts the Prevention of Pollution of the Sea by Oil Act. It is recommended that this problem be addressed in new legislation;

6.8.3 Section 71 of the Petroleum Act should be amended to allow the Minister to take steps to prevent harm to the environment if there is a reasonable belief that such harm will occur;

6.8.4 Section 57 of the Minerals Act should be amended to extend Ministerial powers to non-licence holders;

6.8.5 The proposed new Water Act defines industrial activity more clearly, that industrial effluent discharges standards be applied to waste discharged to rivers and the sea and that these standards be considered against the ambient water quality in the area. It is further recommended that the Minister be given powers to direct clean up of pollution of all water
and that those apply retrospectively;

6.8.5 The Sea Fisheries Act should be amended to encompass harm to the marine environment, not only fish, fish food or aquatic plants and further, that the Minister be empowered to recover the actual costs of damage;

6.8.6 Marine pollution on the sea-shore or inland waters such as estuaries be addressed, either by way of an amendment to the Sea-Shore Act, or in new legislation. Further, the Ministry responsible for emergency response or clean-up as a result of pollution of that area must be made explicit;

6.8.7 The Sea-shore Ordinance be repealed;

6.8.8 The draft Environmental Management Act be amended to include marine pollution control as recommended in paragraph 6.6;

6.8.9 That new legislation be drafted to control marine pollution in a more comprehensive way. It may be done either by way of an Act dealing specifically with marine pollution, alternatively an Act dealing with pollution in general terms should address this question. In particular, attention must be given to marine pollution other than by oil. Special attention should be given to the jurisdiction of government Ministries responsible for pollution control and clean up in different areas, such as the sea, sea-shore and inland waters and estuaries. In addition, such legislation should embody obligations arising out of UNCLOS, discussed below;

6.8.10 Aside from the drafting of new legislation, attention ought to be given to the more efficient enforcement of existing laws and the closer co-operation of governmental departments charged with the enforcement of existing laws controlling marine pollution;
INTERNATIONAL LAW

This brief survey of international treaties and conventions does not purport to be an exhaustive one, it simply analyses important treaties which will most effectively control marine pollution in Namibia. In particular, it does not consider in any detail the treaties which have been superseded by UNCLOS. It also considers international instruments which address marine pollution in an indirect way, as voluntary agreements which assist in the alleviation of marine pollution.

7.1 Treaties to Which Namibia Is A Party

The United Nations records Namibia as having signed and ratified only one international convention or treaty concerning marine pollution, namely UNCLOS. However, given that South Africa became signatory to several conventions dealing with this matter during its period of occupation of Namibia, this may in fact not be entirely accurate as far as international law is concerned. Such an exploration is beyond the scope of this report, but it is recommended that it be carried out.

7.1.1 United Nations Law Of The Sea (UNCLOS 1982)

This treaty, which, as mentioned above, was signed by the UNCN in 1982, entered into force on 16 November 1994. It codifies many declarations of customary international law and, in content, supersedes many earlier conventions and treaties. It is the most significant international convention dealing with marine pollution in that it provides for a broad framework for the management of the marine environment and seeks to control all sources of marine pollution. The most important portions of the convention, for the purposes of this report, are parts V
and XII. Part V defines the exclusive economic zone. Part XII:

7.1.1.1 imposes an obligation on states to protect and to preserve the marine environment.  

7.1.1.2 requires states to "take, individually or jointly, as appropriate, all measures consistent with [the] convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities."  

7.1.1.3 requires states to develop and promote contingency plans for responding to pollution incidents in the marine environment.  

7.1.1.5 requires states to carry out environmental impact assessments of any planned activities under their jurisdiction or control and which may cause substantial pollution of or significant and harmful changes to the marine environment and shall publish such reports to other states.  

