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TO AMEND, REPEAL OR ENACT:

ANALYSING THE LEGISLATION THAT REGULATE ANTI-ILLICIT FINANCIAL FLOWS IN NAMIBIA'S NATURAL RESOURCES SECTOR

by

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This dissertation is dedicated to Suzanna “Ouma Meise Kaapnaar” Cloete. Your strength and tenacity have shaped my whole being. Thank you for raising me, for loving me and for pushing me to pursue education above all else. You are my heart personified and I can only hope that I have brought you as much love and joy as you have brought me. I love you.

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DISCLAIMER: Everything contained in this dissertation reflect the author’s thoughts and ideas. None of the statements or ideas in this dissertation should be attributed to any person acknowledged or to whom this dissertation has been dedicated.

ABSTRACT

This dissertation is premised on the understanding that the legislation meant to curtail illicit financial flows (IFFs) in Namibia is poorly drafted and does not adequately curtail IFFs in the country's natural resource sector resulting in low levels of domestic resource mobilization. IFFs refer to the illegal gain and/or movement of money between entities and persons.[1]

Namibia's natural resources span from its sustainable fishing sector to various nonrenewable mineral resources such as uranium, gold, diamonds, tin, copper, cadmium, lead, lithium, vanadium, salt, and zinc.[2] The country is resource-rich and politically stable. However, despite this its industrialization is stagnant and its development is rudimentary with about a third of its population living in extremely poor socio-economic conditions.

Over the past decade, it has become increasingly evident that Namibia's efforts to curb IFFs have not yielded the desired results. In this regard, Namibia's anti-illicit financial flow laws do not adequately prevent IFFs within the natural resources sector. To paint the full picture of Namibia's anti-IFF legal framework, this dissertation engages in the monism versus dualism debate to ascertain Namibia's position concerning international law within its territory. Evaluating Namibia's international law position and the treaties that apply in Namibia allows this dissertation to ascertain whether the country can use international law to better equip its law enforcement, regulators, and courts with more effective rules for regulation and prosecution. Following this evaluation, this dissertation analyses Namibia's national laws aimed at curbing IFFs in its natural resource sector. From this analysis, this dissertation draws its conclusion that, although there are a few gaps within these laws, the identified shortcomings are material in that their absence greatly undermines the aims and functions of the legislation and their enforcement bodies. Finally, this dissertation proffers recommendations to cure the mischief identified.

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[1] See definition for IFFs from the Global Financial Integrity (GFI), the World Bank, Global Witness, the OECD, the U4 Anti-Corruption Resource Institute, and the International Monetary Fund ('IMF') all have similar definitions for IFFs.
[2] BDO Namibia 'Mining in Namibia' available at *https://www.bdo.com.na/en-gb/industries/natural-resources/mining-in-namibia* accessed on 19 February 2020.

TABLE OF CONTENTS

ACKNOWLEDGEMENTS ... iii
DEDICATION ... iv
ABSTRACT ... v
TABLE OF CONTENTS ... vi
1. CHAPTER ONE ... 8
1.1. Introduction ... 8
1.2. Background ... 9
1.3. Primary Objective of Study and Research Aims ... 14
1.4. Hypothesis ... 14
1.5. Significance of Study ... 14
1.6. Problem Statement and Research Questions ... 15
1.7. Theoretical Framework ... 17
1.8. Method and Methodology ... 18
1.9. Limitations of Study ... 19
1.10. Organization of Study ... 19
2. CHAPTER TWO ... 21
2.1. Introduction ... 21
2.2. Monism versus Dualism ... 21
2.2.1. Dualism ... 22
2.2.2. Monism ... 22
2.3. The Namibian Position ... 23
2.3.1. The Supreme Court ... 23
2.3.2. Article 144 of the Constitution ... 25
2.4. Relevant International Instruments ... 26
2.4.1. The Financial Action Task Force (FATF) Recommendations (the Recommendations) ... 26
2.4.2. The United Nations' (UN) Convention against Transnational Organized Crime of 2000 ... 27
2.4.3. The UN Convention against Corruption of 2003 ... 28
2.4.4. The African Union (AU) Convention on Preventing and Combating Corruption of 2003 ... 29
2.4.5. The Southern African Development Community's (SADC) Protocol against Corruption of 2001, as amended in 2016 ... 30
2.5. International Best Practices in Combating IFFs ... 31
2.5.1. Guidelines for Effective Law ... 31
2.5.2. Guidelines for Effective Administration ... 32
2.6. Namibia's Duty to Uphold International Anti-IFF Laws ... 34
2.7. Conclusion ... 36
3. CHAPTER THREE ... 39
3.1. Introduction ... 39
3.2. PART ONE: Namibia's Natural Resources Legislative Framework ... 39
3.2.1. The Minerals (Prospecting and Mining) Act (the Mining Act) ... 40
3.2.2. The Petroleum (Exploration and Production) Act ... 42
3.2.3. The Diamond Act ... 44
3.2.4. The Marine Resources Act ... 44
3.3. PART TWO: Namibia's Anti-IFF Legislative Framework ... 45
3.3.1. The Financial Intelligence Act (FIA) ... 45
3.3.2. The Income Tax Act (Tax Act) ... 52
3.3.3. The Exchange Control Regulations ... 53
3.3.4. The Banking Institutions Act (BIA) ... 55
3.3.5. The Anti-Corruption Act (ACA) ... 56
3.3.6. The Prevention of Organized Crime Act (POCA) ... 57
3.4. PART THREE: Conclusion ... 58
3.4.1. Namibia's Natural Resources Legislative Framework ... 58
3.4.2. Namibia's Anti-IFF Legislative Framework ... 60

3.4.3. Conclusion 61
4. CHAPTER FOUR 62
4.1. Introduction 62
4.2. Findings 62
4.2.1. Ineffective Application of the Law 62
4.2.2. Ineffective Administration 62
4.3. Recommendations 63
4.3.1. Namibia's Duty to Uphold International Anti-IFF Laws 63
4.3.2. Transparency 63
4.3.3. International Relations 64
4.3.4. Strengthening Authorities 64
4.3.5. Law Reform 65
4.4. Conclusion 69
5. BIBLIOGRAPHY 70
PRIMARY SOURCES 70
LEGISLATION 70
TREATIES AND CONVENTIONS 71
CASE LAW 71
SECONDARY SOURCES 72
PRINTED 72
ELECTRONIC 75

1. CHAPTER ONE

1.1. Introduction

This dissertation is premised on the understanding that the legislation meant to curtail illicit financial flows (IFFs) in Namibia is poorly drafted, and therefore does not effectively regulate these flows in Namibia's natural resources sector. There are several definitions attributed to the concept of IFFs by the world's most renowned institutions.[1] These institutions have shaped the frameworks and guidelines that are internationally recognized as best practices in the fight against IFFs.[2] One of the main reasons for these different definitional compositions is because it is not a legal but a political construct.[3]

The United Nations Development Programme (UNDP) defines IFFs as "cross-border transfers of the proceeds of tax evasion, corruption, trade in contraband goods, and criminal activities such as drug trafficking and counterfeiting".[4] On the other hand, the Organization of Economic Co-operation and Development (OECD)[5] distinguishes between in-country and cross-border IFFs by theorizing that an act can only be classified as cross-border IFFs when it 'contravenes national or international laws'.[6] The OECD's paper outlines the reasons why the funds are illicit;[7] the various ways employed to launder them, [8] which can include legal[9] or illegal techniques;[10] and the mechanisms used by governments to combat them.[11]

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[1] This refers specifically to institutions that conduct economic, legal, and political research; and those that make policy. These include the Thabo Mbeki report, the Organization of Economic Co-operation and Development (OECD), the United Nations Convention on Trade and Development, and the United Nations Economic Commission for Africa.

[2] It is important to bear in mind that the statistics used in this dissertation are 'conservative estimates' compiled from various international and national organizations that each operate under its own agenda.

[3] Hon. Irene Ovonji-Odida and Algresia Akwi-Ogojo 'Illicit Financial Flows: Conceptual and Practical Issues' (January 2019) No. 6 *Tax Cooperation Policy Brief* South Centre. This can also be seen by some attempts to include as IFFs tax avoidance, which can be legally allowed. The discussion about transfer pricing vs transfer mispricing provides one example.

[4] Helen Clark 'Illicit Finances Divert Resources Away from Development' (11 May 2011) *Fourth United Nations Conference on the Least Developed Countries Special event on Illicit Financial Flows: Perspectives on Issues and Options for LDCs* Istanbul available at *https://www.undp.org/content/undp/en/home/presscenter/speeches/2011/05/11/clark-illicit-finances-divert-resources-away-from-development.html* accessed on 16 February 2020.

[5] Ebba Dohlman and Tom Neylan 'Policy Coherence in Combating Illicit Financial Flows: PCSD Thematic Module DRAFT' *OECD* 4 available at *https://www.oecd.org/gov/pcsd/IFFs%20thematic%20module%20v12cl_for%20web.pdf* accessed on 16 February 2020.

[6] This wide category encompasses several different types of financial transfers, made for different of reasons. It can include funds with criminal origin; funds with a criminal destination; funds associated with tax evasion; transfers to, by, or for, entities subject to financial sanctions; and transfers which seek to evade anti-money laundering /counter-terrorist financing measures or other legal requirements, such as exchange controls.

[7] Their association with corruption and other proceeds generating crimes.

[8] OECD iLibrary (2014) has a simpler definition: "IFFs are generated by methods, practices and crimes aiming to transfer financial capital out of a country in contravention of national or international laws", available at https://www.oecd-ilibrary.org/what-do-illicit-financial-flows-mean-for-developing-countries_5jz5lb8dv1bw.pdf?itemId=%2Fcontent%2Fcomponent%2F9789264203501-4-en&mimeType=pdf accessed on 13 October 2019.

[9] The use of shell companies or companies in secrecy jurisdictions.

[10] For example, using false invoices.

This dissertation defines IFFs as the illegal gain and/or movement of money between entities and persons.[12] This movement can be in-country or cross-border.[13] However, this dissertation only focuses on cross-border flows. Furthermore, this dissertation focuses on Namibia's legislative framework for combating IFFs with a succinct theoretical study of the effectiveness of these laws in combating IFFs.

Finally, this dissertation focuses exclusively on whether Namibia's laws adequately curtail the proliferation of IFFs in the natural resources sector. In light of the above, this dissertation posits that the country's domestic legislative framework governing its natural resource sector[14] is lacking in ensuring that the sector is sustainable,[15] profitable for the state.[16] Additionally, that this legislative framework fails to contribute to the promotion and the development of Namibia.[17] This dissertation relies on the definition of 'natural resources' as defined by the African Convention of the Conservation of Nature and Natural Resources for natural resources.[18] Natural resources in this context include renewable and non-renewable resources.

1.2. <u>Background</u>

The World Bank and the United Nations classify Namibia as an upper-middle-income country.[19] However, the country's Gini coefficient index[20] is among the highest in the world; 0.597 in 2020.[21] This index is alarming given

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[11] Dohlman and Neylan op cit note 5.

