

## NAMIBIA<sup>1</sup>

### **I. Overview of Country**

The Namibian legal system is an amalgamation of Westminster-style Constitutional law, Roman-Dutch common law, African customary law, and international law. Most of what constitutes the corpus of Namibian law is not codified and must be distilled from the evolving body of jurisprudence. Notably, in 1989, South Africa withdrew its administration, and on February 9, 1990, the Namibian Constitution was adopted, which has become the template against which the validity of all Namibian laws is tested. Article 140 of the Constitution is dedicated to laws in force at the date of independence. The Namibian administration at independence decided that all laws that were in force immediately before the date of independence would remain in force until repealed or amended by an act of Parliament or until they are declared unconstitutional by a competent court. This applied to both legislation and case law prior to independence. Thus, researching the Namibian legal system prior to independence overlaps with researching the South African legal system before 1989. The only way to tell which cases have been overturned is by reference to the case in which it is overturned, unless it directly affects (by amendment or repeal) a particular piece of legislation. In addition, laws which were not repealed at independence by the Constitution, as outlined in the constitutional schedule, are repealed in Government Gazettes.<sup>2</sup>

The Republic of Namibia attained its independence on 21 March 1990 and was established as a sovereign, secular, democratic and unitary state. In accordance with the doctrine of separation of powers, the government is currently divided into three organs: executive, legislative, and judiciary. Article 102 of the Constitution provides that the country be divided into regional and local units. In keeping with this constitutional requirements, 13 administrative regions and many other local authorities have been established in terms of both Regional Councils Act and Local Authorities Acts of 1992.<sup>3</sup>

Freedoms of assembly and association are guaranteed by law<sup>4</sup> and permitted in practice in Namibia, except in situations of national emergency. Human rights groups generally operate without interference, but government ministers have threatened and harassed nongovernmental organizations and their leadership in the past. Activism in the LGBT (lesbian, gay, bisexual, and transgender) community has grown, with organizations such as Out-Right Namibia urging officials to reassess anti-sodomy laws. Constitutionally guaranteed union rights are respected. However, essential public sector workers do not have the right to strike. Collective bargaining is not widely practiced outside the mining, construction, agriculture, and public service industries. The main umbrella union, the National Union of Namibian Workers, is affiliated with the South West Africa People's Organization (SWAPO) and played a role in selecting the new party leaders.<sup>5</sup>

The basic forms of business enterprise in Namibia are companies, branches of a foreign company, close corporations, business trusts, partnerships (including joint ventures), and sole proprietors. Two

---

<sup>1</sup> The following memorandum was prepared by pro bono counsel for the ABA Center for Human Rights. It is intended as background information only and should not be relied upon as legal advice on a particular case. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association, and, accordingly, should not be construed as representing the policy of the American Bar Association.

<sup>2</sup> See GlobaLex, UPDATE: Researching Namibian Law and the Namibian Legal System, by Geraldine Mwanza Geraldo and Isabella (Skeffers) Nowases, available at <http://www.nyulawglobal.org/globalex/Namibia1.htm>.

<sup>3</sup> Government of Namibia website: Our Government, available at <http://www.gov.na/about-government>.

<sup>4</sup> See Chapter 3, Article 21 of the Constitution of the Republic of Namibia.

<sup>5</sup> See Freedom House, Freedom in the World 2014: Namibia, available at <https://freedomhouse.org/report/freedom-world/2014/namibia>.

types of companies may be formed and incorporated in Namibia: those having a share capital and those not having a share capital (companies limited by guarantee). Companies having a share capital may either be public companies or private companies. The main difference between public companies and private companies is that the articles of a private company must restrict the transfer of its shares, must limit the number of its members to 50, and must prohibit any offer to the public for the subscription of its shares or debentures. The name of a public company having a share capital must include as its last word, the word “Limited” or “Ltd,” while the name of a private company having a share capital must include as its last two words, the words “(Proprietary) Limited” or “(Pty) Ltd.” It is also possible to register defensive names.<sup>6</sup>

The main legislative source governing companies is the Companies Act 28 of 2004 (Companies Act).<sup>7</sup> Public companies listed on the Namibian Stock Exchange (NSX) must also adhere to the rules of the NSX. Other corporate governance sources include the common law and the South African King III Code. It should be noted, however, that the King III Code is not binding in Namibia.<sup>8</sup>

The basic forms of non-profit groups in Namibia are voluntary associations, trusts, and non-profit companies. A voluntary association is a group of people who meet and form an unregistered organization around a common purpose. Non-profit companies are formed in terms of Section 21 of the Companies Act and regarded as public companies (except there is no share capital), and they must follow the same rules and regulations that apply to other kinds of companies.<sup>9</sup>

## **II. Registration Procedures**

### **A. For-Profit Organizations**

#### **a. Laws<sup>10</sup>**

The website of the Namibian Ministry of Trade and Industry (MTI) contains detailed information about the process of registering various types of business entities. Steps and forms for registration according to this website are summarized as follows.<sup>11</sup>

#### **1. Private (Proprietary) Limited and Public (Limited) Companies**

Companies are regulated in Namibia under the Companies Act, Act No. 28 of 2004, as amended, which is based on UK company law. The Companies Act covers both domestic companies and those incorporated outside Namibia but trading through a local branch.

Public companies may offer their shares for sale to the public, although they need not be listed on the stock exchange, nor is it required that the public hold an interest in their shares. Their characteristics

---

<sup>6</sup> National Small Business Chamber, Conducting a Business in Africa, Part 1: Namibia, by Adre Greeff, published 20 March 2014, available at <http://www.nsbcc.org.za/emailers/newsletter-2014/articles/article-20-march-2014-adams.html>.

<sup>7</sup> See Companies Act, available at <http://www.osall.org.za/docs/2011/03/Namibia-Companies-Act-28-of-2004-as-amended.pdf>.

<sup>8</sup> The International Comparative Legal Guide to Corporate Governance 2014, 7th Edition, Global Legal Group, Namibia Chapter –Corporate Governance 2014, by Peter Frank Koep and Hugo Meyer Van Den Berg, Koep & Partners, available at <http://www.africanlawbusiness.com/publications/corporate-governance/corporate-governance-2014/namibia/q-and-a>.

<sup>9</sup> Legal Assistance Centre, Windhoek Namibia 2008, How to Create a Non-Profit Group, available at <http://www.lac.org.na/projects/grap/Pdf/non-profit.pdf>.

<sup>10</sup> See summary of relevant laws, regulations and case law at <http://www.lac.org.na/namlex/Company.pdf>; A Business and Investment Guide for Namibia, 2014 e-Book Edition, PwC Namibia, p. 57-60; 67-71, available at <http://www.pwc.com/na/assets/pdf/business-and-investment-guide-for-namibia.pdf>

<sup>11</sup> Republic of Namibia, Ministry of Trade & Industry website: Registering a Company, available at <http://www.mti.gov.na/companies.html>.

are that the number of shareholders is unlimited, there are no restrictions on the transfer of their shares, and they must file a copy of their annual financial statements with the Registrar of Companies.

Private companies are those that:

- Restrict the right of transfer of their shares.
- Limit the number of members to 50.
- May not offer shares for sale to the public.
- Are not required to file their annual financial statements with the Registrar.
- Must include the word “proprietary” or “Pty” at the end of the registered name immediately before the word “limited.”

Steps for registration of companies with the Registrar of Companies, obtained from the MTI website, are as follows:

- ❖ Step 1: Submission of a name application/reservation form CM5; if approved one may continue with step 2.
- ❖ Step 2: Application for Certificate of Incorporation and Certificate to Commence Business. This requires the submission of the following documents:
  - Certificate of Incorporation on CM1
  - Memorandum and Articles of Association in triplicate on forms CM2, CM44, CM44C, etc. (2x copies certificate by Notary Public)
  - Copy of approved name on CM5
  - Notice of postal and registered address on CM22
  - List of directors, Auditors and Public Officers on CM29
  - Appointment of an Auditor on CM31
  - Statement by each Director regarding the Adequacy of Capital of company on CM47
  - Application for Certificate to Commence Business on CM46
  - Request for Submission of Additional Copies CM51

A more thorough summary of the process for registration of a company, prepared by the World Bank Group, is outlined below. Per the World Bank Group, it takes approximately 66 days to form a business in Namibia, which is longer than the time required in other areas of the Sub-Saharan Africa region. For example, the same process takes 19 days in South Africa.<sup>12</sup>

No.	Procedure	Time to Complete	Associated Costs
1	Reserve a unique company name Agency: Registrar of Companies  Company name search and reservation is done at the Registrar of Companies within the MTI. If the proposed name is acceptable, it will be reserved for 60 days. The Registrar of Companies is working on an online service platform, and the system is in phase 1.	18 days	Included in the cost of registration
2	Pay the registration fees and buy revenue stamps at the Receiver of Revenue Agency: Receiver of Revenue	1 day	ND 230 - ND 250

<sup>12</sup> World Bank Group, “Doing Business 2015: Going Beyond Efficiency – Starting a Business in Namibia” (2014), available at <http://www.doingbusiness.org/data/exploreeconomies/namibia/starting-a-business/>.

