



**Namibia IPP and Investment  
Market Framework Technical Assistance**  
USTDA Grant Number: GH051130313

**Volume II: Annex 5  
LEGAL ENVIRONMENT FOR IPPs IN NAMIBIA**



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**December 2006**



This report was funded by the U.S. Trade and Development Agency (USTDA), an agency of the U.S. Government. The opinions, findings, conclusions, or recommendations expressed in this document are those of the author(s) and do not necessarily represent the official position or policies of USTDA. USTDA makes no representation about, nor does it accept responsibility for, the accuracy or completeness of the information contained in this report.

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## **1. INTRODUCTION**

- 1.1 This is a succinct and preliminary overview of the legal environment having a possible bearing on the facilitation of investment by IPPs and/or Independent Transmission Companies in Namibia.
- 1.2 From the outset it should be noted that this document does not purport to be exhaustive in its ambit and content. Further legal analysis is undoubtedly necessary depending on the more precise and distilled options offered to achieve the above objective.

## **2. ELECTRICITY ACT, 2000**

2.1 The electricity industry in Namibia is principally regulated through the provisions of the Electricity Act, 2000 (Act 2 of 2000) (“the Act”). The Act came into force on 12 July 2000.

### **The ECB**

2.2 The Act establishes the Electricity Control Board (“ECB”) as a juristic person. The ECB’s objects are stated in subsection 3(1) as follows:

***The objects of the Board are to exercise control over the electricity supply industry and to regulate the generation, transmission, distribution, use, import and export of electricity in accordance with prevailing Government policy so as to ensure order in the efficient supply of electricity.***

2.3 In order to achieve these objects, the ECB is required *inter alia* to make recommendations to the Minister of Mines and Energy (“the Minister”) with regard to the issue, transfer, amendment, renewal and cancellation of licences, and the approval of the conditions on which a licensee may supply electricity.

2.4 The ECB’s role also includes advising the Minister on any matter relating to the electricity supply industry.

2.5 It is apparent that the ECB, in discharging its objects, must be guided by the prevailing Government policy. Generally, Government policy can fluctuate, and any such fluctuation will have a bearing on the manner in which the ECB discharges its objects.

2.6 The ECB itself is comprised on five members, appointed by the Minister, and who have appropriate expertise and experience in certain designated fields, including the electricity industry, law, economics and environmental issues. Only Namibian citizens are eligible for appointment to the ECB.

2.7 The ECB appoints its Chief Executive Officer (“the CEO”), who is to hold office for a period not exceeding 5 (five) years. The CEO is, however, eligible for reappointment. The CEO is responsible for the carrying out of the resolutions of the ECB and manages the affairs of the ECB subject to its control and direction.

2.8 The ECB is funded through a number of sources, including money appropriated by Parliament; fees payable to the ECB in terms of the Act and money collected in respect of levies imposed under section 13 of the Act.

### **Types of Licences**

2.9 The Act prohibits any person from establishing or carrying on any undertaking for the generation, transmission, supply, distribution, importation or export of electricity unless such person holds a licence issued in terms of the Act authorising that particular activity. A separate licence is required for each of mentioned activities.

2.10 A licence is not required for the generation of electricity by means of a generation plant which has an installed capacity of less than 500 KVA and which is used for the supply of

electricity exclusively for own use by the person in control of the plant and on the premises owner or occupied by that person.

- 2.11 Licence applications are submitted to the ECB and must be publicly advertised in the prescribed manner. Any objections are forwarded to the ECB.
- 2.12 The Act prescribes how the ECB is to deal with applications and any objections thereto. Ultimately, the ECB submits the application along with any objections to the Minister. This is also accompanied by the ECB's recommendations as to the application as well as any conditions to be attached thereto.
- 2.13 The granting of the licence lies within the Minister's discretion. The Act however requires that the ECB, in making its recommendation, and the Minister, in exercising his discretion:

***must give due consideration to matters or activities which may adversely affect, or result in damage to, the environment or the rights of others, weighed against the advantages in general that may be derived from the grant of the application.***