[12] Global Financial Integrity (GFI), the World Bank, Global Witness, the OECD, the U4 Anti-Corruption Resource Institute and the International Monetary Fund ('IMF') all have similar definitions for IFFs.

[13] Ibid.

[14] Namely, minerals (including diamonds), petroleum and fisheries.

[15] IGF's 'Mining Policy Framework Assessment: Namibia' (September 2018). Also see Economic Association of Namibia 'How Can Namibia's Mining Sector Contribute to Sustainable Development' (2 March 2017) available at *https://www.ean.org.na/?p=2417* accessed on 20 March 2020. New Era 'The future of mining in Namibia' (10 May 2019) available at *https://neweralive.na/posts/the-future-of-mining-in-namibia* accessed on 20 March 2020. Also see Harmony Musiyarira, Ditend Tesh, Mallikarjun Pillalamarry and Nikowa Namate 'Interventions for Ensuring the Sustainability of the Small-Scale Mining Sector in Namibia' in eds. Z.X. Li, Z. Agioutantis and D.H. Zou *Proceedings of the 8th International Conference on Sustainable Development in the Minerals Industry* Camdemia (January 2017).

[16] Dr Jacek Guzek and Ramsay Mc Donald 'Who Benefits from Mining?' Deloitte Consulting South Africa and Deloitte & Touche Namibia available at *https://www2.deloitte.com/content/dam/Deloitte/na/Documents/energy-resources/na_Who_benefits_from_mining_Namibia.pdf* accessed on 21 March 2020. KPMG Global Mining Institute 'Namibia Country mining guide' KPMG International Strategy Series available at *https://assets.kpmg/content/dam/kpmg/pdf/2014/09/namibia-mining-guide.pdf* accessed on 21 March 2020. Charmaine Ngatjiheue 'Mining Royalties at N$1,3b in 2017/18' (April 2018) *Mining Journal* a publication of The Namibian 15-17.

[17] Mining Technology 'Namibia: Diamonds Aren't Forever' (22 November 2016) available at *https://www.mining-technology.com/features/featurenamibia-diamonds-arent-forever-5676320/* accessed on 21 March 2020. Namibia Economist 'Benefits of Mining Questioned' (27 April 2012) available at *https://economist.com.na/1476/special-focus/benefits-of-mining-questioned/* accessed on 21 March 2020. Willem Odendaal and Paul Hebinck 'Mining on communal land as a new frontier – a case study of the Kunene Region, Namibia' (16 October 2019) *Journal of Land Use Science* Informa UK Limited, Taylor & Francis Group. Walter Augusto Fernandes 'The Role of Mining in Economic Development in Namibia Post-2008 Global Economic Crisis' (2014) A research report submitted to the faculty of Engineering and the Built Environment, University of the Witwatersrand, Johannesburg, in fulfilment of the requirements for the degree of Master of Science in Engineering.

[18] The African Convention of the Conservation of Nature and Natural Resources of 1968 at Article V (1968) 3.

[19] The Financial Action Task Force 'Executive Summary Namibia - IBA Anti-Money Laundering' (2009) *Mutual Evaluation Report*. See The World Bank Website *https://www.worldbank.org/en/country/namibia/overview*.

[20] According to Investopedia "the Gini index or Gini coefficient is a statistical measure of distribution developed by the Italian statistician Corrado Gini in 1912. It is often used as a gauge of economic inequality, measuring income distribution or, less commonly, wealth distribution among a population". WorldPopulationReview.com explains that "The Gini coefficient ranges

that Namibia is one of the least densely populated countries in Sub-Saharan Africa[22] despite its relatively large geographical area.[23] Furthermore, the country hosts some of Africa's most diverse and well-endowed natural resource sectors.[24] These resources span from its sustainable fishing sector to various nonrenewable mineral resources such as uranium, gold, diamonds, tin, copper, cadmium, lead, lithium, vanadium, salt, and zinc.[25]

In addition to being resource affluent, Namibia's financial infrastructure is one of the most advanced in Africa.[26] The World Bank advances that Namibia's "banking sector is mature, profitable, and well-capitalized".[27] Despite this, a large percentage of Namibians are still excluded from the country's largely digitized financial systems.[28] Many Namibians are also financially illiterate.[29] Moreover, the country's middle-income status is questionable given its high Gini coefficient index.[30] This renders Namibia's income inequality to be one of the greatest in southern Africa and globally.[31]

These high rates of poverty beg the question; how can the country be considered middle income and why does it have such a "well developed" financial system? Especially since almost one-third of its population lives below the poverty line,[32] and about a third of its adult population is financially illiterate and cannot access the vast financial products available in the financial sector.[33] The simple answer to this is that the money circulating in the Namibian economy is mostly from foreign origin, i.e., from investments, money laundering, and bribes.[34]

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from 0 (0%) to 1 (100%), with 0 representing perfect equality and 1 representing perfect inequality. A higher Gini coefficient means greater inequality. If every resident of a nation had the same income, the Gini coefficient would be zero. If one resident earned all the income in a nation and the rest earned zero, the Gini coefficient would be 1".

[21] See the World Factbook on the United States of America Central Intelligence Agency website's Library Publications available at *https://www.cia.gov/library/publications/the-world-factbook/rankorder/2172rank.html* accessed on 04 April 2020.

[22] Worldometer's 'United Nations Data' (17 March 2020) available at https://www.worldometers.info/sources/ accessed on 31 January 2021. Namibia's population is 2,527,262.

[23] Ibid. "The total land area is 823,290 km^2 (317,874 sq. miles). The country's population density is 3 per km^2 (8 people per mi^2)".

[24] The Gaborone Declaration for Sustainability in Africa as discussed at the Summit for Sustainability in Africa.

[25] BDO Namibia 'Mining in Namibia' available at *https://www.bdo.com.na/en-gb/industries/natural-resources/mining-in-namibia* accessed on 19 February 2020.

[26] Stuart Yikona, Brigitte Slot, Michael Geller, Bjarne Hansen, Fatima el Kadiri 'Ill-gotten Money and the Economy: Experiences from Malawi and Namibia' (2011) *A World Bank Study 65176* at 54.

[27] Ibid.

[28] Ibid at 56.

[29] Ibid.

[30] Ibid. The Oxford Languages Google Dictionary explains that "an increase in the Gini coefficient suggests that income is becoming more unevenly distributed".

[31] Ibid.

[32] National Planning Commission *The Root Causes of Poverty* (2015) 4. 28.7% of the Namibian population is poor, 15% being extremely poor. Rural areas experience higher poverty rates at 37%, than urban areas at 15%. Additionally, women (32%) represent a bigger percentage in the overall numbers that men (26%) do.

[33] Namibia Statistics Agency *Namibia Financial Inclusion Survey* (2017) 12. In 2017 the NFI survey found that 78% of Namibian adults are financially included. Also see Financial Literacy Initiative et al. *Namibia Financial Capability Survey* (2017) 10. The country's financial capability score was 34.70% when measured on the World Bank Indicator, 45.22% when measured on the Houston Indicator, 49.38% when measured on the VISA Indicator, 52.94% when measured on the Namibia Indicator, and 60.13% when measured on the OECD Indicator in 2017. This dissertation makes its argument by relying on the indicator closest to the middle ground between the highest and lowest indicator, i.e., the Houston Indicator.

[34] Yikona *op cit* note 5 at 30.

Consequently, foreigners (primarily South Africans) predominately finance the country's financial system.[35] Suggesting that the bank accounts that make the banking system lucrative belong to foreigners.

The foreign presence in Namibia's financial system gives the impression that currency can move in and out of the country with minimal hassle. This cross border movement of money in Namibia creates the opportunity for illicitly earned money to enter the country; be laundered in the economy under the guise of foreign direct investment, and leave the country without any value added to the country's economic development.[36] Usually, these illicit funds are invested in the bigger sectors of the economy, where tracing is nearly impossible due to the amount of investment received in those sectors.[37] These sectors include the natural resources sectors and real estate.[38] The mining sector accounts for approximately 50% of foreign exchange inflows in Namibia.[39]

IFFs flow in and out of Namibia via (un)official non-bank financial institutions and banking institutions and are facilitated by influential locals, including lawyers, investment firms, and accountants.[40] For example, several lawyers and a high-ranking ex-employee of one of the biggest investment firms in Namibia, Investec, have been linked to the infamous Fishrot case.[41] The country's geographical and geopolitical location makes it ideal for

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[35] Ibid.

[36] Ibid. Also, see Ray Goba 'Money Laundering Control in Namibia' in Charles Goredema (ed.) (2003) No 9 *Profiling Money Laundering in Eastern and Southern Africa* 8 – 49.

[37] Ibid.

[38] Ibid.

[39] See Moody's Analytics 'Namibia - Economic Indicators' available at *https://www.economy.com/namibia/indicators* accessed on 29 January 2021. Also see Know Your Country 'Namibia' available at *https://www.knowyourcountry.com/namibia1111* accessed on 23 May 2020.

[40] Yikona op cit note 5 at 53. Also see Goba op cit note 14.

[41] This case is ongoing, but from court documents at the time that this dissertation was published these are the facts: Two Cabinet members, the Minister of Justice and the Minister of Fisheries, along with several other politically exposed persons, including relatives, acted in concert to allegedly receive brides from an Islandic Fishing Company, Samherji, launder those brides and conceal related illicit activities. The bail applications of this case have been finalized and can be found at *https://ejustice.jud.na/ejustice/f/caseinfo/publicsearch.* These cases are *Bernardt Martin Esau and 5 Others v Magistrate of Windhoek and 5 Others HC-MD-CIV-MOT-GEN-2019/00490* and *Bernard Martin Esau and Tomas T Hatuikulipi V the State* Hc-MD-CRI-APP-CAL-2020/00082. These activities were exposed by investigative journalists from Aljazeera. Further documentation provided by the Whistleblower in the case has since been published on WikiLeaks. However, as mentioned this is an ongoing case and as such new facts continue emerging as the case progresses. See Al Jazeera Investigations' 'Anatomy of a Bribe' (1 December 2019) on YouTube and see WikiLeaks website 'Fishrot Files' available at *https://wikileaks.org/fishrot/releases/* accessed on 18 March 2020. See Shinovene Immanuel, Lazarus Amukeshe and Werner Menges 'Fishrot firms paid N$93m to investment entities' *The Namibian* (22 July 2020) 1 available at *https://www.namibian.com.na/202840/archive-read/Fishrot-firms-paid-N$93m-to-investment-entities* accessed on 29 January 2021. Also see Will Neal 'Leaked Affidavit Implicates Namibian President in Fishrot Scandal' (19 January 2021) *Organized Crime and Corruption Reporting Project* available at *https://www.occrp.org/en/daily/13669-leaked-affidavit-implicates-namibian-president-in-fishrot-scandal* accessed on 29 January 2021. Also see Mathias Haufiku and Tileni Mongudhi 'Lawyer De Klerk in N$20 billion Fishrot deal' *The Namibian* (05 September 2020) 1 available at *https://www.namibian.com.na/200772/archive-read/Lawyer-De-Klerk-in-N$20-billion-Fishrot-deal* accessed on 29 January 2021. And see Sakeus Iikela and Timo Shihepo 'Fishrot: Namandje confirms Swapo payments' *The Namibian* (25 January 2021) 1 available at *https://www.namibian.com.na/98316/read/Fishrot-Namandje-confirms-Swapo-payments* accessed on 29 January 2021. Also see The Namibian 'Samherji's fishy business … Shifting profits out of Namibia' (21 July 2020) 1 available at *https://www.namibian.com.na/92960/read/Samherjis-fishy-business-%E2%80%A6-Shifting-profits-out-of-Namibia* accessed on 10 August 2020. See WikiLeaks 'Fishrot Files' available at *https://wikileaks.org/fishrot/database/docs/9fbe6bcf7ab0014436d45e1d4a159363_fishrot_email_doc* accessed on 10 August 2020. And see Margot Gibbs 'A Fishy Business: Shifting Profits out of Africa' *Organised Crime and Corruption*

money laundering.[42] It is bordered by two of Africa's giant economies, i.e. South Africa and Angola, and provides open-sea access through its harbours.[43] In addition to this, the country is faced with grave institutional challenges, such as underfunding and understaffing, which result in weak customs controls.[44]