No.	Procedure	Time to Complete	Associated Costs
	<p>Annual duty varies depending on number of shares per Companies Act. The fee is ND 4 per 10,000 share capital and ranges between a minimum fee of ND 80 and maximum fee of ND 100. There is also a stamp duty of ND 100 to buy the annual return form CM23.</p> <p>Subject to the provisions of Section 10 (1) (a) and (b) of the Companies Act, fees, additional fees, annual duty, or other moneys payable to the Registrar, may, except where otherwise provided in these regulations, be paid to any receiver of revenue. Proof of payment of such fees, additional fees, annual duty, or other moneys must be affixed to the relevant form or document by spreading adhesive paste or glue over the entire surface of the reverse side of the acknowledgement of receipt form. Fees for inspection or copies of documents may be paid on an account, subject to such conditions as the Registrar may stipulate.</p>		
3	<p>Hire an attorney to register the company with the Registrar of Companies and obtain the certificate of incorporation and the certificate of business commencement. Agency: Registrar of Companies</p> <p>Section 63 of the Companies Act stipulates that the memorandum and articles of association must be filed and uplifted by a subscriber or by a local accountant or company attorney. The following documents must be filed for the registration and incorporation of a company:</p> <ul style="list-style-type: none"> <li>- The original and two notarized copies of the memorandum and articles of incorporation referred to in regulations 17 and 18, bound as prescribed in regulation 4 (1)</li> <li>- Form CM5: Application for Reservation of Name or Shortened Form or Defensive Name, containing particulars of the name reserved for a company, as approved by the Registrar, together with other forms, if any, containing particulars of the shortened form of the name of the company, as approved by the Registrar (ND 50)</li> <li>- Form CM22: Notice of Registered Office and Postal Address of Company, containing a notice of the company's registered office and postal address within the geographical boundaries of Namibia (ND 10)</li> <li>- A power of attorney, signed by the subscribers to the memorandum, in favor of the person filing the documents</li> <li>- Form CM29: Contents of Register of Directors, Auditors, and Officers (ND 10)</li> <li>- Form CM31: Notice of, Consent to Appointment, Change of Name, or Resignation by Auditor or Removal of Auditor, containing the acceptance of appointment of an auditor (ND 10)</li> <li>- Form CM46: Application and Certificate to Commence Business (ND 60 plus annual duty)</li> <li>- Form CM1: Certificate of Incorporation of a Company Having a Share Capital</li> <li>- Form CM2: Memorandum of Association of a Company Having a Share Capital. Proof of payment of the registration fee under Section 63 (2) of the Companies Act must be affixed to the original Form CM2 (ND 100)</li> <li>- CM47: Statement by Each Director Regarding Adequacy of Capital of Company. This is a statement, as prescribed by Section 172(3)(a) of the Companies Act, of the opinion of each director to the effect that the capital of the company is adequate for the company's purpose and its</li> </ul>	14 days	about ND 5,750+ ND 556 notary fees

No.	Procedure	Time to Complete	Associated Costs
	business, or, if the director believes that it is inadequate, the reasons and the manner in which and the sources from which the company is to be financed and the extent thereof. (ND 25) The Registrar of Companies automatically forwards a copy of the memorandum and articles of association to the Receiver of Revenue, which in turns registers the company as a taxpayer and issues a tax identification number. Taxation of 33% of all profit is payable to the Receiver of Revenue.		
4	Deposit the initial capital in a bank account Agency: Bank  The funds for the initial capital deposit must be paid into a bank account. - Authorized share capital: 4,000 ordinary shares of ND 1 each. - Issued share capital: 100 ordinary shares of ND 1 each. No legal requirements are mandated for the minimum startup capital for a private company.	1 day	no charge
5	Receive fire and health inspection Agency: Municipality  The company should not apply for a town planning certificate unless it is the owner of the premises. Companies must have a registered address in Namibia and must apply to receive fire and health inspection in order to obtain the certificate for fitness prior to the commencement of business operations. Local Authorities Act gives Municipalities authority to regulate, though Fire Regulations and Healthy Regulations, that the municipal fire chief and healthy division should inspect the business premises for safety and health of working environment. The municipality carries out municipal inspection and approves business premise occupancy after reviewing applications for receiving health and fire inspection. The inspector typically conducts inspection no later than the second day of application receipt.	1 day	no charge
6	Obtain the certificate of fitness from the local municipality Agency: Municipality  Upon satisfactory inspection of the company premises, the inspector provides the entrepreneur with a letter stating that the workplace has successfully passed inspection. The entrepreneur then returns to the local municipality in order to obtain the certificate of fitness with this proof. The certificate is annually renewable. According to the “Healthy Regulation (Inspection Fees for Premises)” by Department of Economic Development & Environment Division: Health Services, the fees for formal non-food premises (per annum) per Schedule C (c A) (iii) is ND 172.17 of tariff plus ND 25.83 VAT, which is equal to a total of ND 198.	1 day	ND 47.00 to ND 350 depending on the type of business
7	Register for VAT with the Receiver of Revenue at the Ministry of Finance Agency: Receiver of Revenue at the Ministry of Finance  Any person, as defined by the law, who has carried on a taxable activity on or since November 27, 2000, and whose taxable turnover in any 12 month period exceeds or is likely to exceed ND 200,000 must register for VAT. The applicant submits Form VAT I to the Receiver of Revenue at the Ministry of Finance and receives the registration number within 1–4 weeks depending on the application date. The VAT number once issued is	9 days	no charge

No.	Procedure	Time to Complete	Associated Costs
	validated at the beginning of the month following the month of application. Manufacturing companies must register for VAT. It is not compulsory for other types of businesses to register for VAT if their profit is less than ND 200,000. In order to register for VAT, the company must have a local bank account and a certificate of fitness.		
* 8	Register for Pay-As-You-Earn (PAYE) tax with the Receiver of Revenue Agency: Receiver of Revenue at the Ministry of Finance  The registration for pay-as-you-earn tax is separate from registration for VAT, but both are registered by the Receiver of Revenue at the Ministry of Finance.	4 days (simultaneous with previous procedure)	no charge
9	Register employees with the Social Security Commission Agency: Social Security Commission  A percentage of 1.8% is deducted from the basic salary of all employees, shared on a 50/50 basis by the employee (0.9%) and employer (0.9%), with a maximum of ND 81 and a minimum of ND 2.70. The figures reflect the social security contribution of 0.9% on minimum payroll of ND 300 and maximum payroll of ND 9000. SCC has a computerized system in place. The workers will receive one social security card (one card per person) via post after as a confirmation in about 1 month.	21 days	ND 10 per employee
* 10	Register employees with the Workmen's Compensation Commission Agency: Workmen's Compensation Commission  The employer must file an application with the Workmen's Compensation Commission for all employees earning less than ND 72,000 a year, with special circumstances for those employees earning above that amount. The annual amount payable is based on a wage rate scale and on the company industry. Registration types are divided into farming (agriculture) and confirming companies.	20 days (simultaneous with procedure 9)	no charge

\* Takes place simultaneously with another procedure.

## 2. Close Corporations and Business Trusts

A close corporation is a simplified and less expensive form of a limited liability business entity created by the Close Corporations Act, Act No. 26 of 1988 (CCA). Like a company, the members are sheltered from any liabilities of the corporation, provided that the conditions of the CCA are complied with. It is a suitable medium for any enterprise owned and run by up to 10 individuals actively involved in the business. Close corporations are also much simpler and quicker to form and administer than companies.

Steps for registration of close corporations with the Registrar of Companies, obtained from the MTI website, are as follows:

- ❖ Step 1: Submission of name application/reservation of name form CC8; if approved, one may continue with step 2. The current processing time for this submission is between five and 10 working days.
- ❖ Step 2: Submission of a Founding Statement form CC1. This requires the submission of the following documents:
  - Copy of the approved form for name reservation CC8.

- Founding statement in triplicate on CC1 forms.<sup>13</sup> All members are required to sign the founding statement.
- Consent letter from the accounting officer.
- Certified copy of passport in case of foreigners.

If no identity document has been issued, a written statement to this effect must be attached. Minor children and other person under legal disability must be assisted by their parents, guardians or representatives, as the case may be, and the capacity must be stated. Once the registered founding statement is received, business may be commenced. Note that it was not clear from the materials reviewed how long it takes to receive the registered founding statement.

A business trust is a legal arrangement for the conduct of business or the holding of assets for the benefits of its beneficiaries. Business trusts are subject to even fewer formalities and administration restraints than close corporations. Liability is limited to the extent of their assets, although trustees may become personally liable for losses in some circumstances. See below under not-for profit organizations for further information about forming a trust.

### 3. Partnerships, Joint Ventures, Sole Proprietorships, and Defensive Names

There are no specific registration requirements for partnerships and sole proprietorships. However, joint venture arrangements are frequently made between companies in partnership. In this case, each company would be governed by the legal requirements affecting companies operating in Namibia. Also, defensive names may be obtained for such entities, which would require registration as shown below.