- 2.14 It is for the above reason that the ECB is empowered to request an environmental impact assessment study ("EIAS") from an applicant indicating the extent of any potential damage or pollution of the environment and steps proposed to address same in that eventuality.
- 2.15 Over and above the EIAS, the ECB may request the applicant to submit details of the technical and economic-financial resources available to the applicant to execute the work, and generally to operate the business to which the application relates.
- 2.16 The Act also permits the ECB to take into consideration *inter alia* the extent to which the activities of the applicant will or may be detrimental to or adversely affect the rights and operation of other licensees or their customers in the area of operation.
- 2.17 The Minister's decision whether or not to grant the application is, naturally, subject to article 18 of the Namibian Constitution, which provides as follows:

***Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.***

- 2.18 A licence, once granted, remains valid for such period (not exceeding 50 years) as may be determined by the Minister. The licence may, however, be cancelled sooner under section 30 of the Act.
- 2.19 Interestingly, a licensee may, with the approval of the Cabinet of the Republic of Namibia ("Cabinet"), and subject to conditions Cabinet may impose, by expropriation acquire any land or any right in, over or in respect of land as the licensee may require, in the public interest, for any purpose associated with the generation, transmission, distribution or supply of electricity by the licensee. Naturally, such powers must be exercised with due regard to article 16 of the Namibian Constitution, which *inter alia* requires the payment of just compensation.

## **Regulations**

2.20 Section 39 of the Act empowers the Minister to make regulations in relation to a host of matters, including the duties and obligations of licensees; the frequency, type of current and voltage of electricity generated or supplied; and any matter which in terms of the Act is required or permitted to be prescribed.

2.21 Model Supply and Administrative Regulations have been made.

### **3. ELECTRICITY BILL, 2006**

- 3.1 The Electricity Bill, 2006 (“the Bill”) is currently at an advanced stage of development. Predictions are that it will enjoy force of law before the end of this year.
- 3.2 The Bill will, if passed into law, repeal the Act in its entirety. The explanatory memorandum to the Bill describes its purpose thus:

***The proposed new Electricity Bill, 2006, is to replace the Electricity Act, 2000 (Act No. 2 of 2000 – “the Act”). A new Bill is required to enable the rectification of certain imbalances in, and the ongoing restructuring, of the electricity industry. Such rectification and restructuring cannot be effected successfully without certain instrumental changes to the Act. It further aims to facilitate the successful application of the law and the efficient regulation of the electricity industry. Finally, the Electricity Act of 2000 has now been in operation for 5 years and during this time various problems and inefficiencies with the application of certain provisions were identified as in need of amendment. In view of the extensive amendments necessary it was decided to replace the current Electricity Act, 2000, with a complete new bill.***

***In addition to these changes, other amendments of an essentially functional nature are included in the Bill. These other amendments aim at clarifying relations between the Minister of Mines and Energy, the Electricity Control Board (“the ECB”) and stakeholders and other role players in the electricity industry.***

- 3.3 Certain portions of the Act are retained in the Bill. There are, however, some notable changes. A comprehensive review of the changes falls beyond the scope of this document.
- 3.4 The Bill broadens the ECB’s objects to include:
- (a) exercising control over and regulating the provision, use and consumption of electricity in Namibia;
  - (b) overseeing the efficient functioning and development of the electricity industry and security of electricity provision and the electricity system;
  - (c) ensuring the efficient and effective provision of electricity;
  - (d) ensuring a competitive environment in the electricity industry in Namibia with such restrictions as may be necessary for the security of supply and other public interest; and
  - (e) promoting private sector investment in the electricity industry.
- 3.5 The above objects are also to be exercised in accordance with prevailing Government policy.