Further, despite the country's upper-middle-income status, 15.5% of the country's population were living below the poverty line in 2018.[45] To increase the country's development rate and by extension, better people's living standards and socio-economic conditions, the government needs to have more funds available. Several avenues exist to acquire these funds, such as raising taxes, increasing exports, obtaining more loans, or securing more Overseas Development Aid (ODA), or trying to attract more Foreign Direct Investment (FDI).

However, statistics suggest that there is a direct correlation between the amount of debt African countries accumulate and the funds that these countries lose through IFFs. The more money that Africa loses, the more it needs to borrow to make up its budget deficit. This creates a vicious cycle of repayment, increased IFFs, and, consequently, increased borrowing. This results in a never-ending cycle wherein there are little to no funds available for poverty eradication and economic development projects. Consequently, none of the potential avenues for increased funds will be effective if the Namibian government does not plug in the leak of resources currently flowing from the country. Therefore, Namibia needs to curb IFFs as a matter of urgency.

IFFs are a leading cause of poor mobilization of domestic resources.[46] Reduction of IFFs will not only result in more domestic resources being available to feed into industrialization, socio-economic growth initiatives, and developmental plans but rooting out the activities that lead to IFFs will also uncover other sources of revenue. Mobilizing and being able to effectively employ domestic resources is crucial to achieving economic development, the achievement of the Millennium Development Goals, the Sustainable Development Goals, Africa's Vision 2063, and Namibia's own Vision 2030.

In 2012, the Global Financial Integrity's (GFI) IFFs estimates ranked Namibia's IFFs 56th out of 151 countries.[47] The GFI estimated that the country's IFFs were approximately N$17 million.[48] The Namibian government is

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Reporting Project (20 July 2020) available at *https://www.occrp.org/en/investigations/a-fishy-business-shifting-profits-out-of-africa* accessed on 10 August 2020.

[42] Ibid.

[43] Ibid.

[44] Christopher J. Savage, Logan Fransman and Andrew K. Jenkins 'Logistics in Namibia: Issues and Challenges' (2013) Vol. 7 No. 1 in Stephen Kruger (ed.) *Journal of Transport and Supply Chain Management* 6.

[45] See World Bank Website available *https://www.worldbank.org/en/country/namibia/overview* accessed on 09 March 2021.

[46] United Nations Conference on Trade and Development: Economic Development in Africa *Reclaiming Policy Space Domestic Resource Mobilization and Developmental States* (2007) 6.

[47] The Namibian 'Namibia Ranked 56th On Illicit Money Flows' (17 December 2014) AllAfrica Global Media available at *https://allafrica.com/stories/201412170975.html* accessed on 24 February 2020.

[48] Ibid.

aware of the devasting effects of IFFs and has gone on record condemning IFFs.[49] Shortly after government`s condemnation of IFFs, it was revealed that the Namibian Small and Medium Enterprise Bank[50] (SME Bank) lost nearly N$200 million via illicit investments to South Africa.[51]

The Namibian Financial Intelligence Centre's (Centre or FIC) 2020 report cites a potential loss of N$17 billion through illicit activities.[52] However, the activities linked to these funds are still under investigation. For 2019-2020, the Centre received 89 594 reporting types as defined by the Financial Intelligence Act (FIA).[53] Although the report mentions that this new total of reporting types is a decline from previous years, what it does not explicitly state is that the suspected value of the potential loss through the 2019-2020 reporting types by far exceeds the value of previous years' reporting types.

Namibia has an excellently drafted Constitution and generally has well-written comprehensive laws.[54] The legislative framework in the financial sector primarily aims to enhance the country as an investment treasure trove.[55] These laws aim to protect the country's natural resources;[56] its foreign and domestic reserves[57] and to ensure the country's development.[58] However, in trying to optimize the country for investors the Legislature has foregone certain protections that would ordinarily serve as safeguards against IFFs. This dissertation explores how these laws fall short and fail to prevent funds from being siphoned out of the country.

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[49] Njeri Siska 'The Impact of Illicit Financial Flows to African Economies' (06 November 2019) *The Namibian* available at *https://www.namibian.com.na/195080/archive-read/The-Impact-of-Illicit-Financial-Flows-to-African-Economies accessed on 09 March 2021.*

[50] See *Bank of Namibia vs Small and Medium Enterprises Bank Ltd (HCMD-CIV-MOT-GEN-2017-00227) [2017] NAHCMD 350 (4 December 2017)*; and *Metropolitan Bank of Zimbabwe Ltd and Another v Bank of Namibia (SA 77/2017) [2018] NASC 407 (23 October 2018)*.

[51] Siska *op cit* note 30.

[52] FIC *Annual Report* (2019-2020) 28.

[53] Act No. 13 of 2012.

[54] The country has had few constitutional challenges, and only two constitutional amendments in its 30 years of independence. Such few constitutional changes are significantly low for an African country. See Charles Manga Fombad 'Some Perspectives on Durability and Change Under Modern African Constitutions' (17 June 2013) Vol. 11 Issue 2 *International Journal of Constitutional Law* 382–413.

[55] These pieces of legislation include the Minerals Prospecting and Mining Act No. 33 of 1992, the Diamond Act of 1999, Minerals Development Fund Act of 1996, the Financial Intelligence Act No. 13 of 2012, The Prevention of Organised Crime Act No. 29 of 2004, and the Anti-Corruption Act No. 8 of 2003. These laws, and others, are discussed in detail in Chapter 3 of this dissertation.

[56] See Minerals (Prospecting and Mining) Act No. 33 of 1992.

[57] See Financial Intelligence Act No. 3 of 2007; Income Tax Act No. 24 of 1981, as amended; Exchange Control Regulations No. 61 of 1961; Bank of Namibia Act No. 1 of 2020; and Banking Institutions Act No. 2 of 1998.

[58] Ibid, and Namibia's 5th National Development Plan (NDP5), State Finance Act No. 31 of 1991, Minerals Development Fund of Namibia Act No. 19 of 1996 and Environmental Management Act No. 7 of 2007.

1.3. Primary Objective of Study and Research Aims

The primary objective of this dissertation is to determine whether Namibia's current legal framework for IFFs in its resource sector[59] complies with international standards set for effective legislation.[60] Specifically, the standards that this dissertation will employ are those that ensure successful prevention, deterrence, and prohibition of IFFs.

To fulfil its objective, this research aims to establish:

First, whether Namibia is a monist[61] or dualist[62] state. While academics generally agree that the answer is clear-cut, the Namibian Supreme Court has identified this debate as contentious.[63] However, although it acknowledged that doubt exists as to which position Namibia employs, the Court did not decide either way. This dissertation discusses this decision of the Court at length in Chapter Two. This exercise will aid this dissertation in its consideration of the applicability of the international instruments governing IFFs.

Secondly, the research aims to compile a list of international best practice standards concerning the curtailing and prevention of IFFs by examining the International Conventions and Treaties that Namibia is a party to. Thirdly, this research analyzes the two legislative frameworks of Namibia that are relevant to the objective of this dissertation; namely, the laws of its various natural resources sectors and the country's legislative framework that address IFFs. Finally, this dissertation offers recommendations to enhance Namibia's efforts in the fight against IFFs in its resource sector in line with international best practice standards identified.

1.4. Hypothesis

This dissertation hypothesizes that the legislation of Namibia's financial and natural resources sectors were not drafted to combat IFFS, but rather to facilitate permissible financial flows within these sectors. Consequently, these laws inadvertently have loopholes that make Namibia prone to IFFs. As such, the laws are ineffective because while they attract investment by easing permissible financial flows, they do not effectively prevent illicit capital flight.

1.5. Significance of Study

This research is important because it analyses the laws regulating Namibia's natural resource sector with the specific aim to ensure that these laws contain all essential elements of well-drafted legislation. This dissertation

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[59] This dissertation focuses on the resource sector because of its vital importance for the Namibian economy and the nation's present and future prosperity.

[60] Maria Mousmouti 'The "Effectiveness Test" As A Tool for Law Reform' (2014) Vol. 2 Issue 1 Special Issue *IALS Student Law Review* 4.

[61] A state's constitution only requires ratification of the international treaties and those treaties automatically become a part of that state's legal framework.

[62] A state's constitution requires that the government expressly domesticate international treaties.

[63] See *South African Poultry Association (SAPA) v The Ministry of Trade and Industry (A 94/2014) [2014] NAHCMD 331 (07 November 2014) of 2017*.

will assist policy development on natural resources and domestic resources mobilization in Namibia to ensure that natural resources meaningfully benefit the Namibian society.

Namibia needs to maximize the benefits from its resource sector to reach its full economic potential and ultimately become a developed country. One of the best ways to do this is to ensure that the laws that govern the country's resource sector and the laws that are in place to combat and prevent IFFs from the country are both adequately drafted and successfully enforced.

The country is currently facing the biggest corruption, bribery, and fraud scandal in its fishing sector,[64] this is despite the country's natural resources sector being the largest contributor to its Gross Domestic Product (GDP).[65] This research will benefit regulators by exposing possible gaps and weaknesses in the natural resource sector's legislative framework and the laws meant to curb IFFs. This exercise will equip regulators and policymakers with the necessary tools to remedy those gaps and/or weaknesses. In addition to this, if gaps and/or weaknesses are identified, this research will assist law enforcement by identifying ways to cure these and avoiding frequent policy amendments.

Finally, this research will also add value to the Namibian jurisprudence on its natural resource sector by addressing the question of whether the anti-IFF legislation of the research sector is effective from a combined legal and economic perspective. This approach will also identify further areas of research for students interested in the topic to research those areas in the future.