Steps for registration of defensive names with the Registrar of Companies, obtained from the MTI website, are as follows:

#### ❖ Submission of two forms:

- Application for reservation of a defensive name on CM5 form to the Registrar of Companies
- Application for registration of a defensive name on CM8 form

A defensive name is valid for two years and is renewable on the submission of a CM8A form. Note that it was not clear from the materials reviewed how long it takes to obtain a defensive name, but it is likely not more than 18 days, as with the reservation of names for companies shown above.

### 4. Foreign Companies

A foreign company that establishes a place of business in Namibia is known as an “external company” and is required to register with the Registrar of Companies.

Steps for registration of foreign companies with the Registrar of Companies, obtained from the MTI website, are as follows:

- ❖ Step 1: Submission of a name application/reservation form CM5 to the Registrar of Companies; if approved one may continue with step 2.

---

<sup>13</sup> See Part III, Section 12 of the CCA for the information to be included in the founding statement, including the name of the entity, the principal business to be carried on, the name and address of each member, the size of each member’s interest in the entity, and the particulars of the contribution of each member to the entity.

- ❖ Step 2: Application for a Certificate of Incorporation and Certificate to Commence Business. Certified copy of a memorandum and Articles of Association in triplicate of forms as it was registered in its original country to be submitted. This requires the submission of the following documents:
  - Notice of postal and registered addresses on CM22
  - List of Directors, Auditors and Public Officers on CM29
  - Appointment of an Auditor on CM31
  - Alteration to Memorandum of External Company on 39
  - Application of Certificate of Registration of Memorandum of External company on CM47
  - Request for Submission of Additional Copies on CM51

## 5. Local Equity Requirements<sup>14</sup>

There are no local equity requirements laid down in the Companies Act. Local equity participation may, however, be a sound business strategy, especially in industry sectors that involve the exploitation of natural resources. An example is the fishing industry, where this is taken into account in the allocation of fishing quotas. There are also no requirements with regard to local directors in the Companies Act. Other acts governing certain industry sectors (e.g., insurance) may, however, require local directors. Companies are required to appoint a public officer who is resident in Namibia. Fifty percent or more of the interest in agricultural land may not be owned by a foreigner (unless specific approval is obtained from the Minister of Lands and Resettlement).

## 6. Additional Registration Information<sup>15</sup>

The business registration process has long been raised as an issue that introduces a great deal of red tape into the process of local and foreign investment in Namibia and that unnecessarily hinders the speed at which investment can begin to take place. In addition to the length of time involved in registering a business, several inefficiencies exist in terms of tracking the processing of applications. The World Bank's Doing Business report shows (see table above) that it currently takes up to 66 days to register a business, which is well above the sub-Saharan Africa average of 30 days, and significantly longer than the Organization for Economic Co-operation and Development (OECD) high income country average of 11 days. Perhaps most pertinently for Namibia, in Botswana, registration takes 60 days and in South Africa, registration takes just 19 days. The MTI is currently working to reform and re-engineer the business registration process, and recently set up the Business and Intellectual Property Authority (BIPA) to modernize these processes, and to make them "shorter, faster and easier" by bringing several parts of the process online. Once it is fully functional, BIPA anticipates the business registration process being shortened to 24 to 48 hours.

To date, a computerized Integrated Companies Registration System (ICRS) has been developed and is being rolled out, and major aspects of the registration process can already be done through this new system, such as the registration of companies, close corporations, name reservation, and name searches. The authority's registration services will not be strictly online, however, and the MTI has given the directive to ensure that both online and face-to-face service delivery are running in parallel.

In addition to the establishment and functioning of BIPA, there are also ongoing efforts to restructure the Namibia Investment Centre (NIC) into a "single window" service or "one-stop-shop" for foreign investors, a one-stop information source, and to assist investors with business registration. BIPA

<sup>14</sup> See PwC Namibia, *supra* note 10, p. 57-60; 67-71.

<sup>15</sup> See Institute for Public Policy Research (IPPR) Research Report, Easing the Way for Investment In Namibia, June 2014, p. 14-16, 53-54, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/324601/IPPR\\_Investment\\_Book\\_web.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/324601/IPPR_Investment_Book_web.pdf).



is yet to ascertain its exact role in this setup, although it would likely assist at least with business registration issues. Foreign investors are regulated through the Foreign Investment Act (FIA), and while the requirements are the same in terms of business registration, they have to work within the confines of the FIA.

## 7. Deregistration<sup>16</sup>

Section 74 of the Companies Act provides that, if a company has failed, for a period of more than two years, to lodge with the Registrar an annual return in compliance with section 181, or when the Registrar has reasonable cause to believe that company is not carrying on business or is not in operation, he or she must send to the company by certified post a letter enquiring whether it is carrying on business or is in operation. If the Registrar does not, within one month after sending the letter, receive any answer or receives an answer to the effect that the company is not carrying on business or is not in operation, the Registrar may publish in the Gazette and send to the company by certified post a notice that at the expiry of two months from the date of that notice that company will, unless good cause is shown to the contrary, be deregistered. At the expiry of the period mentioned in any notice referred to above or on receipt from any company of a written statement signed by every director to the effect that the company has ceased to carry on business and has no assets or liabilities, the Registrar may, unless good cause to the contrary has been shown by the company, deregister the company concerned, and must give notice to that effect in the Gazette and the date of the publication of that notice in the Gazette is deemed to be the date of deregistration. The Court may, on application by any interested person or the Registrar, if it is satisfied that a company was at the time of its deregistration carrying on business or was in operation, or otherwise that is just that the registration of the company be restored, make an order that the registration be restored accordingly, and after which the company is deemed to have continued in existence as if it had not been deregistered.

### b. Case Law

We were unable to find significant case law on this topic.

## B. Not-For Profit Organizations

### a. Laws

Since the introduction of the Government of the Republic of Namibia Civic Organizations Partnership Policy (GRN-COPP) in 2005, most people refer to civil society organizations in Namibia simply as “civic organizations.” The GRN-COPP uses that term to encompass all organizations “found at all levels of civil society between the individual or family and the state,” including non-governmental organizations (NGOs), community-based organizations (CBOs), clubs, and groups such as foundations, women’s groups, trade unions, chambers of commerce, and faith-based organizations. The GRN-COPP goes on to identify the following as the common characteristics of civic organizations (COs):

- They are non-profit distributing.
- They operate in the public interest or in the interest of their members and/or sponsors.
- They adhere to democratic structures.
- Involvement is voluntary.
- They feature high levels of participation.
- They emphasize empowerment of beneficiaries.
- They operate independently (both financially and administratively) from the state and donors.

---

<sup>16</sup> See Companies Act, available at <http://www.osall.org.za/docs/2011/03/Namibia-Companies-Act-28-of-2004-as-amended.pdf>.

Under the current law, the legal status of a CO may take one of the following forms:

- Section 21 Company (or “company not for gain” or NGO) – regulated under the Companies Act 2004;
- Voluntary Association – regulated under the common law;
- Trust – regulated under the Trust Moneys Protection Act 1934;
- Incorporation under special statutes, such as Cooperatives Act (for the registration and incorporation of cooperative societies) and Trade Unions Act (for the registration and incorporation of trade unions).

Accordingly, individuals who wish to establish a CO have the option of giving it a legal status in any of the first three forms. The group may only establish a CO in the fourth form if a special statute exists for the incorporation of the particular type of CO (e.g., a cooperative society).<sup>17</sup>

### 1. Non-Profit Companies<sup>18</sup>

Some non-profit groups may decide to register as a non-profit company, usually known as a section 21 company or NGO. A Section 21 company must meet the following criteria: (a) it must be formed for a lawful purpose; (b) its main object must be the promotion of religion, arts, sciences, education, charity, or any other cultural or social activity or communal or group interest; (c) it must intend to apply any profits or income solely to the promotion of that main object and not to its members; (d) the members must not get any dividends; and (e) the assets of the company must go to a group with similar objectives if it is dissolved. Foreign branches and non-profit associations can register as section 21 companies, provided that they comply with the requirements of section 21. A section 21 company must be registered in the same manner as any other company in Namibia and must follow the same rules and regulations that apply to other kinds of companies.<sup>19</sup> There are no available figures on the number of section 21 companies in existence in Namibia, but it is believed that there are not many of them. Most of the formal civic organizations are registered as trusts, a far easier and cheaper window for registration.<sup>20</sup>

The website of the MTI contains detailed information about the process of registering various types of business entities. Steps and forms for registration for NGOs according to this website are summarized as follows.<sup>21</sup>

- ❖ Step 1: Submission of a name application/reservation form CM5; if approved one may continue with step 2.
- ❖ Step 2: Application for a Certificate of Incorporation and Certificate to Commence Business. This requires the submission of the following documents:
  - Memorandum and Articles of Association in triplicate of forms CM3, CM4, CM4B, CM44B, and CM44C
  - Copy of the approved name CM5
  - Notice of postal and registered addresses on CM22
  - List of Directors, Auditors and Public Officers on CM29

---

<sup>17</sup> See Benedict C. IHEME, *The Legal and Regulatory Framework for Civic Organizations in Namibia*, 11 Int'l J. Not-for Profit L., Feb. 2009.