3.6 The Bill also introduces a new type of licence, the *trading licence*. The explanatory memorandum to the Bill comments as follows:-

***A new type of licence is added to the list of licences namely a trading licence (and the Bill distinguishes between a wholesale and retail trading licence). This definition is necessary (including the provisions on trading) to ensure a regulatory framework for a single licence (or more) trading market in the electricity sector.***

3.7 Another notable addition is the ECB's powers to make rules and codes, at it may deem necessary, in order to further its objects. The Bill specifically contemplates rules and codes pertaining *inter alia* to:

- (a) the establishment, operation and administration of electricity markets, and the licensees and other persons operating on such markets and any other matter relating thereto;
- (b) the introduction of market rules, the ECB's market responsibilities, prudential requirements, the establishment and regulation of spot markets, regions and regional reference nodes, network losses and constraints, projected assessment of system adequacy, central dispatch and spot market operation, spot price determination, ancillary services, reliability safety net, market information, administrative price cap and market suspension, settlements, participant compensation fund, software and settlement residue actions, registered bid and offer data, methods for determining loss factors and principles for determining credit limits; and
- (c) good corporate governance and rules relating to objectivity, transparency and independence.

3.8 Before the ECB publishes the aforementioned rules and codes (including also guidelines on the implementation thereof), it must consult with the affected role players in the electricity industry and must obtain the Minister's approval.

3.9 The Bill empowers the ECB to issue orders in writing requiring acts or things to be performance on done in terms of the rules and codes and may also prohibit acts of things from being performed.

3.10 Undoubtedly, the Bill empowers the ECB to be far more involved in the regulation of the electricity industry, allowing it greater powers to enforce adherence to rules and codes published by it. How these powers will be exercised in practice remains to be seen, moreover if regard is had to the mammoth task of overseeing and enforcing compliance. The possibility also exists that the industry may become over-regulated and stifled.

3.11 Part VI of the Bill deals with the Regional Electricity Distributors ("REDS"). The Act makes no mention of REDS and it is vital for their proper establishment and functioning that specific legislative provision be made. The Bill now caters for this.

3.12 The Bill introduces a range of further changes. A more detailed overview is, however, for the present purposes unnecessary. The Bill, along with the explanatory memorandum is, however, annexed hereto.



#### **4. THE STATE OWNED ENTERPRISES BILL, 2006**

- 4.1 The State Owner Enterprises Bill, 2006 (“SOE Bill”) is at an advanced stage of preparation. The purpose of the SOE Bill is apparently to make provision for the efficient governance of State-owned enterprises (“SOEs”) and the monitoring of their performance. It also caters for the restructuring of such enterprises. Oddly, the SOE Bill also encompasses certain regulatory bodies.
- 4.2 The ECB and the Namibia Power Corporation (Proprietary) Limited (“NAMPOWER”) presently fall within schedule 1 of the SOE Bill, and hence under its purview.
- 4.3 The SOE Bill aims to establish State-owned Enterprises Governance Council (“the Council”) as a special committee of Cabinet.
- 4.4 The Council is empowered *inter alia* to:
- (a) establish generally accepted common principles of corporate governance and good practice governing State-owned enterprises;
  - (b) develop common policy frameworks for the operations of State-owned enterprises, including policy on issues relating to human resources, assets and finance;
  - (c) determine criteria for the performance measurement and evaluation of State-owned enterprises, and develop appropriate means for monitoring their performance;
  - (d) lay down directives in relation to:
    - governance agreements to be entered into by a portfolio Minister with the board of a State-owned enterprise;
    - performance agreements to be entered into between a portfolio Minister and the individual members of a board of a State-owned enterprise and between such a board and its chief executive officer and other senior management staff;
    - remuneration levels of board members, chief executive officers and other senior management staff of State-owned enterprises; and
    - benefits for employees of State-owned enterprises generally.
  - (e) to make determinations in relation to the number of members to be appointed to the boards of State-owned enterprises and advise the portfolio Ministers on the appointment of such members.