1.6. Problem Statement and Research Questions

The anti-IFFs legal standards must be effective. The current legislative framework has various weaknesses resulting in a regulatory environment that is reactive rather than proactive in its fight against IFFs. When any law fails to cure the mischief for which it was enacted people's confidence in all laws is shaken.[66] Moreover, when people see offenders getting off with minimal to no repercussions they often lose faith in the judiciary, even if the cause of the failure is a flaw in the legislation - as opposed to incompetent or corrupt enforcers.[67] Besides, such

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[64] See Al Jazeera News 'Anatomy of a Bribe' available at *https://www.aljazeera.com/investigations/anatomyofabribe/* accessed on 18 March 2020. Also see Nyasha Nyaungwa 'Iceland's Samherji Exiting Namibia Following Bribery Scandal' Reuters World News (18 January 2020) available at *https://www.reuters.com/article/us-namibia-samherji/icelands-samherji-exiting-namibia-following-bribery-scandal-idUSKBN1ZH0DF* accessed on 18 March 2020. Al Jazeera News 'Officials in Namibia Corruption Scheme to Remain in Custody' 2 December 2019 available at *https://www.aljazeera.com/news/2019/12/officials-namibia-corruption-scheme-remain-custody-191202140206392.html* accessed on 18 March 2020. SABC News 'Namibian ex-ministers enmeshed in fish scandal in jail for New Year' 27 December 2019 available at *https://www.sabcnews.com/sabcnews/namibian-ex-ministers-enmeshed-in-fish-scandal-in-jail-for-new-year/* accessed on 18 March 2020. Tim Cocks 'Former fisheries minister charged in Namibia-Angola bribery scandal' 12 December 2019 *Reuters.*

[65] The largest source of income in Namibia is SACU, i.e., taxes on international trade. Taxes on mining companies rank as third largest source of government revenue after consumption taxes (Namibia's 2nd largest income source) and SACU receipts.

[66] Atul Setalvad 'Paper Laws' (16 July 1988) Vol. 23 No. 29 *Economic and Political Weekly* 1467-1470.

[67] Ibid.

occurrences do not deter the offender but rather emboldens them to evade other laws.[68] Moreover, where a prosecution does succeed, but the results obtained are subpar[69] the public will still question the validity of the judgment and the legitimacy of the courts.[70]

In Namibia, the information leaked by the whistleblower in the country's biggest corruption case, the so-called Fishrot case, has led to the arrest of more than ten accused.[71] This leaked information contains inferences that laws were amended and enacted to further the alleged crimes of the accused.[72] Furthermore, the leaked documents revealed that when a law could not be amended - a trade agreement was entered into with a foreign nation to circumvent Namibian legislation meant to protect its fishing sector.[73] This surreal finding raises questions about how many pieces of legislation the legislators pass to benefit themselves instead of the people that elected them into office.

In addition to this, the country's legislation on corruption[74] and anti-money laundering[75] applies across economic sectors, and not simply to resource sectors. This wholesale application of the anti-corruption legislation is not an issue; the problem lies in the fact that the country`s regulators rarely interpret Article 144[76] of the Namibian Constitution purposively. Instead, it seems the country's courts insist on similarly interpreting this provision as was done in the pre-independence legal regime.[77] Moreover, this interpretation by regulators has been adopted by law enforcement as well.

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[68] Ibid.

[69] One just needs to the read the overwhelming unsatisfactory newspaper articles and opinions published surrounding the Genocide lawyers' payments, the Kapia's conviction, the Hanse-Himarwa's conviction, the Kora Awards investigation.

[70] See *S v Hanse-Himarwa* (CC 05/2018) [2019] NAHCMD 229 (08 July 2019), *S v Lameck* (CC 11/2010) [2018] NAHCMD 214 (16 July 2018), and *S v Kapia and Others* (CC 09/2008) [2018] NAHCMD 124 (11 May 2018). Also see local newspaper articles that were published about this case, for ease of reference visit *https://www.namibian.com.na*, *https://neweralive.na/epapers* and *https://www.namibiansun.com/inserts/edition/1*.

[71] Supra note 41.

[72] One of the main co-accused in the Fishrot case is the country's former Minister of Justice. The Minister held office as Attorney General at the start of the scheme and occupied the Minister of Justice office by the time that the scandal broke, and he was arrested.

See *https://www.ruv.is/kveikur/fishrot/sharks/* and *https://www.observer.com.na/index.php/national/item/11689-esau-blatant-act-of-betrayal,* these reports show that the Fishrot sharks either directly or indirectly had a hand in the amendment of the Inland Fisheries Resources Act (No. 1 of 2003).

[73] Government Gazette of the Republic of Namibia No. 5785 (17 July 2015) Proclamation No. 22 'Publication of Agreement between Government of Republic of Namibia and Government of Republic of Angola on Co-operation in Fisheries and Aquaculture: Marine Resources Act, 2000' Windhoek. Also see Stop Illegal Fishing 'Angola and Namibia Sign Agreement in Fisheries Sector' (13 July 2016) All Africa available at *https://stopillegalfishing.com/press-links/angola-namibia-sign-agreement-fisheries-sector/* accessed on 21 March 2020. And see, Shinovene Immanuel 'Namibia-Angola Fish Quota Hijacked' (04 October 2019) *The Namibian* 1.

[74] Supra note 55. Also, supra note 57.

[75] Ibid.

[76] Article 144 provides that "Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia".

[77] Dunia P. Zongwe *International Law in Namibia* (2019) 70.

Thus, this dissertation's research question is: Does Namibia's legal framework aimed at combating IFFs in its resource sector[78] comply with international standards set for effective anti-IFF legislation?[79]

1.7. Theoretical Framework

This dissertation employs the effectiveness test to establish the efficacy of Namibia's anti-illicit financial flows legislation. Legal theory measures the effectiveness of legislation by establishing whether it is fit for its purpose and performs satisfactorily.[80] Effectiveness as a legal theory is both a principle that guides the lawmaking process and a criterion to evaluate its results.[81] Simply put, this involves comparing the desired outcome expressed during the drafting stage and the actual outcome once the law is implemented.

Mousmouti posits that the measure of the effectiveness of a piece is legislative is found at the intersection of the purpose for which the legislation has been enacted and the results that the legislation has achieved since coming into force.[82] The effectiveness of legislation thus rests on two main pillars, namely, good drafting and thorough enforcement.[83] There must be a clear nexus between the purpose and results of legislation. The crux of this relationship and the attitudes and actions of the legislation's target population can be used as indicators as to whether a piece of legislation is effective or not.[84] Effectiveness thus shows us whether, and to what degree, a law can do what it aims to do.[85] For this reason, the effectiveness test "is considered the primary expression of legislative quality".[86]

The 'effectiveness test' advance that:

1. Good drafting is the foundation of effectiveness.[87] This entails plain language that is used to communicate a clear and concise instruction or rule. Several writings explore the use of clear language and concise writing but for this dissertation, this means using ordinary words, short sentences, and short paragraphs – each putting across one idea at a time;[88]

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[78] This dissertation focuses on the natural resource sector because of its vital importance for the Namibian economy and the nation's present and future prosperity.
[79] Mousmouti *op cit* note 60. The standards that this dissertation will employ are those that ensure successful prevention, deterrence, and prohibition of IFFs.
[80] Ibid at 4.
[81] Maria Mousmouti *Designing Effective Legislation* (2019) 5.
[82] Mousmouti *op cit* note 60.
[83] Ibid.
[84] Helen Xanthaki 'On Transferability of Legislative Solutions: The Functionality Test' in Constantin Stefanou and Helen Xanthaki (eds) *Drafting Legislation: A Modern Approach* (2008) 17 in Ibid.
[85] Ibid.
[86] Ibid.
[87] Ibid.
[88] See Eleanor Cornelius 'Defining 'Plain Language' In Contemporary South Africa' (2015) Vol. 44 *Stellenbosch Papers in Linguistics* 1-18.

2. The design, drafting, implementation, and regulation of the legislation must be performed by competent and incorruptible institutions that employ good governance principles and the appropriate management tools;[89]

3. There must be a direct correlation between what the legislation aims to achieve, the mechanisms employed to achieve that purpose, and the results achieved from the enforcement of the legislation; [90]

4. The measures adopted must be appropriate to cure the mischief that the legislation aims to address, i.e., the measures must not be "too broad or too narrow in relation to the stated purpose";[91] and

5. The target group for that legislation must find it easily accessible, understandable and they must find it easy to comply with the rules advanced by the legislation.

The effectiveness test is the ideal theory for establishing whether legislation is fit for its purpose. This dissertation draws extensively from this theory in its analysis and discussions of Namibia's anti-IFF legislation. However, no empirical research is conducted in this research despite that certain aspect of effectiveness can only be tested by conducting empirical research. As such, this dissertation primarily focuses on whether the drafting of the legislation complies with international best practices concerning the regulation of IFFs. Where enforcement is mentioned, this will only be done to strengthen the arguments related to compliance with international best practices. This dissertation employs this test by evaluating the aim of the relevant legislation, its actual content and grammatical meaning, and its real-life results.[92]

1.8. Method and Methodology

This dissertation will employ a doctrinal method of research, relying on both primary and secondary sources, such as legislation, case law, and case examples, as well as books and journals. However, there is a paucity of academic literature on the research question under investigation in this dissertation, as such this dissertation employs reports and data from charts and graphs produced by international organizations. In doing so, this research will use every possible avenue to rely only on verifiable sources produced by reputable organizations.

Concerning its methodology, this dissertation uses an analytical methodology to answer its research question. This answer will be researched by analyzing the status quo concerning Namibia's IFFs regulatory framework and relevant case law, as well as employing tests constructed by renowned international institutions to determine whether Namibia's anti-IFF laws are effective.

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[89] Mousmouti op cit note 81 at 5.
[90] Ibid.
[91] Ibid. 'Measures' include enforcement and implementation strategies and mechanisms.
[92] Ibid.

1.9. Limitations of Study

A pertinent limitation of this study is that the biggest IFFs related case that Namibia's resource sector ever faced[93] is ongoing before the High Court.[94] Another possible challenge may be that all the relevant documented data on Namibia's resource sector might not be readily available.

Furthermore, detailed data about IFFs in Namibia's resource sector might be even harder to access because apart from the authorities empowered by legislation to publish aggregate data on suspected IFFs in Namibia, there is not much academic literature published on the subject specifically focusing on Namibia as a case study. Additionally, where data is available, most figures, whether produced by the Namibian government, international organizations, or non-governmental organizations, will be conservative estimates and thus not reflect the enormity of how much monies the country loses through its resource sector.

1.10. Organization of Study

In conclusion, this dissertation is divided as follow:

Chapter one of this dissertation[95] introduces the concept of IFFs, and the laws in Namibia meant to combat IFFs. This chapter then provides the theoretical framework within which this research places itself. Herein the effectiveness test is discussed and the criterion against which this dissertation tests the effectiveness of legislation discussed is presented.