<sup>18</sup> See Legal Assistance Centre, *supra* note 8.

<sup>19</sup> See Legal Assistance Centre, *supra* note 8.

<sup>20</sup> See Benedict C. IHEME, *The Legal and Regulatory Framework for Civic Organizations in Namibia*, 11 Int'l J. Not-for Profit L., Feb. 2009.

<sup>21</sup> See Republic of Namibia, Ministry of Trade & Industry website, *supra* note 11.

- Appointment of an Auditor on CM31
- Application for Certificate to Commence Business on CM46
- Request for Submission of Additional Copies on CM51

Additionally, note that NGOs require a Memorandum and Articles of Association that need to be certified by a notary public and must be a member of the legal profession. Also, see the detailed description of the company registration process above provided by the World Bank Group, which applies to NGOs to the same extent as to other companies.

See above regarding deregistration of for-profit companies; similar rules apply for NGOs under the Companies Act. However, section 21 of the Companies Act provides that, on the winding-up, deregistration, or dissolution of an NGO, the assets of the association remaining after the satisfaction of all of its liabilities must be given or transferred to some other association or institution or associations or institutions having objects similar to its object, to be determined by the members of the association at or before the time of its dissolution or, failing that determination, by the Court.<sup>22</sup>

## 2. Voluntary Associations<sup>23</sup>

A voluntary association is a group of people who meet and form an organization around a common purpose, such as promoting non-violence or helping children. This is the most basic type of non-profit group, and it is generally believed that by far the largest number of civic organizations in Namibia belong to this category. Voluntary associations are easy to create. Under the rules of common law, all that it takes to establish a voluntary association is for a group of people to agree orally or in writing to set up the association to pursue any lawful object other than making a profit. Voluntary associations do not have to be registered with any ministry or government body (but may be registered as welfare organizations as discussed further below). Subject to a few common law rules, it is very much up to the members to make the provisions to guide the conduct of the affairs of the association. Among the common law rules are a duty on the part of the members to act in good faith towards each other, and a duty – in case of possible conflict between the interest of a member and that of the association – to ensure that the interest of the association is protected. There are four basic requirements for a voluntary association: (i) a written constitution which explains the purpose of the group and how it will work; (ii) the group must be membership-based, having members who are involved in the programs and activities of the organization, and the constitution should reflect this; (iii) the constitution must say that the group is a “legal person;” and (iv) the constitution must say what will happen to the assets of the group if it closes down. Most voluntary associations say that the assets of the group must go to a group which does similar work in Namibia.

## 3. Trusts<sup>24</sup>

Trusts are regulated by the Trust Moneys Protection Act 1934. A trust can be formed (1) for the purpose of benefiting a particular person or class of persons; or (2) for the purpose of carrying out some goal, usually something which will help some segment of the community. The objectives and structure of the trust must be written in a deed of trust and registered with the Master of the High Court. A trust requires that all founders provide some money to the Master as security, to show that they will do a good job in looking after the trust’s assets, but the Master often makes an exception to this requirement. A trust must also hold some property, which can be a symbolic amount (even as low as N\$1.00) when the trust is

<sup>22</sup> See Companies Act, available at <http://www.osall.org.za/docs/2011/03/Namibia-Companies-Act-28-of-2004-as-amended.pdf>.

<sup>23</sup> See Legal Assistance Centre, *supra* note 8. See also See Benedict C. Iheme, *The Legal and Regulatory Framework for Civic Organizations in Namibia*, 11 Int’l J. Not-for Profit L., Feb. 2009.

<sup>24</sup> See Legal Assistance Centre, *supra* note 8.

first established. See the Master of the High Court in Windhoek to get more information about the requirements for this kind of group.

#### 4. Registration as a Welfare Organization<sup>25</sup>

Organizations that (a) engage in certain “public welfare” activities, and (b) intend to request donations from the government at the national, regional or local level or to collect money from the general public, must usually register as welfare organizations. A welfare organization is an organization registered with the Ministry of Health and Social Services (MHSS) and formally recognized as providing public welfare in certain ways. The National Welfare Act 79 of 1965 (NWA)<sup>26</sup> lists several activities that welfare organizations may be engaged in. Not all voluntary associations, trusts, section 21 companies or other non-profit groups need to register as welfare organizations. However, such registration is the most widely used method of showing that all of an organization’s activities are for the public good. Therefore, a group should register as a welfare organization if it meets the definition of a welfare organization in the NWA and is asking for funds from the general public or from government.

The first step in becoming a welfare organization is to make sure that the organization is properly set up as a voluntary association, a trust, or some other legal structure. Next, the group must formally apply to the MHSS. The group will need to supply three things with its application: (1) the organization’s constitution; (2) a completed application form (available from the MHSS); and (3) the name of a registered audit company and a letter from the audit company stating that they will audit the organization every year. Finally, when the application and registration are complete, the organization must place an advertisement in the Government Gazette and in one local newspaper to announce that it intends to be a welfare organization. The organization must pay the costs of the newspaper advertisements. If nobody from the public objects within 21 days, the organization is finally registered as a welfare organization.

##### b. Case Law

We were unable to find significant case law on this topic.

#### C. Analytical comparison of the legal process of registration

In general, registration of for-profit and non-profit companies appears to follow similar steps, as both are governed by the Companies Act and involve registration with the Registrar of Companies. Voluntary associations and may skip the registration process, but their permitted purposes are more limited. Non-profit welfare organizations require the extra step of registration with the MHSS.

### III. Tax Laws

#### A. For-Profit Organizations<sup>27</sup>

##### a. Laws

##### 1. Tax Overview.

---

<sup>25</sup> See Legal Assistance Centre, supra note 8.

<sup>26</sup> See summary of relevant laws and regulations at <http://www.lac.org.na/namlex/Soclwelf.pdf>.

<sup>27</sup> See summaries of relevant tax laws and regulations at <http://www.lac.org.na/namlex/Incomtax.pdf> and <http://www.lac.org.na/namlex/Revenue.pdf>.

Income tax is levied under the Income Tax Act, Act No. 24 of 1981 (the Income Tax Act), as amended, except for income derived from petroleum, which is taxed in accordance with the Petroleum (Taxation) Act, Act No. 3 of 1991. The Income Tax Act provides that all companies, close corporations, individuals and other taxable entities are liable for normal tax on taxable income derived from a source within or deemed to be within Namibia. "Source" is not defined in the Act, and it is therefore necessary to refer to case law to determine whether income is or is not from a source within Namibia. The Income Tax Act provides for withholding taxes on interest, dividends, royalties, management, admin, technical, consulting, entertainment and directors fees. The Income Tax Act and schedules thereto further provide that Pay-As-You-Earn (PAYE) should be withheld by an employer and be paid over to the Directorate of Inland Revenue (DIR) on behalf of the employees. There is no estate duty, donations tax, capital gains (other than profits on the sale of mining licenses/rights) or wealth taxes in Namibia. Value-Added Tax (VAT) is levied under the Value-Added Tax Act, Act No. 10 of 2000, as amended. Stamp duties are payable on numerous documents, including transfers of listed and unlisted marketable securities in terms of the Stamp Duty Act, Act No. 15 of 1993 (the Stamp Duty Act). Transfers of immovable property are also subject to transfer duty in terms of the Transfer Duty Act, Act No. 14 of 1993 (the Transfer Duty Act). The Directorate Customs and Excise levies customs and excise duties on goods imported from outside SACU and on certain locally manufactured goods, including alcoholic and non-alcoholic beverages. Municipalities and similar bodies charge rates and taxes based on immovable property values such as the site value (A), improvement value (B) and open space value (A + B). There are no other property imposts.

Income earned by foreign companies from a source within or deemed to be within Namibia will be subject to tax in Namibia. In such cases, the foreign entity must determine whether it is obliged to register a local entity or branch. A company is required to register a branch if it has established a place of business in Namibia. A local subsidiary company may be registered as an alternative to a branch. In the event that Namibia has entered into a double tax agreement (DTA) with the country where the foreign company resides, such entity will only be taxable in Namibia if it has established a permanent establishment (PE) in Namibia. If a PE exists, only the portion of income attributable to the PE will be subject to tax in Namibia. Non-residents who do not have a place of business in Namibia may, however, be subject to withholding taxes.