7.1.1.6 imposes an obligation to "adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources, including rivers, estuaries, pipelines and outfall structures taking into account internationally agreed rules, standards, and recommend practices and procedures;"  

86 Article 55.  
87 Article 192.  
88 Article 194(1).  
89 Article 199.  
90 Article 206 read with Article 205.  
91 Article 207.
allows states to make laws for the prevention, reduction and control of marine pollution from foreign vessels, including those exercising the right of innocent passage.\textsuperscript{92}

requires states to adopt laws and regulations to prevent, reduce and control marine pollution through the atmosphere, either in airspace within their jurisdiction or by vessels flying their flags.\textsuperscript{93}

states to enforce their legislation concerning land-based pollution;\textsuperscript{94} pollution from seabed activities\textsuperscript{95} and dumping\textsuperscript{96} by foreign vessels or vessels flying its flag;\textsuperscript{97} and

empowers states to take measures to protect their coastlines and fishing stocks from pollution or threat thereof following a maritime casualty.\textsuperscript{98}

Other obligations include:

a requirement that a party to the convention ensures that its legal systems provides "prompt and adequate compensation or other relief in respect of damage caused by pollution of the environment by natural or juridical persons under its jurisdiction."\textsuperscript{99}

\textsuperscript{92} Article 211(4).
\textsuperscript{93} Article 212(1).
\textsuperscript{94} Article 213.
\textsuperscript{95} Article 214.
\textsuperscript{96} Article 210.
\textsuperscript{97} Article 216(1).
\textsuperscript{98} Article 221.
\textsuperscript{99} Article 235(3).
7.1.2 Implications

As can be seen, Namibia has a number of obligations under this convention with which it is not complying. These include the promulgation and enforcement of laws which effectively control marine pollution from whatever source, including land and the atmosphere. Some of Namibia's pollution control laws are not very effective, nor are they well enforced. Namibian law contains no obligation or procedure for the carrying out of environmental impact studies of activities which will impact on the marine (or, indeed any other) environment. Arguably there are no measures in Namibian law for the prompt or adequate compensation of parties following damage by marine pollution, as is required by UNCLOS.

It is important for Namibia to realise that the convention takes into account the special position of developing countries attempting to balance resource utilisation with conservation. In this way, the convention incorporates a concept of relative due diligence. As with other treaties it makes reference to the need to take "all measures necessary" to prevent and control pollution damage to other states, but it moderates this requirement by allowing the use of the "best practicable means" at Namibia's disposal in accordance with its own special capabilities. The effect of this is to provide a developing nation such as Namibia with greater flexibility and discretion. Similarly, technical and other assistance including training, equipment and funds, is allocated to participating states, with preferential treatment given to developing countries. Namibia needs to address its non-compliance within the framework of the latitude accorded to developing countries.

7.2 Treaties To Which Namibia Is Not A Party

Aside from UNCLOS there are many other conventions and treaties governing marine pollution. It is recommended that Namibia become party to some, but not all, of them. They are discussed, for the most part, in chronological order:
7.2.1 International Convention for the Prevention of Pollution of the Sea by Oil (OILPOL) 1954

This treaty, which entered into force in 1958, was the first convention aimed at preventing marine pollution. It places limitations in respect of place and content of discharge of oil or oil mixtures from tankers. This convention was, however, superseded by:

7.2.2 International Convention for the Prevention of Pollution By Ships (MARPOL) 1973

MARPOL is broader than OILPOL in that it deals with all forms of operational or accidental marine pollution by ships. It has five annexures, regulating prevention of oil pollution, transportation of noxious liquid substances, packaged harmful substances, sewage from ships and domestic waste from ships respectively. Given the broad scope of UNCLOS\(^{100}\) it is not thought essential that Namibia accede to this convention. Given that these conventions largely cover matters dealt with by UNCLOS, it is not recommended that Namibia become party to them.

7.2.3 International Convention on Civil Liability for Oil Pollution Damage (1969)

The objectives of this 1969 convention (known as CLC or the Liability Convention), which entered into force in 1975, are to ensure that adequate compensation is available to persons who and nations which suffered damaged caused by pollution from the escape or discharge of oil from ships. The convention

\(^{100}\) Such as Article 194 which deals with the control of all sources of pollution, pollution from vessels and installations.
applies only to damage caused by persistent oil\textsuperscript{101} carried in bulk as cargo. Spills of bunker oil from vessels other than tankers are excluded. Furthermore the convention has standardised international rules and procedures for determining questions of liability and adequate compensation in such areas.