- (f) furnish a portfolio Minister with any comments it may wish to make in relation to an annual budget of a State-owned enterprise submitted to that Minister for approval and provided to the Council for its information and comment;
  - (g) facilitate the provision of programmes for the training and development of members of the boards and management staff of State-owned enterprises on corporate governance and efficient management practices;
  - (h) receive and consider for approval submissions made by State-owned enterprises on the annual distribution of profits and the declaration of dividends;
  - (i) submit to Cabinet for decision any proposed restructuring plan prepared and approved by the Council under Part VI in relation to any State-owned enterprise identified by Cabinet for restructuring; and
  - (j) to perform any other function entrusted to the Council by or under this Act or any other law.
- 4.5 The Council may (and most likely will) establish committees to advise the Council in relation to matters submitted to it. It may also establish committees to exercise any of the powers or perform any of the duties of the Council that the Council delegates or assigns to it.
- 4.6 The Council is given rather wide powers in regards to determining the number of persons to serve on a board of directors of SOEs as well as the requisite qualifications, experience and skills. The Council will also determine the term of office of the respective boards.
- 4.7 The SOE Bill provides for the establishment of the Council’s secretariat (“the secretariat”), which is charged with certain functions, including reporting to Council as to recommendations on the number of board members to be appointed (if and when a vacancy arises) and recommendations as to the persons to be appointed into such vacancies.
- 4.8 The SOE Bill further requires that the SOE must, within 1 (one) month *of being constituted*, enter into a governance agreement with the applicable portfolio Minister in relation to:
- (a) the State’s expectations in respect of the State-owned enterprise’s scope of business, efficiency and financial performance, and achievement of objectives;
  - (b) the portfolio Minister’s obligations in relation to any function conferred or imposed by the establishing Act of the State-owned enterprise;
  - (c) the principles to be followed by the State-owned enterprise for business planning;
  - (d) the measures which are necessary to protect the financial soundness of the State-owned enterprise;
  - (e) key performance indicators in terms of which the State-owned enterprise’s performance will be evaluated;

- (f) the structure of the business and financial plan;
  - (g) the principles to be followed at the end of each financial year in respect of any surplus in the accounts of the State-owned enterprise; and
  - (h) any other matter relating to the performance of the State-owned enterprise's functions under any law.
- 4.9 Board members are also required to enter into *performance agreements* with the portfolio Minister. The agreements are to contain a number of provisions including one prohibiting a director who has retired or resigned from the SOE's board from making improper use of information acquired by virtue of his or her position as such a members to gain, directly or indirectly, an advantage for himself or herself or for any other person or to cause detriment to the SOE. Precisely what would constitute *improper use* is not defined.
- 4.10 Annually, every SOE must submit a business and financial plan to the portfolio Minister. The SOE may not, without the written permission of the portfolio Minister, deviate from the business and financial plan. The Council may comment on the business and financial plan, and may also comment on the SOE's budget. The SOE board must take any comments into account and consult with the portfolio Minister regarding same, *with a view to reaching agreement*. Any matter on which no agreement can be reached must be omitted from the budget.
- 4.11 The SOE must report any *significant affecting event* to the Council and the Council is empowered to demand the provision of certain information from the relevant Chief Executive Officer.
- 4.12 The Council may, by regulation, impose obligations in relation to any subsidiary of any SOE in relation to any matter with a view to achieving the efficient governance of the subsidiary and the monitoring of its performance.
- 4.13 The SOE Bill also provides for the conducting of a special investigation in relation to any matter concerning the business, trade, dealings, affairs, assets or liabilities of a SOE.
- 4.14 Part VI of the Bill deals with *restructuring of SOEs*. This process is consultative in nature, but ultimate discretion vests in Cabinet (as recommended by the Council). In approving or determining a proposed plan for restructuring, the Council is enjoined to give consideration to the inclusion of schemes on achieving empowerment objectives through increasing private sector participation, and in the particulars for the empowerment of persons who have been disadvantaged by past discriminatory laws and practices that were applied before Namibia's independence.
- 4.15 A SOE can be exempt from the provisions of the SOE Bill if it applies to Council and shows *good cause*. Schedule 1 of the SOE Bills lists those entities falling under the purview of the said Bill. SOEs may be added in the discretion of Council.
- 4.16 This review of the SOE Bill is far from exhaustive. However, it should already be apparent that once the Bill becomes law, will impact on the functioning of the ECB (unless exempt) and NAMPOWER. The SOE Bill introduces an extended bureaucracy and will probably result in delayed decision making and protracted SOE financial and business planning.