Chapter two analyses the monism and dualism theories and the applicable theory is applied to Namibia. After this discussion, the chapter evaluates whether the Namibian government must enforce and comply with its international law obligations domestically. The chapter then introduces the international best-practice standards in combating IFFs. Furthermore, this chapter relies on the theory that this dissertation employs to examine which tests will be most applicable and practical for Namibia to use as a measuring tool when drafting its laws in the future.

Chapter three analyses Namibia's resource sector's current legal framework as well the laws in place in the country which aim to combat and prevent IFFs. This chapter thereafter applies the tests discussed in chapter two before concluding whether those laws are effective.

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[93] See Al Jazeera Investigations' 'Anatomy of a Bribe' (1 December 2019) on YouTube and see WikiLeaks website 'Fishrot Files' available at *https://wikileaks.org/fishrot/releases/* accessed on 18 March 2020.

[94] This dissertation refers to this case as the 'Fishrot case' as it has been dubbed in the media since breaking about a year ago. In addition, while there has been ample reporting on the case, it is quite likely that by the time that this dissertation is completed a judgement will not yet have been delivered in the case.

[95] The sole focus of this dissertation is to analyse the current legal landscape of Namibia's resource sector with specific relevance to IFFs.

Finally, chapter four concludes and puts forth recommendations that can practically be implemented in Namibia to combat IFFs more effectively. These recommendations will be aimed at both influencing policies and purposefully adding to the jurisprudence of IFFs in Namibia's natural resource sector.

2. CHAPTER TWO

2.1. *Introduction*

This chapter establishes the extent to which international anti-IFF rules apply in Namibia. The reason for this is so that the full scope of all laws that have a bearing on the subject matter of this dissertation are considered in this study.

At the core, this chapter establishes whether Namibia is a monist or dualist state, establishing this is important because if Namibia is a monist state, international treaties, and conventions that are ratified potentially apply automatically within the domestic legal regime. Conversely, if Namibia is a dualist state, the Legislature needs to take further steps to domesticate the provisions in international treaties and conventions for those provisions to apply domestically. There are also hybrid systems comprised of elements of monism and dualism, however, this dissertation does not be analysing those hybrid systems.

This chapter introduces and discusses the relevant international treaties, conventions, and best-practice standards in combating IFFs. Thereafter, this chapter establishes whether there is any duty on the Namibian government to comply with and enforce the rules of international law that it has ratified. The chapter concludes discussing international best practice as it has been put forth by taskforces comprising of the international organizations at the forefront of anti-IFF efforts.

2.2. *Monism versus Dualism*

Monism and dualism are two opposing theories concerning the relationship between national law and international law.[1] The monism-dualism debate is relevant to this chapter because it appears whenever parties raise the question of the application of international law in the national legal system.[2]

This debate arises when parties raise questions concerning the applicability of the rules in conventions and treaties in the domestic legal system. As O'Connell remarked, in virtually all cases where international law is applied, the relationship between national law and international law is in question.[3] For instance, does the mere ratification of the relevant anti-corruption or anti-IFF treaties make those treaties part of Namibian law automatically (i.e., the monist position) or does it require that the government expressly domesticates those treaties (i.e., the dualist position)?

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[1] See Madelaine Chiam 'Monism and Dualism in International Law' (27 June 2018) *Oxford Bibliographies* DOI: 10.1093/OBO/9780199796953-0168.

[2] Ibid.

[3] Daniel P. O'Connell 'The Relationship Between International Law and Municipal Law 48' (1960) *Georgetown Law Journal* 444.

2.2.1. Dualism

The dualist system considers national and international law distinct, separate and independent.[4] The applicability of international law in a legal system that applies dualism is determined by an enactment of national law that authorizes the application of that specific international rule.[5] Historically, dualism is founded in the doctrines of separation of powers and positivism.[6] These schools of thought reject the monist belief of unity between domestic and international law.[7] Rather, they believe in the distinction between national and international law. The need for this distinction is advocated for based on the sovereignty of nations.[8] This is because, according to dualists, international law is created by a consensus between several states, while domestic law is created by a specific state to cater to its individual needs exclusively.[9]

Accordingly, international law is concerned with the relationships between countries, while national law concerns itself with the rights and responsibilities of individuals within a country.[10] Further, dualists hold the position that the applicability of international law should be determined regardless of whether domestic law authorizes the application of the specific international rule.[11]

2.2.2. Monism

The monism theory asserts that national and international law are part of one legal system.[12] Monists assert that national and international law, while different, must still be treated as if they originate from "a single conception of law".[13] The main features of monism are that international law must be ranked higher than national law when there is a conflict between the two, the two systems of law must be united and regarded as one, and international law must be automatically incorporated into national law.[14]

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[4] Ololade O. Shyllon 'Monism/Dualism or Self-Executory: The Application of Human Rights Treaties by Domestic Courts in Africa' (17 – 28 August 2009) *Advanced Course on the International Protection of Human Rights Institute for Human Rights* Abo Akademi University 4.
[5] Ibid.
[6] M. Walters 'Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties' Vol. 107 (2007) *Columbia Law Review* 628-705 in Ibid. The Oxford dictionary defines Positivism as: "the theory that laws and their operation derive validity from the fact of having been enacted by authority or of deriving logically from existing decisions, rather than from any moral considerations (e.g., that a rule is unjust)"; and Separation of Powers as: "the vesting of the legislative, executive, and judiciary powers of government in separate bodies".
[7] Ibid.
[8] Ibid.
[9] V. S. Vereshchetin 'New Constitutions and the Old Problem of the Relationship between International Law and National Law' (1996) *European Journal of International Law* 1-41 in Ibid.
[10] Dixon Malenovsky *Textbook on International Law* (1996) Clarendon Press 65 in Ibid.
[11] Ibid.
[12] Malenovsky *op cit* note 10.
[13] Shyllon *op cit* note 4 at 4 – 6. "The origin of monism is traceable to the medieval philosophical conception of the world as a single hierarchically organized legal system. In ancient Judaism, the law was universal, communicated to the people by God. This was equally true of the ancient Greek and Roman philosophy of law, in which 'law represented precepts of reason embedded in nature, the latter being created by God and organised harmoniously with laws that have universal validity'". Also see, John Dugard *International Law A South African Perspective* (3rd ed.) 2005 Juta 47.
[14] Ibid.

Kelsen, who is considered the father of monism, argued that a hierarchical relationship exists within monism.[15] He theorizes that in this relationship "international law is superior to domestic law and thus prevails in any conflict between the two".[16] Kelsen's "basic norm" is that countries behave as they have customarily behaved.[17] Consequently, international law is ranked higher than national law because it is established by the behaviour and acts of States, while national law is conceived by only a single State in response to its individual needs.[18]

2.3. The Namibian Position

2.3.1. The Supreme Court

Generally, it is a country's Constitution that prescribes how international law ought to be incorporated into domestic law, and whether international law enjoys primacy over domestic law.[19] In this regard, Article 144 of the Constitution provides that, "Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding[20] upon Namibia under this Constitution shall form part of the law of Namibia".[21] However, although the language of Article 144 is quite explicit regarding the applicability of international law within Namibia, the courts have given conflicting judgments regarding the issue. Consequently, the issue is currently not settled in law.

The Supreme Court of Namibia recognized in *South African Poultry Association (SAPA) v The Ministry of Trade and Industry* that a conflict exists in the interpretation of Article 144.[22] This case was a review application originally brought to the High Court. The applicants principally sought to review and set aside a determination by the Namibian Minister of Trade and Industry. The Determination: Restrictions on Importation of Poultry Products

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[15] Chiam *op cit* note 1.
[16] Hans Kelsen *General Theory of Law* (1949) Harvard University Press.
[17] Ibid. Also see, Shyllon *op cit* note 4 at 4 – 6.
[18] Ibid.
[19] Ibid.
[20] See D J Devine 'The Relationship between International Law and Municipal Law in Light of the Constitution of the Republic of Namibia' 26 (1994) *Case Western Reserve Journal of International Law* 301-302. "In deciding this question, a Namibian court should examine and apply the general international legal rules relating to the formation and binding character of treaties. If the court found that, the treaty in question was duly concluded and binding on Namibia as such, the treaty would then be *prima facie* part of the Namibian law. At this stage the court would then have to satisfy itself that the National Assembly had decided to succeed to the treaty under article 63(2)(d) and that the treaty is not in conflict with the Constitution or with an Act of Parliament".
[21] The Constitution of the Republic of Namibia. Also see Article 143: "Existing International Agreements: All existing international agreements binding upon Namibia shall remain in force, unless and until the National Assembly acting under Article 63(2)(d) hereof otherwise decides"; and Article 145: "(1) Nothing contained in this Constitution shall be construed as imposing upon the Government of Namibia: (a) any obligations to any other State which would not otherwise have existed under international law; (b) any obligations to any person arising out of the acts or contracts of prior Administrations which would not otherwise have been recognised by international law as binding upon the Republic of Namibia. (2) Nothing contained in this Constitution shall be construed as recognising in any way the validity of the Administration of Namibia by the Government of the Republic of South Africa or by the Administrator-General appointed by the Government of the Republic of South Africa to administer Namibia".
[22] *South African Poultry Association (SAPA) v The Ministry of Trade and Industry (A 94/2014) [2014] NAHCMD 331 (07 November 2014) of 2017*.

into Namibia in terms of the Import and Export Control Act No. 30 of 1994 (the Act) restricted the importation into Namibia of certain chicken products.[23]

In casu SAPA argued that the purported Infant Industry Protection (IIP) embodied in the notice runs fowl of the Namibian government's treaty obligations. Specifically, the *World Trade Organisation (WTO) Agreement*, *Southern African Development Community (SADC) Treaty* together with the *SADC Protocol on Trade of 1996*, the *General Agreement on Tariffs and Trade (GATT)*, and the *Southern African Customs Union (SACU) Agreement*.[24] This assertion by SAPA implied that these treaties were, in terms of Article 144 of the Constitution, incorporated into Namibian law. The 3rd Respondent, Namibia Poultry Industries (PTY) LTD (NPI), argued that in support of this ascertain SAPA must prove:

(a) the act of the President or his delegate signing these treaties;
(b) ratification of the respective instruments by the National Assembly; and
(c) the coming into force of these treaties as per their respective terms and publication in the gazette.[25]

The NPI further required that SAPA places discovery copies of each treaty relied on.[26] To this, SAPA's response was two-fold: (a) the treaties are public knowledge and NPI has access to same; and (b) regarding when these treaties came into force this is a subject of discovery by the Namibian Government.[27] To which NPI responded that (b) the discovered documents do not provide evidentiary support for "the international agreements and treaties and Namibia's alleged assent thereto were ratified and published in the Government Gazette and deposited per their terms".[28] Concerning discovery, the Court *a quo* held that except for the SACU agreement, NPI was entitled to the discovery of the treaties that SAPA relies on for its cause of action.[29] Further, regarding International Treaties the Court held that there is no doubt that bilateral and international instruments are binding on the government of Namibia.