The taxable income of Namibian branches of foreign companies is taxed at the corporate tax rate applicable to the Namibian companies with a similar trade. The taxable income of a Namibian branch is determined in accordance with the Namibian income tax legislation, which is source-based and not resident-based. Note that charges between a Namibian branch and a foreign holding company are not deductible due to them being considered as one legal entity that cannot transact with itself. Dividends declared by the Namibian branch to a foreign shareholder will be subject to Non-Resident Shareholders Tax (NRST), a withholding tax, at a rate of 10 to 20 percent unless a DTA specifies a lower rate. If the branch is not registered as a local company (i.e. the branch is registered as an external company) in Namibia and does not have any shareholders, NRST would apply if profits are distributed to the head office and the head office declares dividends from Namibian profits to a non-Namibian-shareholder, even if the head office company is not a Namibian resident. Double taxation relief may, however, apply. If the branch is registered in Namibia as a local company (subsidiary) and has nonresident shareholders, NRST will apply. Namibian subsidiaries of foreign parent companies are not subject to any special rules and are treated in the same manner as domestic Namibian companies for tax purposes.

Partnerships (including unincorporated joint ventures, syndicates and consortiums) are not taxed as separate entities for income tax purposes. Once determined, the partners' shares of the partnership's taxable income or loss will be accounted for in the hands of the partners. It may be required that a copy of the annual financial statements of the joint venture or partnership is submitted along with the entity's

annual tax return. Unincorporated joint ventures and partnerships may also be required to register for VAT, PAYE and withholding taxes on services.<sup>28</sup>

Namibia has a higher corporate tax rate, at 32 percent, than most of its neighbors; note that South Africa's is 28 percent and Botswana's is 22 percent. –The administrative and compliance environment is also relatively burdensome. In recent years, the private sector in Namibia has raised a number of concerns about tax, particularly regarding the withholding tax on services, the export levy, and delayed VAT refunds, all of which affect both the local and foreign investor.<sup>29</sup>

## 2. Tax and Other Incentives<sup>30</sup>

The Namibian government has stated that it is committed to stimulating economic growth and employment and establishing Namibia as a gateway location in southern Africa. To this end, it has introduced numerous incentives that are largely concentrated on stimulating manufacturing in Namibia and promoting exports into the region and to the rest of the world. Examples of such incentives include:

- nonresident shareholders' tax is only 10 percent;
- dividends accruing to Namibian companies or resident shareholders are tax-exempt;
- plant, machinery and equipment can be fully written off over a period of three years;
- buildings of non-manufacturing operations can be written off, 20 percent in the first year and the balance at 4 percent over the ensuing 20 years;
- import or purchase of manufacturing machinery and equipment is exempted from VAT; and
- preferential market access to EU, USA, and other markets for manufacturers.

The Namibian government has introduced a package of tax and non-tax special incentives applying specifically to manufacturing, applicable to both existing and new manufacturing enterprises, exporters and Export Processing Zone (EPZ) enterprises. In 1995, the Namibian government adopted the Export Processing Zone (EPZ) Act, Act No. 9 of 1995 as a legal framework for promoting export-led industrialization of the national economy. The Export Processing Zone Act was enacted to offer investors various incentives in exchange for technology transfers, capital inflow, skills development and job creation in Namibia. Companies operating under the regime are free to locate their operations anywhere in Namibia. Though the Offshore Development Company (ODC), EPZ enterprises also have access to factor facilities rented at economical rates.<sup>31</sup>

Manufacturing activities in all sectors, including local value-added processing of Namibia's minerals, fish and agricultural products currently exported largely in raw form, stand to benefit from the tax incentives mentioned above. Tax incentives are also available to exporters when exporting Namibian manufactured goods. Examples of such tax incentives include:

- An additional 25 percent allowance on manufacturing wages (section 17A) of the Income Tax Act;
- An additional 25 percent allowance on marketing expenses incurred in export countries in relations to goods exported for sale (section 17B);
- An 80 percent allowance on the manufacturing gross profit of a manufacturer (other than one exporting manufactured fish or meat products) whose income is mainly derived from the export of goods manufactured in Namibia (section 17C);

---

<sup>28</sup> See PwC Namibia, *supra* note 10, p. 73-93.

<sup>29</sup> See IPPR, *supra* note 14, p. 55.

<sup>30</sup> See summaries of relevant laws and regulations at <http://www.lac.org.na/namlex/Trade.pdf> and <http://www.lac.org.na/namlex/Importex.pdf>.

<sup>31</sup> Republic of Namibia, Ministry of Trade & Industry website: Incentives, available at <http://www.mti.gov.na/incentives.html>.

- An additional 25 percent allowance, for a period of 10 years from registration as manufacturer under section 5A of the Income Tax Act, on land based transport costs (road or rail) incurred in relation to materials used in the manufacturing activity or to the importation of manufacturing equipment (section 17D);
- An initial building allowance of 20 percent on the erection costs of buildings used solely for manufacturing purposes in the year in which the building is brought into use for purposes of trade;
- An annual building allowance of 8 percent on such erection costs as referred to above for the next 10 years following the year in which the building was brought into use; and
- Registered manufacturers are taxed at 18 percent for the first 10 years from registration, and at 34 percent for all following years.

All manufacturing concerns claiming incentives must register with the MTI, and, in respect of taxation incentives, must also be registered with the Ministry of Finance in accordance with section 5A of the Income Tax Act. To promote control and prevent the misuse of taxation incentives, enterprises qualifying for such incentives will not be relieved of the duty to submit fully substantiated annual tax returns. Only corporates will qualify for these allowances.

A number of other special incentives are also available for manufacturing enterprises. The incentives are controlled and administered by the NIC, to whom application should be made. The incentives include: (i) subsidized loans from the Namibian Development Corporation; (ii) cash grants for exporters of locally manufactured goods of up to fifty percent of the real cost of specified export promotion and marketing expenses incurred; and (iii) industrial studies undertaken by the government available at 50 percent of their production costs to companies that wish to develop investment opportunities.<sup>32</sup>

Below is a summary, prepared by the Institute for Public Policy Research, of incentives available to registered manufacturers, exporters of manufactured goods, and EPZ enterprises.<sup>33</sup>

---

<sup>32</sup> See PwC Namibia, *supra* note 10, p. 15-17.

<sup>33</sup> See IPPR, *supra* note 14, p. 27.

	<i>Registered Manufacturers</i>	<i>Exporters of Manufactured Goods</i>	<i>Export Processing Zone Enterprises</i>
<b>Eligibility and Registration</b>	Enterprises engaged in manufacturing. Application to the Ministry of Trade and Industry and approval by the Ministry of Finance.	Enterprises that export manufactured goods whether produced in Namibia or not. Application and approval by the Ministry of Finance.	Enterprises engaged in manufacturing, assembly, packaging or break-bulk and exporting mainly to outside of SACU markets. Application to the EPZ Committee through the ODC or EPZMC.
<b>Corporate tax</b>	Set at a rate of 18% for a period of 10 years, whereafter it will revert to the general prevailing rate.	80% allowance on income derived from exporting manufactured goods.	Exempt.
<b>VAT</b>	Exemption on purchase and import of manufacturing machinery and equipment.	Normal treatment.	Exempt.
<b>Stamp &amp; Transfer Duty</b>	Normal treatment.	Normal treatment.	Exempt.
<b>Establishment Tax Package</b>	Negotiable rates and terms by special tax package.	Not eligible.	Not eligible.
<b>Special Building Allowance</b>	Factory buildings written off at 20% in first year and balance at 8% for 10 years.	Not eligible.	Not eligible.
<b>Transportation Allowance</b>	Allowance for land-based transportation by road or rail of 25% deduction from total cost.	Not eligible.	Not eligible.
<b>Export Promotion Allowance</b>	Additional deduction from taxable income of 25%.	Not eligible.	Not eligible.
<b>Incentive for Training</b>	Additional deduction from taxable income of between 25% and 75%.	Not eligible.	Substantial, issued by Government on implementation of approved training programme.
<b>Industrial studies</b>	Available at 50% of cost	Not eligible.	Not eligible.
<b>Cash Grants</b>	50% of direct cost of approved export promotion activities.	Not eligible.	Not eligible.

## b. Case Law

We were unable to find significant case law on this topic.

## B. Not-For Profit Organizations

### a. Laws

#### 1. Overview<sup>34</sup>

Most types of non-profit organizations in Namibia will qualify for exemption from income taxation, though such exemptions are not automatic and must be applied for in terms of the relevant legislation. The supply of goods to “charitable organizations” (although the term is not defined in the applicable statute) is exempt from VAT. Charitable organizations are exempt from taxes on the transfer of real estate, and may be exempt from the tax on agricultural land, subject to the approval of the Minister of

<sup>34</sup> See Wesley Holl, Foreign Tax & Trade Briefs – Namibia (Matthew Bender & Company, Inc. 2012); see also Benedict C. Iheme, The Legal and Regulatory Framework for Civic Organizations in Namibia, 11 Int’l J. Not-for Profit L., Feb. 2009.



Lands, Resettlement and Rehabilitation. Rebates for custom duties may be available for certain kinds of imports for the use of charitable organizations under narrow and particular conditions (frequently including governmental pre-approval).