- 4.17 There is already reluctance by Ministers dealing with SOEs to take firm decisions on matters presented to them in view of the imminence of the passing of the SOE Bill (and which matters will fall within the ambit of the Council once established). This is regrettable and results in unnecessary delays in decision making. It may, in any event, be quite some time before the Council and its secretariat is properly established and functioning.
- 4.18 The SOE Bill reflects Cabinet's desire to exercise greater control over the management and operations of SOEs. Members of Cabinet are required, in terms of the Namibian Constitution, to *direct, co-ordinate and supervise para-statal enterprises, and to review and advise the President and the National Assembly on the desirability and wisdom of any prevailing subordinate legislation, regulations or orders pertaining to such para-statal enterprises, regarding being had to the public interest.*

## **5. FOREIGN INVESTMENT ACT, 1990**

5.1 The Foreign Investment Act, 1990 (Act 27 of 1990) (“the FI Act”) provides for the promotion of foreign investment in Namibia. Subject to the applicable provisions of the FI Act, and compliance with any formalities or requirements prescribed by law in relation to the relevant business activity, a foreign national may invest and engage in any business activity in Namibia which any Namibian may undertake.

5.2 The FI Act includes a number of provisions that cater for foreign investors and provides, *inter alia* that:

***no foreign national engaged in a business activity or intending to commence a business activity in Namibia shall be required to provide for the participation of the Government or any Namibian as shareholder or as partner in such business, or for the transfer of such business to the Government or any Namibian: Provided that it may be a condition of any licence or other authorisation to or any agreement with a foreign national for the grant of rights over natural resources that the Government shall be entitled to or may acquire an interest in any enterprise to be formed for the exploitation of such rights.***

5.3 The FI Act also provides for the issuing of a Certificate of Status Investment in the investment of foreign assets in Namibia is an ‘*eligible investment*’ as defined in section 5 of the FI Act. In considering whether or not to issue such a certificate, the Minister of Trade and Industry shall have special regard *inter alia* to the extent to which the proposed investment is likely to contribute towards Namibia’s developmental objectives.

5.4 The certificate opens certain avenues in respect of amongst other things the availability of foreign currency for certain payments, as well as the expatriation of profits.

5.5 Section 11 of the Act deals with expropriation, and provides that:

***(1) No enterprise, or part of an undertaking carried on in case of by an enterprise, or interest in or right over any property expropriation forming part of such undertaking shall be expropriated except in accordance with the provisions of Article 16 (2) of the Namibian Constitution.***

***(2) Where an enterprise or any part of an undertaking carried on by an enterprise, or any interest in or right over any property forming part of such undertaking is expropriated, the Government shall pay to the holder of the Certificate just compensation for such expropriation without undue delay and in freely convertible currency.***

## **6. COMPETITION ACT, 2003**

6.1 The Competition Act, 2003 (Act 2 of 2003) (“the Competition Act”) aims to safeguard and promote competition in the Namibian market and establishes the Namibian Competition Commission.

6.2 Once again, an exhaustive overview of the Competition Act falls beyond the scope of this document.

6.3 Chapter 3 (three) of the Competition Act deals with restrictive business practices. Section 23 provides *inter alia* that:

***(1) Agreements between undertakings, decisions by associations of undertakings or concerted practices by undertakings which have as their object or effect the prevention or substantial lessening of competition in trade in any goods or services in Namibia, or a part of Namibia, are prohibited, unless they are exempt in accordance with the provisions of Part III of this Chapter.***

***(2) Agreements and concerted practices contemplated in subsection (1), include agreements concluded between -***

***(a) parties in a horizontal relationship, being undertakings trading in competition; or***

***(b) parties in a vertical relationship, being an undertaking and its suppliers or customers or both.***

6.4 Section 23 is also of particular application to any agreement, decision or concerted practice that directly or indirectly fixes purchase or selling prices or any other trading conditions and/or which divides markets by allocating customers, suppliers, areas or specific types of goods or services.

6.5 The Competition Act includes a broad range of further restrictions.

6.6 Careful consideration should be given to the possible application of the provisions of the Competition Act, particularly if regard is had to the proposed *single buyer market framework* and the form and content of any *power-purchase agreement* that may be entered into.