Although certain rules of the Supreme Court in the appeal were not adhered to by the parties, the court found the issue of Article 144 so pressing and of enough importance that it excused the parties' non-compliance with the rules of court. The court held that the ventilation and determination of the application of Article 144 of the Constitution would be in the public interest. Furthermore, the court held that it is in the interest of the public to determine the extent to which, if at all, international law and treaties can be enforced in domestic courts.[30] This admission by the court is evidence of the fact that the interpretation of Article 144 has not been settled in law and

[23] Ibid.
[24] Ibid.
[25] Ibid.
[26] Ibid.
[27] Ibid.
[28] Ibid.
[29] Ibid.
[30] Ibid.

requires further examination, both by the judiciary and academia. However, the court found that this issue would be better dealt with by a court of the first instance.[31] Although the court considered it in the interest of the public to determine once and for all what the position of international law is in Namibia, this case has not yet been resolved.

2.3.2. Article 144 of the Constitution

Before independence, while forming part of South Africa at the time, Namibia followed the dualist position.[32] However, once Namibia gained its independence the country's constitution adopted a different approach.[33] The reasoning for this can be attributed to international law and the international community's pivotal role in Namibia achieving her independence.[34] Another reason for this could be the parties that constituted Namibia's Constituent Assembly, i.e., the United Nations, and representatives from several foreign countries and Namibia.[35] Namibia's constitution was thus drafted with significant international and foreign influence and this may explain why Article 144 was drafted in a manner that favours the inclusion of international law in the domestic legal framework.

In its ordinary grammatical meaning, the Constitution unambiguously establishes the status of international law within Namibia's legal framework. As such, this dissertation applies a purposive interpretation to Article 144, as required by the Supreme Court in *Minister of Defence v Mwandinghi.*[36] *In casu*, the court provided that the Constitution must not be interpreted narrowly and mechanically.[37] The court relied on *S v Acheson* and reiterated that the Constitution is a "mirror reflecting the national soul" and that that the "spirit and tenor of the constitution" must be the overarching reasoning in the processes of judicial interpretation and judicial discretion.[38] In this regard, reading the principles of the Constituent Assembly, with the Preamble of the Constitution and Article 144, and taking into account the vital role of international law in Namibia obtaining independence, this dissertation concludes that Namibia is a monist state. As such this paper answers its research question under this

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[31] For the reasons articulated in *Rally for Democracy and Progress and others v Electoral Commission and others 2010(2) NR487 (SC),* Article 79(4) of the Constitution, and Sub-Section 14 and 15 of the Supreme Court Act No. 15 of 1990.

[32] See Dunia P. Zongwe *International Law in Namibia* (2019) chapters 1 -3 for an in-depth discussion on this issue.

[33] Ibid.

[34] Ibid.

[35] See Document Retrieval: Principles concerning the Constituent Assembly and the Constitution for an Independent Namibia available at *https://peacemaker.un.org/namibia-constituent-assembly82* accessed on 16 February 2021.

[36] (SA 5/91) [1991] NASC 5 (25 October 1991).

[37] Ibid.

[38] 1991 (2) S.A.805 (Nm. H.C.). The Bench went further in *Mwandinghi* by stating that "the Namibian Constitution must be interpreted purposively to avoid the 'austerity of tabulated legalism', and that the interpretation advanced by the Appellant's council '[s]ubscribes to words used in the Constitution a narrow and pedantic meaning and avoids a construction that is most beneficial to the widest possible amplitude'". However, the court also cited H.M. Seervai stating, "A broad and liberal spirit should inspire those whose duty it is to interpret the Constitution. This does not imply that they are free to stretch or pervert the language of the enactment in the interests of any legal or constitutional theory, or even for the purposes of supplying missions or correcting supposed errors". The court concluded that, "*It would not be generous and purposeful to ignore the special characteristics of a constitution when rendering an interpretation to any of its provisions. The Namibian Constitution has a Declaration of Fundamental Human Rights and Freedoms which must be protected. These freedoms and rights are framed in a broad and ample style and are international in character. In their interpretation they call for the application of international human right norms".* Thus, the court itself did acknowledge that international law and norms is a strong theme throughout the text of the Constitution.

assumption. The positions of this theory will be reflected in the assertions of this dissertation, and ultimately in its recommendations.

2.4. Relevant International Instruments

This section describes each treaty and convention relating to the curbing, preventing, combatting, and prosecuting of IFFs that Namibia has ratified.[39] Discussing these treaties will allow this dissertation to extrapolate relevant provisions that Namibia may employ to bolster its existing anti-IFF domestic legislative framework. This discussion will also aid this dissertation in identifying international best practices on curbing, combating, preventing, and prosecuting of IFFs.

2.4.1. The Financial Action Task Force (FATF) Recommendations (the Recommendations)

Namibia is part of the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG).[40] The purpose of the ESAAMLG is to curb money laundering by implementing the Recommendations. The Recommendations set out the measures that countries must implement to effectively identify the risks, develop policies, and coordinate their efforts to prevent, reduce and prosecute money laundering, terrorist financing, and the financing of proliferation.[41] In this regard, countries are advised to apply preventive and monitoring measures in their financial and other designated sectors.[42]

Additionally, countries must establish powers and responsibilities for law enforcement in their jurisdictions, and investigative and supervisory authorities to competently combat and prosecute the offences covered by the Recommendations.[43] Implementing countries are also urged to create policies that mandate transparency and make beneficial ownership information more readily available.[44]

The Recommendations require that countries implement effective measures nationally to combat money laundering, terrorist financing, and the financing of proliferation.[45] These measures must comply with the

[39] This list includes all *binding* multi-lateral international agreements signed, ratified, or acceded to by Namibia.
[40] See FATF Recommendation 2012 available at *http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html* accessed 27 November 2020. "These are internationally endorsed global standards against money laundering and terrorist financing: they increase transparency and enable countries to act against illicit use of their financial system". The Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) Website available at *https://www.esaamlg.org/* accessed on 22 January 2021.
[41] FATF Recommendation *op cit* note 40 at 6.
[42] Ibid.
[43] Ibid.
[44] Ibid.
[45] Ibid at 8.

Recommendations.[46] Countries are further urged to maintain an open channel for critical dialogue with the private sector, civil society, and all other stakeholders when developing and implementing these measures.[47]

The Recommendations also advance measures that are vital to curbing IFFs. These include risk identification policies, coordination with anti-money laundering, terrorist financing and the financing of proliferation activities stakeholders, and the development and application of preventive risk management measures.[48] Further *essentialia* include, establishing the required powers and responsibilities for relevant authorities and institutions to perform their duties to the best of their ability, enhancing transparency efforts related to the availability of beneficial ownership information, and facilitating international cooperation.[49]

2.4.2. The United Nations' (UN) Convention against Transnational Organized Crime of 2000

Namibia signed this Convention on 13 December 2000 and ratified it on 16 August 2002.[50] This Convention[51] provides an effective blueprint for international cooperation in combating criminal activities.[52] These activities include, *inter alia*, corruption, money laundering, terrorist crimes, and the growing links between transnational organized crime.[53] The purpose of this Convention is to promote cooperation between member states to effectively prevent and combat transnational organized crime.[54]

The Convention acknowledges the negative economic and social effects that organized criminal activities have on society.[55] It emphasizes with urgency the need to bolster cooperation with the view to effectively prevent and combat organized criminal activities nationally, regionally, and internationally.[56] Further, it provides that asylum must be denied to those who engage in organized crime and that countries must prosecute these crimes transnationally and cooperate accordingly.[57] However, Article 4 of the Convention provides for the protection of

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46 Ibid.
47 Ibid.
48 Ibid at 9 – 12.
49 Ibid at 6.
50 United Nations Treaty Collection available at *https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&clang=_en* accessed on 16 February 2021.
51 General Assembly Resolution 55/25 of 15 November 2000, as revised. Known as the Palermo Convention. Including the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children of 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air of 2000.
52 Ibid.
53 The Convention defines an organized criminal group as "a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit".
54 The Palermo Convention *op cit* note 40 at article 1.
55 Ibid at 2.
56 Ibid.
57 Ibid.

sovereignty. Accordingly, states must not exercise jurisdiction and perform functions in the territory of another state.[58]

The Convention requires that countries set out measures to combat money laundering,[59] and criminalize participation in organized criminal groups, and laundering the proceeds of crime.[60] It prescribes that states institute all-encompassing regulatory and supervisory regimes for institutions susceptible to money laundering.[61] States are also required to include in this 'regime' requirements for reporting suspicious transactions, record keeping, customer identification, and actionable measures for detecting and monitoring illicit financial outflows.[62] Additionally, countries are urged to confer to their authorities the right to cooperate and exchange information both nationally and internationally.[63]

Furthermore, the Convention criminalizes corruption[64] and provides measures that member states can implement against and for purposes of, combatting and prosecuting corruption.[65] In particular, Article 10 prescribes that member states must ensure that persons who are liable for corruption face proportionate, effective, and dissuasive sanctions.[66] Article 11 provides for the prosecution, adjudication, and particular sanctions of these crimes.[67] It prescribes that states must exercise discretionary powers concerning the prosecution of persons in a manner that maximizes the effectiveness of these measures and with sufficient consideration of the need to deter offenders.[68] Lastly, it prescribes that courts or other regulatory institutions must be cognizant of the devastating nature of the offences covered by this Convention when they consider the parole or pardon of persons convicted of such offences.[69]

2.4.3. The UN Convention against Corruption of 2003

Namibia signed this Convention on 9 December 2003 and ratified it on 3 August 2004.[70] This Convention addresses the threat that corruption poses to the stability and security of the state.[71] The Convention addresses the investigation, prevention, and prosecution of corruption.[72] It also applies to the seizure, freezing, confiscating, and return of the money earned from offences proscribed by the Convention.[73] It recognizes that corruption

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[58] Ibid at article 4.
[59] Ibid at article 7.
[60] Ibid at articles 5 and 6.
[61] Ibid at article 7.
[62] Ibid.
[63] Ibid.
[64] Ibid at article 8.
[65] Ibid.
[66] Ibid at article 10.
[67] Ibid at article 11.
[68] Ibid.
[69] Ibid.
[70] United Nations Treaty Collection *op cit* note 51.
[71] United Nations Convention against Corruption: General Assembly resolution 58/4 of 31 October 2003 Preamble 5.
[72] Ibid at article 3.
[73] Ibid.

undermines the institutions, democracies, and judicial systems of countries.[74] Moreover, this Convention posits that corruption hinders sustainable development and the Rule of Law.[75]

The Preamble identifies that unlawful acquisition of personal wealth is uniquely destructive to national economies and democratic institutions.[76] It also recognizes that corruption, and organized and economic crime, specifically money laundering, are inexplicably intertwined.[77] This link speaks directly to this dissertation's scope, i.e., IFFs. Wherein monies are gained through dubious means and laundered out of the country. Corruption is thus a big contributor to IFFs. Tackling this root cause may therefore be the key to significantly reducing IFFs.