## 2. Tax Exemptions and Other Tax Benefits<sup>35</sup>

Section 16 of the Income Tax Act No. 24 of 1981 provides for exemptions from income tax. Of particular relevance to civic organizations are section 16 (1) (e), (f), (g), and (i). Each of these paragraphs mentions, and exempts from tax, the income of a specific type of civic organization. For instance, paragraph (j) exempts “the receipts or accruals of all ecclesiastical, charitable and educational institutions of a public character, whether or not supported wholly or partly from the public revenue.” Most civic organizations, whether or not they are registered under any law, will probably come within the provisions of section 16 and can claim tax exemption.

The Income Tax Amendment Act No. 22 of 1995 provides for tax deductions in respect of “any amount donated by the taxpayer during the year of assessment” to either “(i) a welfare organization registered or deemed to be registered under the National Welfare Act 1965 (Act 79 of 1965), and which is approved by the Minister [of Finance] after consultation with the Minister of Health and Social Service; or (ii) an educational institution approved by the Minister [of Finance] after consultation with the Minister of Higher Education, Vocational Training, Science and Technology or with the Minister of Basic Education and Culture, as the case may be.” This means that the benefit is available, not to all civic organizations, but to the ones that are welfare organizations registered or deemed to be registered under the Welfare Act. Also, a donation is deductible if made to an educational institution belonging to a civic organization if the approval of the Minister of Finance is obtained after consultation with the appropriate Minister of Education.

Under section 9 and Schedule III of The Value Added Tax Act No. 10 of 2000, as amended, the “supply of goods or services by any charitable organization, children’s home, old age home or orphanage” shall be charged with VAT at the rate of zero percent (i.e., zero-rated). Similarly, under section 10 and Schedule IV, educational services in schools and medical or paramedical services by medical professionals or in hospitals and other medical facilities are among the supplies that are exempt from payment of VAT. Again, this means that a civic organization that can persuade the tax authorities that it comes within the category of “charitable organization” will, in effect, not pay VAT. “Charitable organization” is not defined in the Act but is arguably wide enough to cover most civic organizations.

Under section 84 and Schedule No.4 Part 1 of the Customs and Excise Act No. 20 of 1998, provisions are made for specific rebates of custom duties on particular types of goods imported into Namibia by particular organizations or institutions and under particular conditions. In respect of “Goods for Cultural, Educational, Charitable, Welfare or Youth Organizations or Purposes” imported by “approved institutions or bodies,” the Schedule grants full rebate for some itemized types of goods imported under specified conditions. The listed types of goods includes “Goods (excluding clothing) forwarded unsolicited and free to any organization registered in terms of the National Welfare Act, 1965 ..., entered in terms of a specific permit issued by the Permanent Secretary, [Ministry of ] Trade and Industry, for the official use by such organization.” Another type is “Goods (excluding motor vehicles) specially designed for use by persons with mental defects, subject to the production of a certificate from the Permanent Secretary, [Ministry of] Health and Social Services, that such goods are for use exclusively by such handicapped persons, such certificate being endorsed by the Permanent Secretary, [Ministry of] Trade and Industry that such or similar goods are not ordinarily or satisfactorily made in Namibia.”

---

<sup>35</sup> See Benedict C. Iheme, *The Legal and Regulatory Framework for Civic Organizations in Namibia*, 11 Int’l J. Not-for Profit L., Feb. 2009.

While, in principle, most civic organizations will probably qualify to benefit from the rebates, an organization must be approved by the Ministry of Finance before it can claim the rebate. Also, in each case, several other conditions must be satisfied. Probably one of the most onerous combinations is that some of the goods must be forwarded “unsolicited” and also require a special permit from the Permanent Secretary. It is no surprise that civic organizations, in fact, rarely obtain these rebates.

b. Case Law

We were unable to find significant case law on this topic.

C. Analytical Comparison

As certain civic organizations are exempt from various taxes and duties as described above, many of the incentives described above for for-profit entities would not be applicable to such civic organizations. To the extent that civic organizations are required to pay certain taxes and duties, from the limited information available, it appears that they would be eligible for the same incentives as for-profit businesses, provided that the civic organizations meet the criteria for obtaining such incentives.

#### IV. Financial Transaction Laws

A. For-Profit Organizations<sup>36</sup>

a. Laws

i. Foreign Investment/Foreign Funding Laws

1. Investment Incentives.<sup>37</sup>

Namibia’s policy on foreign investment is vested in the Foreign Investment Act, Act No. 27 of 1990 (FIA). The FIA created the NIC to facilitate the promotion and administration of foreign investments. The FIA provides for the following: (i) liberal foreign investment conditions; (ii) equal treatment of foreign and local investors; (iii) openness of the majority of sectors of the economy to foreign investment; (iv) no local participation requirements (although some restrictions may apply to specific tenders); and (v) the awarding of a Certificate of Status Investment (CSI).

The main aim of the FIA is to address and stimulate foreign investment in Namibia. The Act allows any foreign national to invest and engage in any business activity in Namibia (with the exception of the exemptions mentioned above) which may be undertaken by a Namibian. Furthermore, for the purpose of any law governing the establishment and operation of any business, or the taxation of such business, the FIA ensures that a foreign national is in the same position as any Namibian.

Foreign nationals engaged in business activities or intending to commence activities in Namibia are not required to have local equity participation (but see comment above regarding government contracts), nor to transfer their business or any part thereof to the government or to any Namibian. There is, however, one proviso in the case of foreigners applying for a license or authorization of an agreement for rights over natural resources, however: the government is entitled to acquire an interest in any enterprise to be formed for the exploitation of such rights.

---

<sup>36</sup> See summaries of relevant tax laws and regulations at <http://www.lac.org.na/namlex/Incomtax.pdf> and <http://www.lac.org.na/namlex/Revenue.pdf>.

<sup>37</sup> See PwC Namibia, *supra* note 10, p. 15-17.

Sections 4 to 7 of the FIA deal with the concept of “status investments.” The Minister of Trade and Industry may, under certain circumstances, issue a CSI to a foreign investor in respect of particular investments in Namibia. The criteria for the issuance of such a certificate are as follows: (i) significance of the size of the proposed investment; (ii) involvement of the foreign national in the management of the local company or joint venture; (iii) the extent to which the proposed investment is likely to contribute towards Namibia’s development objectives, as well as towards the utilization of Namibian resources, including labor and natural resources, increased employment opportunities, providing for the training of Namibians, earning or saving of foreign exchange, generating development in the less developed areas in Namibia, the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws and practices. Holders of a CSI are allowed to buy convertible foreign currency freely to meet foreign financial obligations arising from the investment. In addition, the FIA provides assurance that holders of these certificates will have preferential access to convertible foreign currency for the repatriation, without any restriction, of any the following: (i) profits of a Namibian branch of a foreign company; (ii) dividends, after deduction of nonresidents’ shareholders tax; (iii) profits on the sale of the business or any part thereof to a person ordinarily resident in Namibia; (iv) any reduction in share capital. The local banking institutions acting as agents for the Bank of Namibia would, however, still require documentation to assist with the repatriation of funds denominated in foreign currency.

## 2. Exchange Control Implications<sup>38</sup>

Exchange control in Namibia is administered by the central bank, namely Bank of Namibia, through authorized dealers, the latter being the commercial banks in the country. Control applies at present to all Namibian residents as well as to foreign-owned business undertakings operating in Namibia. Exchange control regulations prescribe procedures that must be followed for making payments for imports, freight and other services, interest on foreign loans, dividend transfers, etc. The payments are unrestricted on presentation of the prescribed supporting documentation to an authorized dealer in foreign exchange.

Different exchange control rulings apply to the transactions of residents of the Common Monetary Area (CMA), and other non-residents. The CMA is comprised of the Republic of South Africa, Lesotho, Namibia and Swaziland. There are no trade and exchange restrictions between the members of the CMA, and the members form a single exchange control territory. Lesotho, Namibia and Swaziland have their own exchange control authorities as well as their own acts or regulations and rulings, but in terms of the CMA Agreement, the application of these authorities and rules must be at least as strict as that of South Africa. Accordingly, investments and transfers of funds from South Africa to other CMA countries do not require the approval of exchange control, but may require the approval of the host country. Settlements by residents of Namibia with the non-resident area may be made to and from a non-resident account and in any foreign currency.

The maximum allowable foreign investment by private Namibian residents is N\$4 million, while Namibian resident companies may invest N\$750 million offshore. An application to invest offshore should be accompanied by a certificate of good standing from the Receiver of Revenue. These amounts may be changed by regulation from the Bank of Namibia and prospective investors are advised to confirm the thresholds with a Namibian forex agent.

Direct investment in Namibia by a foreign investor, including the establishment of new subsidiaries and branches, the acquisition of controlling or noncontrolling interests in existing Namibian

---

<sup>38</sup> See PwC Namibia, *supra* note 10, p. 18-22.

companies, and the increase of capital funds of existing local subsidiaries and associates, may be provided by way of equity or loan capital, or a combination of the two. Exchange control permission is not required for the inward transfer of equity capital, but permission is required for loan funds. It is advised that all foreign investments are registered with the Bank of Namibia (BON). In respect of the repatriation of investment money, the BON requires a formal application to be submitted through an authorized dealer. An authorized dealer has advised that the BON may prescribe a minimum investment period before capital invested may be repatriated.