CLC imposes strict liability on a ship owner for damage from pollution and does not concern itself with the nationality of the ship owner or the flag state of the vessel. There would therefore no need for Namibia to prove fault or intention by the ship owner. To avoid liability, ship owners must prove that they fell within defined exemptions, including war, exceptional natural phenomena, sabotage or the negligence of public authorities in, for example, maintaining navigational aids.\textsuperscript{102} The convention allows a shipowner to limit its liability under the convention, but not if the incident occurred as a result of the shipowner.\textsuperscript{103} In order for a ship to be covered by the Convention it must carry commensurate insurance and certificates confirming the existence of such liability insurance.\textsuperscript{104} Because the Convention only applies to damage caused in the territory and territorial sea of states party to it, Namibia would have to be party to the CLC in order to derive a benefit from it.

7.2.4

The International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND 1971)

The realisation that the limits under the CLC 1969 might be inadequate for very large scale oil pollution incidents, resulted in 1971, in a supplementary convention, called the International Convention on the Establishment of an International Fund

\textsuperscript{101} And therefore excludes damage by non-persistent oil such as gasoline and light diesel oil.

\textsuperscript{102} Article III.

\textsuperscript{103} Article V.

\textsuperscript{104} Article VII.
for Compensation for Oil Pollution Damage, usually referred to as the FUND convention, to provide additional financial coverage for catastrophic oil pollution incidents. It is therefore only open to parties to the CLC. The convention, which indemnifies a shipowner for a portion of liability under the CLC, entered into force in 1978. The fund consists of finances from levies on the import and export of oil in contracting states. Where the shipowner is seeking compensation, the flag state of the vessel which caused the damage must also be a party to the FUND. In 1984 and 1992 Protocols to the CLC and FUND were adopted which provide even higher limits of compensation and a wider scope of application than the original conventions, for example, extending the area covered by the convention to include the EEZ. Of Namibia's neighbours, only South African has ratified either Protocol, being the Protocol to the CLC.

The Fund will pay compensation in respect of oil damage suffered in a party state (or its territorial waters) where full compensation is not paid under the CLC where:

1. The shipowner falls into one of the exemptions and is therefore not liable to pay compensation;

2. The shipowner cannot pay in full its financial obligations under the CLC and carries insufficient insurance to meet the claims for compensation arising out of pollution damage;

3. The damage caused exceeds the shipowner's liability under the CLC.\(^{106}\)

Damage for which the Fund will compensate includes damage to property, costs

\(^{105}\) Article IV.

\(^{106}\) Most incidents dealt with by the Fund fall within this category. *International Oil Pollution Compensation Fund: General Information on Liability and Compensation for Oil Pollution Damage*. July 1995 3.
of clean up, consequential loss (such as loss of earnings by a fishing enterprise as a result of damage caused to nets by oil pollution) and, in some cases, pure economic loss.\textsuperscript{107}

It is strongly recommended that Namibia accede to the CLC and the FUND and the accompanying 1984 Protocols. The particular features of Namibia’s coastline, including its inaccessibility and pristine nature, make the threat of an oil spill serious.

The conventions provide assistance and money in times when it is needed most and under urgent conditions. The limits of the Conventions reaches tens of millions of US dollars (approximately US$ 86 million), and the total amount of existing funds reach totals in the hundreds of millions of US dollars. Since 1989, the FUND has funded the clean up of more than twenty oil pollution incidents.\textsuperscript{108}

Although these two conventions have limitations, the most important of which is the coverage of oil damage in bulk only, it is nevertheless recommended that Namibia become party to them.\textsuperscript{109} As a non-member, Namibia would, itself, have to foot the bill for damages and clean up costs caused by oil pollution and, where a shipowner has few assets or inadequate insurance, will not be able to recover those costs. The Fund is financed by contributions levied on persons who have received more than 150 000 tonnes of crude oil in a calendar year.\textsuperscript{110} These are

\textsuperscript{107} An example of such damages would be where no damaged was caused to the nets of a fishing enterprise but where it could not fish because the sea is polluted and it impossible to fish elsewhere ibid 14.