The Convention prescribes the development, implementation, and maintenance of effective anti-corruption policies.[78] These policies must promote accountability, transparency, the participation of society, integrity, and the rule of law.[79] Moreover, states are required to review their domestic anti-corruption laws periodically to determine their adequacy to prevent and fight corruption.[80] Article 14 complements this provision by requiring states to institute various measures to prevent money laundering.[81] Finally, Article 20 and Article 24 respectively provide that states must adopt measures to establish illicit enrichment,[82] and the concealment or continued retention of property[83] as a criminal offense.

2.4.4. The African Union (AU) Convention on Preventing and Combating Corruption of 2003

Namibia signed this Convention on 9 December 2003 and ratified it on 5 August 2004.[84] The Convention echoes the UN Convention against Corruption. It provides in its Preamble that corruption promotes behavior contrary to transparency and accountability in governments.[85] It also recognizes how corruption hinders socio-economic

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[74] Ibid at Preamble 5.
[75] Ibid.
[76] Ibid at Preamble para 7.
[77] Ibid at para 2.
[78] Ibid at article 5.
[79] Ibid.
[80] Ibid.
[81] Ibid at article 14.
[82] Ibid at article 20. Illicit enrichment is defined as: "A significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income".
[83] Ibid at article 24. The concealment or continued retention of property is defined as: "When the person involved knows that such property is the result of any of the offences established in accordance with this Convention".
[84] List of Countries which have signed, ratified/acceded to the African Union Convention on Preventing and Combatting Corruption available at *https://au.int/sites/default/files/treaties/36382-sl AFRICAN%20UNION%20CONVENTION%20ON%20PREVENTING%20AND%20COMBATING%20CORRUPTION.pdf* accessed on 16 February 2021.
[85] The AU Convention on Preventing and Combating Corruption of 2003 preamble 2 available at *https://au.int/en/treaties/african-union-convention-preventing-and-combating-corruption* accessed on 27 January 2021.

development in Africa.[86] Furthermore, the Preamble calls on member states to address the root causes of corruption.[87]

Article 5 of the Convention provides that states must strengthen their control measures and ensure that foreign companies' establishments and operations are subject to national laws.[88] In addition, these laws must comply, as far as possible, with this Convention.[89] Furthermore, Article 6 provides that states must criminalize the laundering of the proceeds of corruption.[90] While Article 8 prescribes that member states must establish an offence for illicit enrichment.[91]

Finally, Article 13 provides states with extra-territorial jurisdiction over corrupt acts committed by their citizens.[92] Extraterritorial jurisdiction is of particular interest to this dissertation because IFFs in their very nature are a crime that is committed outside of a country. Therefore, extraterritorial jurisdiction has the effect of giving countries greater powers to effectively combat IFFs. The AU Convention, therefore, gives Namibia a solid foundation for incorporating extraterritorial jurisdiction into national legislation.

2.4.5. The Southern African Development Community's (SADC) Protocol against Corruption of 2001, as amended in 2016

Namibia has been a member of SADC since its inception.[93] The country signed the protocol on 14 August 2001 and ratified it on 23 June 2005.[94] This preamble of this Protocol acknowledges that corruption has a crippling effect on countries' economies.[95] In addition, it recognizes that corruption is an international problem that must be addressed as a matter of urgency.[96] Article 4 provides that states must implement controls for government revenue collection that deters corruption.[97] States are also expected to enact laws that prohibit favourable tax treatment for expenses that contravene their anti-corruption laws.[98]

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86 Ibid.
87 Ibid.
88 Ibid at article 5.
89 Ibid.
90 Ibid at article 6.
91 Ibid at article 8.
92 Ibid at article 13.
93 Declaration and Treaty of SADC available at *https://www.sadc.int/files/8613/5292/8378/Declaration__Treaty_of_SADC.pdf* available on 16 February 2021.
94 See Namlex Appendix on International Law Legal Assistance Centre 2017 at 31 available at accessed on 16 February 2021.
95 The SADC Protocol against Corruption of 2001, as amended in 2016 at 1 available at *https://www.sadc.int/index.php/documents-publications/protocols?sortBy=date&pageSize=10&doc_q_4700=&sortOrder=desc&filterByKey=&filterByVal=&page=2* accessed on 27 January 2021.
96 Ibid.
97 Ibid at article 4.
98 Ibid.

The instruments discussed in this section respectively reiterate the impact of IFFs on the political, social, and economic stability and development of countries. Moreover, they recognize that the recovery and return of stolen assets are becoming increasingly complex due to cryptocurrencies and other technological advancements.[99] As such, member states are strongly encouraged to enact laws and create institutions that will effectively prevent and counter the illicit use of these technologies.[100]

2.5. International Best Practices in Combating IFFs

This dissertation uses the tests discussed below to determine whether anti-IFF laws are effective. Furthermore, this dissertation relies on the monism theory to establish which tests are the most feasible and practical for Namibia as a measuring tool when drafting its laws in the future. In particular, the FATF Recommendations aim to provide countries with actionable items that can be incorporated in their laws, policies, and administration to effectively combat IFFs.[101] With this in mind, this section aims to identify guidelines for effectiveness.

2.5.1. Guidelines for Effective Law

An ineffective law can be described as a law that does not cure the mischief for which it was enacted.[102] A government must ensure that the laws that the Legislature passes are implemented and enforced. Accordingly, this requires that the drafting language is enforceable and easy to understand.[103] Additionally, implementation requires effective machinery that the state must set up.[104] It also requires the support of a large section of the community as no governmental machinery can be all-encompassing.[105]

Evans lists the requirements of effective legislation.[106] He submits that legislation must be practical, not utopian and that its rationale must be compatible with established cultural and legal principles.[107] Further, legislation must contain adequate sanctions and incentives, sanctions to deter the lawbreaker, and incentives for the victims to enforce the law.[108]

Setalvad adds the following to Evans' list; the Legislature must be knowledgeable about the problem that the legislation seeks to address, i.e., why it goes on and how it goes on.[109] He also adds that after a law is enacted

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[99] Andrew W. Balthazor 'The Challenges of Cryptocurrency Asset Recovery' (2019) Vol. 13 No. 6 *Florida International University Law Review* 1207 – 1235.
[100] Ibid.
[101] FATF Recommendation op cit note 40.
[102] Atul Setalvad 'Paper Laws' (16 July 1988) Vol. 23 No. 29 *Economic and Political Weekly* 1467-1470.
[103] Ibid.
[104] Ibid.
[105] Ibid.
[106] See W. M. Evans 'Law as an Instrument of Social Change' in Alvin W, Gouldner and S. M. Miller (ed.) *Applied Sociology Opportunities and Problems* (1990) 554–562.
[107] Ibid.
[108] Ibid.
[109] Setalvad *op cit* note 10393.

there must be independent surveys of how it is working, and how effective it is.[110] Independent surveys would allow us to examine whether the law is effective or not; and if it is not effective, the surveys will indicate why the law failed or is ineffective.[111]

2.5.2. Guidelines for Effective Administration

Regarding the administration of legislation, Evans posits that there must be a sincere conviction in the enforcement agencies, and they must be neither hypocritical about it nor corrupt.[112] On the other hand, Setalvad argues that legislators must think as much of the enforcement machinery as they do of the object of the law and provide effective machinery.[113] Ineffective administration can cripple the results of the best-drafted legislation. It is thus of equal importance that the effectiveness of administration is tested along with the effectiveness of legislation.

The Sustainable Development Goals (SDGs) set out the needed action to curb IFFs effectively. Target 16.4 provides that, "by 2030 states must significantly reduce illicit financial and arms flows, strengthen recovery and return of stolen assets, and combat all forms of organized crime".[114] The Sustainable Development Solutions Network (SDSN)[115] proposes that to reach this target states must make publicly available information relating to the beneficial ownership of proportions of legal persons. Further, the emphasis is placed on states being able to keep detailed data on suspected and proved inflows and outflows, including tracking, returning and/or recovering inflows and outflows in line with international instruments.[116]

Further, at the UNs high-level meeting on International Cooperation to Combat Illicit Financial Flows and Strengthen Good Practices on Asset Returns, Heads of States singled out IFFs as a significant threat to achieving Agenda 2030.[117] In addition, the concern was raised that the 2030 Agenda does not have sufficient financing.[118] Nations held that increased intervention to curb IFFs is one of the most cost-effective strategies to ensure that the 2030 Agenda is implemented.[119]

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[110] Ibid.
[111] Ibid.
[112] Evans *op cit* note 107.
[113] Ibid.
[114] The Sustainable Development Solutions Network available at *unsdsn.org* accessed on 31 January 2021.
[115] Ibid.
[116] Ibid.
[117] The UNs High Level Meeting on International Cooperation to Combat Illicit Financial Flows and Strengthen Good Practices on Asset Returns on 16 May 2019 available at *https://www.un.org/pga/73/event/international-cooperation-to-combat-illicit-financial-flows-and-strengthen-good-practices-on-asset-returns/* accessed on 27 January 2021.
[118] See Resolution A/RES/72/207 entitled "*Promotion of international cooperation to combat illicit financial flows and strengthen good practices on asset returns to foster sustainable dev*elopment".
[119] The UNs High Level Meeting *op cit* note 118.

Concerning international best practices, the Meeting advanced that countries must implement requirements to publicize data and country-by-country reporting under the new OECD standards.[120] Countries are also encouraged to take forward their capacities and ensure best practices in asset recovery and repatriation.[121] Lastly, the need for multilateral initiatives that promote global regulatory frameworks was stressed.[122] Cooperation between countries is emphasized throughout, and a global regulatory framework could be key to facilitating the recovery and return of assets illicitly moved from one country to another.

This dissertation is of the view that the UN, notwithstanding its politics, is uniquely capable and positioned to fill this role because it already has the requisite funds, membership, infrastructure, and human capacity in place to successfully set up such a framework and the regulatory body to enforce it. In addition to this, the UNs' Policy recommendations in its Study on the Global Governance Architecture for Combating Illicit Financial Flows submit a consolidated list of best practices.[123] These are, *inter alia*, technical, legal, and policy reforms, customs services be digitized to compare prices, and countries must maintain digital registries of companies and, for tax purposes, list companies registered locally as well as their foreign-affiliated party's information[124] Furthermore, countries should implement the automatic exchange of tax information and maintain databases on the pricing of goods and services.[125] This Study provides the foundation for the functions and duties of the envisaged regulatory body.