In general, distributions of profit, including dividends from foreign investment, can be made freely and without prior approval, except by concerns owned 75 percent or more by non-residents who have availed themselves of local borrowing facilities. In these cases, prior approval must be obtained before remittance. Evidence that the distributions have accrued as a result of trading or from income on investments must be produced. This would normally take the form of an auditor's certificate. Other documentation that may be required to be submitted to the agent or Bank of Namibia are (i) good standing certificate from Inland Revenue and (ii) the company resolution approving the declaration of dividends. It is further advised that share certificates are stamped as "Non-resident shareholders". This may be required for dividends to be repatriated subsequently. Withholding taxes on dividends (normally 10 percent, but reduced for some countries under the various double taxation agreements), and royalties (30 percent of the current corporate tax rate, i.e., 9.9 percent, but also reduced for some countries) must be deducted before remittances are made.

The acceptance by a local company of loans from non-resident shareholders is subject to approval from Exchange Control at the Bank of Namibia prior to the funds being introduced into Namibia. In terms of such an approval, the Bank of Namibia will require notification on drawdown of amounts (amortization schedule) in terms of the facility and an appropriate interest rate. Such debt funding from abroad is subject to a ratio of 3:1 (i.e. 75 percent to 25 percent) being adhered to in respect of the proportion of loan funds to share capital. Concessions to allow debt funding beyond the 75 percent threshold can be obtained from Bank of Namibia in very special circumstances only. Guideline interest rates are not publicly available and can be obtained from forex desks of commercial banks on a case by case basis. General practice by the BON has indicated that foreign denominated loans may bear interest at LIBOR + 2 percent. The BON further stipulates that interest rates should not exceed the prime lending rate + 3 percent. Where a loan agreement is amended, the amendment should be submitted to the BON for approval. As a BON general rule, capital repayment on loans can only take place after a period of six months, whereas interest on the loans can be immediately repatriated.

Namibia provides a favorable regime for foreign investors. There is no capital gains tax (other than the sale of mining licenses or right to mine minerals and the shares in a company holding such a license/right) or marketable securities tax. The only special tax on foreign nationals is the non-resident shareholders' tax at between 10 percent and 20 percent of dividends remitted (depending on shareholding), mitigated by double tax treaties with certain countries. There are also no general restrictions on foreign ownership of shares in Namibian listed companies, and all shares are freely tradable. Foreign exchange regulations are almost identical to those of South Africa, as both countries are members of the CMA and the Namibia Dollar is linked at par with the South African Rand. Investors must apply through an authorized dealer to ensure free remittance of dividends and proceeds of sales.

Royalties, technical, management and similar fees are also transferable, although prior approval of the terms of the underlying agreements must be obtained. Applications for the foreign exchange required must normally be supported by an auditor's certificate and possibly a good standing certificate from Inland Revenue. Normal selling commissions to independent agents abroad who have assisted in the export of goods are remittable. Directors' fees are also permitted to be remitted to each non-resident director upon prior approval. Withholding tax on directors fees must be paid before remittance is affected.

Other documentation that may be required to be submitted to the agent or Bank of Namibia are: (i) good standing certificate from Inland Revenue, (ii) auditor's certificate; and (iii) the company resolution approving the payment of directors' fees.

The local sale or redemption proceeds on non-resident owned assets in Namibia may be regarded as freely remittable, or be used freely by non-residents for investment purposes within the CMA.

There are various restrictions on local financial assistance relating to the degree of non-resident participation in an enterprise. These restrictions are calculated in accordance with a formula that takes into account the percentage of foreign participation in the equity. Where 75 percent or more of a Namibian company's capital or earnings is controlled directly or indirectly by non-residents, such a company may borrow locally up to an agreed percentage of its total effective capital. Effective capital consists of share capital, reserves and loans from shareholders as specifically approved by Exchange Control. Unrealized profits on revaluations of assets are not recognized as reserves for this purpose. That portion of inter-company current accounts for imports, which may be regarded as permanent in character may, however, be accepted as forming part of the shareholders' loans. The normal local financial assistance allowed is determined in accordance with guidelines that are available from foreign exchange agents (Namibian commercial banks). The definition of local financial assistance embraces bank and other credit facilities including mortgage finance, hire purchase, factoring and financial leasing arrangements. Financial assistance does not include the granting of credit by a seller to a purchaser of equipment of a productive nature. Sometimes temporary excess financial assistance is condoned, such as in situations where there is local expansion or modernization or where trading losses must be made good. In such circumstances the remittance of dividends or other withdrawals by non-residents would be restricted.

## ii. Political Contribution Laws<sup>39</sup>

Namibian political parties represented in the National Assembly receive funds from the state on an annual basis, in proportion to the votes they garnered in the previous legislative election. Public funding of parties is restricted to 0.2 percent of the state budget of the previous year. There are no legal obligations on parties to submit audited accounts for funds received. Several commentators have observed that political parties are heavily dependent on state funding to finance their operations.

There are few restrictions on private funding of political parties. The Electoral Act (1992, 46) requires disclosure of all foreign funds received "unless such money is disclosed to the public within such period after having received it and in such a manner and subject to such conditions as may be prescribed"; violation of this clause carries a penalty of N\$12 000 or imprisonment up to three years or both (Electoral Act 1992, 98). The law, however, does not in fact prescribe the conditions for disclosure. The Democratic Turnhalle Alliance, SWAPO Party Namibia, the Congress of Democrats, and the Republican Party have all disclosed that they have received funds from abroad. Four parties of the nine competing in the 2004 election admitted to receiving foreign funding.

Other than this there is no other regulation of party funding. Boer (2004, 7) summed up the situation as follows:

There are no laws at all about how much a private individual, company or organization can donate to a political party. Donors do not have to disclose contributions nor are there tax benefits for supporting political parties. There are no ceilings on contributions and no limits to how much money

---

<sup>39</sup> Electoral Institute for Sustainable Democracy in Africa, Namibia: Party funding, available at <http://www.content.eisa.org.za/old-page/namibia-party-funding>.

parties can raise. There are no bans on donations from foreigners, companies, government contractors, trade unions or anonymous donations.

b. Case Law

We were unable to find significant case law on this topic.

B. Not-For Profit Organizations

a. Laws

i. Foreign Investment/Foreign Funding Laws

See rules above for for-profit organizations. Additional information specific to non-profit organizations was not readily available.

ii. Political Contribution Laws

See rules above for for-profit organizations.

b. Case Law

We were unable to find significant case law on this topic.

C. Analytical Comparison

There appears to be no difference between for-profit and not-for-profit organizations in the rules regarding financial transactions.

**V. Auditing/Reporting Requirements**

A. For-Profit Organizations

a. Laws<sup>40</sup>

1. Companies

The Companies Act requires that every company keep, in English, accounting records that fairly present the state of affairs and business of the company as at the end of the financial year concerned and the profit or loss of the company for that financial year and reflect its transactions and financial position in accordance with the requirements of the Act and with generally accepted accounting practice in Namibia. It is the duty of the directors of the company to prepare annual financial statements and to present the statements at an annual general meeting for approval by the shareholders. A full statutory audit is required for each financial period (the financial year end is elected by the shareholders). The Companies Act requires the appointment of an external auditor registered with the Public Accountants and Auditors Board of Namibia to audit the financial statements of a company.

The Institute of Chartered Accountants of Namibia (ICAN) is a member of the International Federation of Accountants (IFAC) and has a reciprocity agreement with the South African Institute of

---

<sup>40</sup> See PwC Namibia, *supra* note 10, p. 57-60; 67-71.

Chartered Accountants (SAICA). The Institute of Chartered Accountants of Namibia (ICAN) adopted all International Financial Reporting Standards (IFRS) as Namibian Statements of Generally Accepted Accounting Practice (GAAP). Audits in Namibia are performed in terms of International Standards on Auditing and financial statements for companies are prepared in terms of International Financial Reporting Standards (IFRS). International Standards on Auditing are also applied to the auditing of other information and to related services.

Companies incorporated in Namibia must also have a registered office, and must maintain certain statutory and accounting records. The statutory records, which include registers of share allotments and transfers, members and directors and officers, must be maintained in Namibia. If the accounting records are maintained outside Namibia, the company must receive such financial information and returns as will enable the statutory financial statements to be prepared and audited locally.

It is not necessary for directors or shareholders to be resident in Namibia, although many overseas holding companies appoint local directors to their local subsidiaries. Nominee shareholders are also permitted without disclosure of the identity of the beneficial ownership.

It is necessary to obtain approval from the Registrar of Companies for the name of the company before incorporation. Each company must pay an annual duty calculated with reference to its total issued share capital (including share premium).