\textsuperscript{108} Unfortunately, many incidents are not covered by the FUND. One such incident which received no money from the FUND for lack of membership, occurred of the coast of Angola, when in May 1991 the ABT SUMMER sunk with its cargo of 260 000 tonnes of crude oil.

\textsuperscript{109} Some of the shortcomings are overcome by accession and ratification of other conventions, such as UNCLOS.

\textsuperscript{110} Articles X, XI and XII.
paid directly to the Fund and the Namibian government would, in signing the convention, incur no liability for those payments unless it chose to do so.\textsuperscript{111}

Although domestic legislation does provide for the recovery of costs from shipowners deemed liable for damage in terms of the legislation, these two conventions overcome difficulties associated with shipowners whose vessels are wrecked, who refuse to remediate and who have no attachable assets, particularly where the cost of clean-up exceeds the value of the vessel. In such circumstances, while Namibia is not party to these conventions, it will have to finance the costs of remediation itself.

7.2.5

International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (Intervention 1969)

This Convention empowers states to take reasonable action to avert a grave threat of marine pollution arising out of a "maritime casualty".\textsuperscript{112} Following a protocol in 1973, the convention now covers substances other than oil.\textsuperscript{113}

Although this convention appears to allow coastal states to take a more proactive approach to vessels which present a grave and imminent danger than is specifically provided for in UNCLOS,\textsuperscript{114} UNCLOS does oblige states to put in place measures which would allow for the kind of intervention contemplated by this

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{111} Op cit 8.
\item \textsuperscript{112} Except in respect of warships or state-owned, non-commercial vessels.
\item \textsuperscript{113} This was done in terms of the Protocol Relating to the Intervention on the High Seas in Cases of Marine Pollution by Substances Other than Oil (1973). This Protocol (which entered into force in 1983) extends the right of states to intervene in maritime casualties to those instances in which serious damage by substances other than oil are threatened.
\item \textsuperscript{114} Which obliges states to take measures such as emergency response plans and the like.
\end{enumerate}
\end{footnotesize}
convention under domestic legislation.\textsuperscript{115} It is therefore not thought necessary for Namibia to accede to this Convention.

7.2.6 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London, 1972)

This convention's scope is limited to the deliberate dumping of wastes or other matter but excludes wastes derived by normal operations of vessels and installations\textsuperscript{116} thereby legitimising a significant source of marine pollution. It also allows for the dumping of substances where a permit has been obtained.\textsuperscript{117} Given that the ambit of UNCLOS is far wider and prohibits more activities which cause marine pollution, it is not recommended that this convention be acceded to.

7.2.7 International Convention on Oil Pollution Preparedness, Response and Co-operation (London 1990).

This convention places an obligation member states to ensure programmes of oil pollution response preparedness are in place. Its aims are to ensure co-operation between states in dealing with significant oil pollution incidents and to encourage states to develop and maintain preparedness capabilities. It currently covers only oil pollution but attempts are being made to expand its scope to include hazardous and noxious substances.\textsuperscript{118} The Convention places obligations on personnel in charge of vessels, offshore installations sea ports as well as pilots of civil aircraft to report oil pollution incidents. The party obliges member states to furnish others

\textsuperscript{115} Article 194(3)(b).

\textsuperscript{116} Article 3 1 (a) and (b).

\textsuperscript{117} Article 4(1)(b) and (c).

\textsuperscript{118} Yeater, Marceli and Ockwell, Ron "International Emergency Response Capacities: A Review od Existing Arrangements Both Within and Outside the UN System. UNEP Report October 1993."
with response equipment and technical support. If donor countries have acted in response to a request they will be reimbursed; those not so acting will not be.\textsuperscript{119} Significantly, the convention allows for action by states whose assets are threatened beyond the limits of their territorial waters.

Given the risks of oil spills and the lack of equipment which Namibia has to deal with such an incident, it is recommended that it accede to this treaty. This is particularly recommended because although UNCLOS empowers states to take measures to avoid actual or threatened damage as a result of maritime casualties\textsuperscript{120} and imposes an obligation on member states to develop contingency plans against pollution,\textsuperscript{121} it does not create an obligation on member states to provide each other with equipment or technical support.\textsuperscript{122}

7.3

\textbf{Treaties which Address Marine Pollution Indirectly}

7.3.1

Safety of Life at Sea (London 1974)

The International Convention for Safety of Life at Sea (SOLAS) is primarily concerned with minimum safety standards of vessels. To this end ships flying member state's flags are obliged to be adequately certified in accordance with the requirements of the convention. It also deals\textsuperscript{123} with the carriage of dangerous goods and with nuclear ships.

Given that the integrity of ships ensures a lower risk of wreck and therefore

\textsuperscript{119} Ibid 15.

\textsuperscript{120} Article 221.

\textsuperscript{121} Article 199.

\textsuperscript{122} The article merely enjoins member states to jointly develop and promote contingency plans for responding to pollution incidents in the marine environment.

\textsuperscript{123} In Chapters VII and VIII respectively.
reduces pollution, this convention has an indirect bearing on marine pollution. Obviously, it would not cover ships flying non-member states flags which may present a pollution hazard in Namibian waters. It is recommended that Namibian government accede to the convention, which covers matters not addressed by UNCLOS, but, from a marine pollution point of view, it as not an urgent a recommendation as the accession to other conventions mentioned above.

### 7.4 Relevant Regional Conventions

There are many regional conventions and treaties which deal with marine pollution. Of particular relevance is:

#### 7.4.1 Convention For Co-operation And The Protection And Development Of The Marine And Coastal Environment Of The Western Central African Region (Abidjan 1981)

The Abidjan Convention is a regional agreement as contemplated by UNCLOS, which allows such regional agreements to further implement its provisions. Thus, the objectives of the Abidjan Convention are similar to UNCLOS, namely to protect the marine environment, coastal zones and related internal waters falling within the jurisdiction of the signatory states. The convention is open for accession by any coastal or island state on the west and central African coast which geographic area stretches from Mauritania to Namibia.

The Abidjan Convention is similarly structured to UNCLOS, providing that parties shall take all necessary measures to prevent, reduce, combat and control pollution of the convention area, particularly from ships, aircraft, land-based sources, and activities related to the seabed, and atmosphere. In addition, the convention also addresses the prevention and control of coastal erosion as well as the protection and preservation of rare or fragile eco-systems or endangered species of marine
life in protected areas.

The convention would require Namibia to establish national laws and regulations to discharge the obligations prescribed in the convention, and to similarly harmonise its national policies. As part of Namibia's environmental management policy, the convention requires a party to develop technical and other guidelines to assist in the implementation of environmental impact assessments for any activity within its territory, particularly in Namibia's coastal area. Namibia would also be required to co-operate in dealing with pollution emergencies, in the exchange of data and other scientific information, as well as establishing procedures for the determination of liability and the payment of compensation for pollution damage.

In addition, should Namibia accede to the Abidjan Convention, it must also become a party to at least one of its related protocols. The first protocol was concurrently established with the Convention, that being the Protocol Concerning Co-operation and Combatting Pollution in Cases of Emergency (1981).

Although Namibia is not currently signatory to the Abidjan Convention, its geographical area is included in the protected area of the convention, and Namibia's accession to it would help establish international ties to its African neighbours. Furthermore, since Namibia is already signatory to UNCLOS, accession to Abidjan would be a natural progression, especially since the provisions of Abidjan are more applicable and specific to the regional issues concerning Namibia. The obligations which are attached to membership are no more onerous than those already attached by membership in UNCLOS, and Namibia's compliance with one convention would substantially be compliance with the other.¹²⁴

¹²⁴ It is contended by Philomene Verlaan ("The International Legal Context for the Management of the Marine Environment" (UNEP) (OSA) WACAF IG 7INF) that where a state is a party to UNCLOS but not to a regional sea convention it will be obliged to apply the provisions of the regional conventions notwithstanding
7.5 Voluntary Agreements:

Aside from international conventions, it is important to note that there are in existence two voluntary agreements entered into between shipowners and oil companies which have the effect of providing some compensation for oil damage caused to property and the environment in states not party to CLC or the FUND Conventions. They are:

7.5.1 Tanker Owners' Voluntary Agreement Concerning Liability for Oil Pollution (TOVALOP 1969)

This provides compensation for damage caused by participating tankers. The purpose of the agreement is to encourage tanker owners to clean up pollution regardless of fault, on the understanding that their exposure would be covered by Protection and Indemnity (P&I) Clubs.\textsuperscript{125} Upper limits were set on the claims, initially at US $10 million, but increased over the years. Compensation covers damage caused as well as mitigatory measures taken and removal of the vessel. Liability is strict but the agreement is restricted to persistent oils (either bunkers or cargo) only.\textsuperscript{126} It is in many respects the private industrial version of the CLC,\textsuperscript{127} but there is no TOVALOP liability if the CLC applies to a pollution

\textsuperscript{125} For a fuller discussion see Gold, Edgar Handbook on Marine Pollution Norway 1985 25.

\textsuperscript{126} Gold op cit 47.

\textsuperscript{127} Ibid.
incident.\textsuperscript{128}

7.5.2 The Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution (CRISTAL)

This agreement, which mirrors the Fund convention to a large extent, allows for compensation for marine pollution and damaged caused by incidents not covered by the Fund, regardless of whether the state within whose jurisdiction the incident occurred is signatory to CLC or whether appropriate domestic laws exist. However, it does not apply where pollution incidents are covered by the fund.\textsuperscript{129} However, as matters currently stand, both of these agreements will lapse next year, and they cannot be relied upon for financial protection against damage caused by marine pollution.

7.6 Summary of Recommendations Regarding International Law

Namibia is not an enormously wealthy country and it has budgetary priorities more important than carrying out obligations under an unrealistically wide range of international treaties and conventions. It is therefore recommended that a practical approach be adopted; that Namibia concentrate on carrying out its obligations under UNCLOS and that it become signatory to only those international instruments which will be of significant benefit and which obligations imposed can realistically be carried out. Of the international instruments considered, it is recommended that:

\textsuperscript{128} Gold op cit 116.
\textsuperscript{129} Gold op cit 118.
7.6.1 Namibia accede to and ratify:

7.6.1.1 International Convention on Civil Liability for Oil Pollution Damage (CLC1969)

7.6.1.2 The International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND 1971)


7.6.1.4 Safety of Life at Sea (London 1974)

7.6.1.5 Convention For Co-operation and the Protection and Development Of The Marine and Coastal Environment of The Western Central African Region (Abidjan 1981)

7.6.2 Namibia not accede to or ratify:

7.6.2.1 International Convention for the Prevention of Pollution of the Sea by Oil (OILPOL) 1954

7.6.2.2 International Convention for the Prevention of Pollution By Ships (MARPOL) 1973

7.6.2.3 International Convention on Civil Liability for Oil Pollution Damage (1969)

7.6.2.4 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London, 1972)
8. CONCLUSION

From this survey it can be seen that marine pollution is a fairly important threat in Namibia because of the country's reliance on its marine resources and in particular, its fishing stocks. It is not suggested that the marine pollution situation in Namibia is critical but the findings of this report show that there are insufficient adequate legal controls and those that exist are not always well enforced. This legal situation may allow the marine environment to become more seriously polluted; it is not recommended that this situation be allowed to occur. For this reason suggestions have been made concerning necessary changes which must be made in domestic law and the international instruments to which Namibia should accede.
**TABLE OF INTERNATIONAL TREATIES AND CONVENTIONS REFERRED TO**


TABLE OF DOMESTIC LEGISLATION REFERRED TO

ACTS


2. Dumping at Sea Control Act 73 of 1980.\textsuperscript{130}


10. Territorial Sea and Exclusive Economic Zone of Namibia Act 3 of 1990.


\textsuperscript{130} Enforced but not part of Namibian Law.
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