Companies in Namibia must also file income tax returns within seven months after the financial year end, with provisional tax returns due once within six months from commencement of the tax year (on or before August 31) and once on or before the last day of the company's financial year end.. Employers must also submit PAYE returns within 20 days following the month during which the PAYE is required to be withheld, with an annual PAYE reconciliation to be submitted within 30 days from the tax year end (i.e., March 30). Withholding tax returns are also due within a prescribed number of days following the month in which applicable payments are received.<sup>41</sup>

## 2. Branch of a Foreign Company

A foreign company that establishes a place of business in Namibia must appoint a local agent and a local auditor who must be a registered accountant and auditor. An external company must maintain certain statutory records at the company's registered address in Namibia, and such accounting records as are necessary to fairly present its state of affairs and business in Namibia. If the accounting records are kept outside Namibia, returns sufficient for the preparation and audit of the annual financial statements must be sent to Namibia.

A foreign company must present audited annual financial statements in respect of the business in Namibia, which must present fairly the financial position of a company and the results of its operations in accordance with the requirements of the Act and with generally accepted accounting practice in Namibia. A foreign company must also lodge with the Registrar a certified copy, with a certified translation if necessary, of its latest complete annual financial statements as prepared under the requirements of its country of incorporation.

Upon registration, notary-certified copies of the company's memorandum and articles of association should be lodged with the local Registrar of Companies.

---

<sup>41</sup> See PwC Namibia, *supra* note 10, p. 87-88.

Any subsequent changes to an external company's memorandum should be lodged under cover of the prescribed form with the Registrar within three months of such alteration.

External companies are also required to open and maintain a register of directors and secretaries. Furthermore, a minute book must be kept with minutes of all meetings of directors pertaining to the local business of the company.

Considerations for determining whether businesses operated in Namibia should be conducted through a branch or through a subsidiary are as follows:

- A branch may remit its after tax profit without deduction of withholding tax but when the foreign branch declares dividends, withholding tax will be payable on those dividends declared in relation to profits in Namibia. Dividends from a subsidiary are subject to such tax (rates may be reduced under a relevant double taxation agreement).
- A private company subsidiary does not have to file its annual financial statements, or those of its parent company, with the Registrar of Companies.
- If there are to be dealings on a large scale with the Namibian government, a local subsidiary may be viewed more favorably.
- Annual duty of a subsidiary is calculated with reference to the share capital of the subsidiary. In the case of a local branch of a foreign company, annual duty is determined by the amount of the share capital of the foreign company, which is often very high.
- Administrative and similar charges from the foreign head office to a Namibian branch are generally not deductible under Namibian tax law.
- The liability of a subsidiary is theoretically limited to its share capital and reserves, and these should be less than those of the foreign company. In practice, this advantage may be negated by the need for the overseas parent to support its subsidiary through subordinations of loans and through guarantees.

### 3. Close Corporations

There is no statutory audit requirement, but an accounting officer must be appointed, who has certain duties to fulfil under the Act and annual tax returns are required. A close corporation cannot become the subsidiary of a company or another close corporation as only natural persons may hold members' interests in close corporations.

The Close Corporations Act requires that the financial statements of a corporation must fairly present its state of affairs and results of operations in accordance with generally accepted accounting practice. Unlike the Companies Act, the Close Corporations Act does not lay down detailed reporting requirements.

### 4. Partnerships and Sole Traders

There are no specific registration requirements for partnerships and sole traders. However, joint venture arrangements are frequently made between companies in partnership. In this case, each company would be governed by the legal requirements affecting companies operating in Namibia.

There are no statutory reporting requirements, except that for tax purposes each must produce financial statements in sufficient detail to accompany the annual return of income to the Receiver of Revenue to enable tax assessments to be made. Statutory audits are not required, and these types of entities are not required to publicly disclose their affairs. A partnership agreement may, however, stipulate that the books of the partnership should be audited.



## 5. Business Trusts

There are no statutory reporting requirements for trusts (unless specifically required in the trust deed), except that for tax purposes each must produce financial statements in sufficient detail to accompany the annual return of income to the Receiver of Revenue to enable tax assessments to be made. Statutory audits are not required (unless specifically required in the trust deed), and these types of entities are not required to publicly disclose their affairs.

### b. Case Law

We were unable to find significant case law on this topic.

## B. Not-For Profit Organizations

### a. Laws

See above with respect to for-profit companies; the same reporting obligations apply to non-profit companies under the Companies Act.

In addition, entities that register as welfare organizations must provide a report to the Ministry of Health every year to maintain their status. Such entities must also prepare financial statements every year and have them checked by an independent financial auditor.<sup>42</sup> Additional information on the reporting requirements for welfare organizations was difficult to find.<sup>43</sup>

### b. Case Law

We were unable to find significant case law on this topic.

## C. Analytical Comparison

See B above.

## VI. Penalties for Non-Compliance

### A. For-Profit Organizations

#### a. Laws<sup>44</sup>

The Companies Act contains various fines and potential criminal penalties for failure to comply with administrative requirements. For example, a company which fails to comply with certain administrative requirements under Chapter 7 of the Act, and/or certain persons who are responsible for or knowingly a party to the contravention, commits an offense and is liable to a fine. Fines vary for different offenses, with some fines continuing to accrue for each day the contravention continues.

Criminal penalties apply in connection with the sale of shares to the public, certain other financial transactions and certain self-dealing transactions involving directors and managers, but do not generally

---

<sup>42</sup> See the MHSS website <http://www.mhss.gov.na/national-directorates/Developmental-Social-Welfare-Service/50/>.

<sup>43</sup> See Legal Assistance Centre, *supra* note 8.

<sup>44</sup> See Companies Act, available at <http://www.osall.org.za/docs/2011/03/Namibia-Companies-Act-28-of-2004-as-amended.pdf>.

apply for most administrative requirements. However, there are certain exceptions to this, particularly with respect to accounting and disclosure requirements. For example, Section 292 of the Act provides that any company which fails to keep proper accounting records as required by this section and every director or officer who is a party to that failure or who fails to take all reasonable steps to secure compliance by the company with this section, commits an offence and is liable to a fine which does not exceed N\$8000 or to be imprisoned for a period which does not exceed two years or to both the fine and imprisonment. Similarly, Section 294 of the Act provides that any director or officer of a company who fails to take all reasonable steps to comply or to secure compliance with this section, which deals with preparing annual financial statements and laying them out before the annual meeting, or with any other requirements of this Act as to matters to be stated in annual financial statements, commits an offence and is liable to a fine which does not exceed N\$2000 or to be imprisoned for a period which does not exceed six months or to both the fine and imprisonment. In any proceedings against any director or officer of a company in respect of the foregoing sections, it is a defense to prove that the accused had reasonable grounds for believing and did believe that a competent and reliable person was charged with the duty of seeing that this section was complied with and was in a position to discharge that duty and that the accused had no reason to believe that that person had failed in any way to discharge that duty.

There are a number of disclosure-related penalties in the Act which carry both fines criminal penalties, and these penalties are generally not subject to the aforementioned defense. For example, Section 295 of the Act provides that, if any financial statements or circulars of a company which are incomplete in any material particular or otherwise do not comply with the requirements of this Act, are issued, circulated or published, the company and every director or officer who is a party to that issue, circulation or publication, commits an offense and is liable to a fine which does not exceed N\$1 000 or to be imprisoned for a period which does not exceed three months or to both the fine and imprisonment.

b. Case Law

We were unable to find significant case law on this topic.

B. Not-For Profit Organizations

a. Laws

As discussed above, civic organizations are subject to varying levels of regulation, depending on their type and whether they are registered as welfare organizations. Section 21 companies are subject to the same registration and reporting requirements, and the same penalties, described above with respect to for-profit companies. Certain other civic organizations, such as voluntary associations, are subject to little regulation and thus have few repercussions for noncompliance.

b. Case Law

We were unable to find significant case law on this topic.

C. Analytical comparison

See B above.

**OVERVIEW CHART**

<b>Issue</b>	<b>For-Profit Organizations</b>	<b>Not-For Profit Organizations</b>	<b>Similarities</b>
--------------	---------------------------------	-------------------------------------	---------------------

Registration Procedures		<p>Section 21 companies have similar requirements to for-profit companies.</p> <p>Voluntary associations have few requirements for formation and are not required to be registered.</p> <p>Civic organizations have additional registration procedures in order to become a registered welfare organization.</p>	
Tax Laws	Subject to taxation, but tax and duty incentives apply, if organization meets applicable requirements.	Exempt from most taxes and certain duties, if requirements of relevant legislation are met.	
Financial Transaction Laws			Similar from a legal entity perspective.
Auditing/Reporting Requirements		<p>Depends on type of civic organization, as some are subject to little or no regulation.</p> <p>Additional requirements relating to maintenance of status as a registered charitable organization.</p>	
Penalties	Civil and criminal penalties apply for non-compliance, depending on the type of entity.	<p>Depends on type of civic organization, as some are subject to little or no regulation that would result in penalties for non-compliance.</p> <p>Civic organizations registered as welfare organizations have the additional penalty of loss of such registered status.</p>	