The Report of the High-Level Panel on Illicit Financial Flows from Africa also submits a comprehensive list of recommendations for combatting IFFs.[126] Primarily, it advocates that African governments engage with non-African governments and intergovernmental bodies to ensure that the practices of these stakeholders do not directly or indirectly encourage IFFs from Africa.[127]

The Panel recommends that countries mobilize resources to combat and prosecute trade-related IFFs specifically.[128] Countries must also enact and, where necessary, amend existing laws to explicitly criminalize intentionally providing false information regarding the price, quality, quantity, or any other characteristic of goods

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[120] Ibid.
[121] Ibid.
[122] Ibid.
[123] United Nations Economic Commission for Africa *A Study on The Global Governance Architecture for Combating Illicit Financial Flows* 2018 available at *https://www.uneca.org/archive/publications/study-global-governance-architecture-combating-illicit-financial-flows* accessed on 27 January 2021.
[124] Ibid.
[125] Ibid.
[126] Financial Transparency Coalition *The High Level Panel Report on Illicit Financial Flows from Africa* (31 July 2020) Commissioned by the AU/ECA Conference of Ministers of Finance, Planning and Economic Development available at *https://financialtransparency.org/materials/high-level-panel-report-illicit-financial-flows-africa/#:~:text=The%20High%2DLevel%20Panel%20published,they%20are%20large%20and%20increasing* accessed on 27 January 2021.
[127] Ibid.
[128] Ibid.

and services being traded.[129] Especially, where this is done to move monies out of the country or to avoid, evade, or manipulate taxation, or customs and excise duties.[130] In this regard, the Panel recommends that the databases of the companies' registration office and the tax authority be linked for ease of streamlining tax information.[131] Further, countries' customs authorities must use existing databases that compare the pricing of goods and services around the world in their operations to identify suspiciously priced commodities.[132]

It is also recommended that countries engage in the automatic exchange of tax information and establish transfer pricing units as a matter of extreme urgency.[133] Moreover, countries must require that beneficial ownership information of companies be provided regularly and be made public record.[134] Any false declarations in this regard must be met with robust penalties.[135] Additionally, countries must review and where needed renegotiate their current and prospective double taxation agreements, specifically those entered into with jurisdictions that are known to be IFFs destinations.[136] This review must entail a comprehensive review targeting provisions that may provide opportunities for abuse.[137]

The Panel further recommends that countries with, and companies operating in, extractive sectors must join initiatives such as the Extractive Industries Transparency Initiative.[138] Further, African countries must require compulsory project-by-project and country-by-country reporting particularly in the extractive sectors, but also across all sectors.[139]

Finally, the institutions created to combat IFFs must be strengthened and made independent from other organs of state.[140] These institutions must employ robust mechanisms for the supervision of banking, and nonbanking financial, institutions.[141] These mechanisms and their accompanying law must require compulsory reporting of transactions that are suspected to be involved in, derived from, or meant for illicit activity.[142]

2.6. Namibia's Duty to Uphold International Anti-IFF Laws

Ndeunyema agrees that it is often concluded that Namibia adopts a monist approach concerning its relationship with international law.[143] However, his position is that Namibia's precise position is a "weak or qualified monism

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[129] Ibid.
[130] Ibid.
[131] Ibid.
[132] Ibid.
[133] Ibid.
[134] Ibid.
[135] Ibid.
[136] Ibid.
[137] Ibid.
[138] Ibid.
[139] Ibid.
[140] Ibid.
[141] Ibid.
[142] Ibid.
[143] O Tshosa 'The Status of International Law in Namibian National Law' Vol. 2 No. 1 (2010) *Namibia Law Journal* 5.

approach because Namibia's Constitution requires that international law be consistent with the Constitution and Acts of Parliament".[144] Unfortunately, the courts – and the law – have yet to provide a definitive answer as to whether the country is a monist in the full sense of the term; a 'weak' monist as Ndeunyema argues[145] or employs a blended method of monism and dualism.

This section investigates whether there exists any positive duty in law for the country's lawmakers, enforcers, and interpreters to apply 'general principles of international law' and provisions of treaties that Namibia has ratified or acceded to in the execution of their duties. Furthermore, although South Africa is classified as a dualist,[146] the *Glenister v President of the Republic of South Africa & Others (Helen Suzman Foundation as Amicus Curiae)* (Glenister),[147] has valuable insights that this section will draw from.

In *Glenister*, the Constitutional Court held that where the constitution recognizes the application of international law in the country the courts of that country must consider international law when interpreting the law.[148] This approach was adopted in Namibia's *Kauesa v Minister of Home Affairs.*[149] *Kauesa* not only applied an international agreement but also invoked it in interpreting the Constitution.[150]

Glenister essentially provided that where a country's constitution recognizes and incorporates international law or aspects thereof, it is a court's constitutional duty to consider international law in the performance of its duties. The *Grootboom* case[151] provided some guidance regarding how this should be done. *Grootboom* provides that the relevant international law must be an interpretative guide for the court.[152] However, the weight that the court attaches to the applicable international law principle or rule will vary.[153] Unfortunately, the court did not discuss how this 'weight' will be decided.

The Court also acknowledged that "there is a constitutional injunction to integrate, in a way that the Constitution permits, international law obligations into domestic law".[154] The Court held that it integrates international law into domestic law willingly and in compliance with its constitutional duty. In this regard, in *S v Mushwena and Others*,

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[144] Magnus Killander 'The Impact of Transjudicialism on Constitutional Adjudication' in C Fomband (ed.) *The Effects of International Law Norms on Constitutional Adjudication in Africa* (oup 2017) 216 in Ndjodi Ndeunyema 'The Namibian Constitution, International Law and the Courts: A Critique' (2020) Vol. 9 *Global Journal of Comparative Law* 275. "Inverse monism is a species of monism in the reverse, asserting that municipal law has primacy over international law in both international and municipal decisions".

[145] Ibid.

[146] Werner Scholtz and Gerrit Ferreira 'The Interpretation of Section 231 Of the South African Constitution: A Lost Ball in The High Weeds!' (JULY 2008) Vol. 41 No. 2 *The Comparative and International Law Journal of Southern Africa* 332.

[147] *Glenister v President of the Republic of South Africa and Others (with the Helen Suzman Foundation as Amicus Curiae)* [2011] ZACC 6, 2011 (3) SA 347 (CC).

[148] Juha Tuovinen 'What to Do with International Law? Three Flaws in *Glenister' Constitutional Court Review* 435 – 449.

[149] (SA-1994/5) [1995] NASC 3 (11 October 1995).

[150] Ndeunyema *op cit* note 145 at 275.

[151] *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000).

[152] Ibid.

[153] Tuovinen *op cit* note 149.

[154] Supra note 148.

Namibia's Supreme Court upheld the country's obligations in the International Covenant on Civil and Political Rights of 1966 and the UN Convention Relating to the Status of Refugees.[155] The court elaborated that these obligations are not only binding on Namibia through accession, as provided in the Namibian Constitution, but that its basic principles concerning extradition, deportation, and repatriation have been incorporated into domestic law.[156] With this judgment, the court not only applied the provisions of international agreements domestically but also confirmed the undeniable influence that international law has on national legislation.[157]

Further uncertainty was created when in *Government of the Republic of Namibia and Others v Mwilima and Others*[158] the Supreme Court did not apply the Legal Aid Act (LAA) because the LAA did not give full effect to the rights afforded by Article 14(3)(d) of the International Covenant on Civil and Political Rights.[159] Ndeunyema advances that by doing this the Court made the provisions of international agreement superior to those of national legislation.[160] This judgment goes against the 'black letter' of Article 144, which explicitly states that national law supersedes international law.[161]

However, the majority decision of *Glenister* posited that there is a positive obligation on organs of the state to comply with its international law obligations.[162] In this regard, as Article 144 unambiguously makes international law directly applicable in Namibia, this dissertation asserts that compliance with Namibia's international law obligations is a constitutional duty of the state.

Consequently, if a treaty requires that a government that has ratified said treaty implement certain controls, performs certain actions, and maintain certain conditions within its territory that government is obligated to perform those duties. And, if the government fails to perform those duties the people of that country can pursue legal action against their government and a court can order that the state complies with its duties accordingly. The organs of state, including the Judiciary, thus have a positive duty to enforce and comply with international law and the obligations of treaties that have been ratified, that is not in conflict with Article 144 of the Constitution, as they would enforce and comply with national legislation.

2.7. Conclusion

A clear problem has been identified because Namibia's regulators rarely interpret Article 144 of the Namibian Constitution purposively. With the quality and quantity of international anti-IFF treaties that Namibia has ratified, not interpreting Article 144 purposively is doing the country a great disservice in its efforts to combat IFFs.

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[155] *S v Mushwena and Others* (SA-2004/4) [2004] NASC 2 (21 July 2004) (hereinafter '*Mushwena*').
[156] Ibid.
[157] Ndeunyema *op cit* note 145.
[158] (SA-2001/29) [2002] NASC 8 (07 June 2002) (hereinafter '*Mwilima*'). See Ndjodi Ndeunyema 'The Namibian Constitution, International Law and the Courts: A Critique' (2020) Vol. 9 *Global Journal of Comparative Law* 275.
[159] Ibid.
[160] Ibid.
[161] Ibid.
[162] Supra note 1481.

Having established that Namibia is a monist state, the question now becomes why regulators have not used the full spectrum of laws at its disposal to its full potential in the fight against IFFs when there is a plethora of case law that illustrate how ineffective[163] the country's domestic money laundering, tax avoidance, transfer mispricing, and anti-corruption laws are.[164] For example, in 2012, the High Court held in *Lameck and Another v President of Republic of Namibia and Others* that the very formulation of the definition of the crime "corruption" in the Anti-Corruption Act violates the Namibian Constitution because it is overbroad and vague.[165] As a result, the definition of "corruptly" contained in section 32 of the Anti-Corruption Act was declared unconstitutional and struck down.[166]

However, in *S v Goabab and Another* the Supreme Court held that the offences in the Act were not affected by the judgment in the *Lameck* case.[167] Consequently, the word 'corruptly' used in those sections would bear its ordinary grammatical meaning. The court held that the wide scope the crime corruption is international.[168] The Court reiterated the words of the sixth Preamble to the Africa Union Convention on Preventing and Combating Corruption, that the effects of corruption on the African States are devastating and negatively impact economies and social development.[169] Furthermore, it acknowledged that corruption is contrary to a culture of transparency and accountability, and socio-economic development.[170]

Additionally, the court relied on the first Preamble of the United Nations Convention against Corruption wherein States expressed their concern about the gravity of the challenges that corruption brings to societies by undermining their sustainable development, institutions, values, and the rule of law.[171] The court thus defined the word 'corruption', for this judgment, too - at its lowest threshold – "include the abuse of a public office or position (including the powers and resources associated with it) for personal gain".[172] It concluded by mentioning that "synonyms for 'corruptly' include 'immorally, wickedly, dissolutely and dishonestly'".[173]

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[163] This dissertation relies on following two assumptions based on the case law referenced below regarding this ascertain these are, *inter alia,* that the laws are inadequately drafted and that they are enforced ineffectively.

[164] The following cases are but a drop in the ocean of case law that illustrates this point: *Atlantic Ocean Management Group (Pty) Ltd v The Prosecutor-General* (HC-MD-CIV-MOT-GEN-2017/00172) [2017] NAHCMD 255 (6 September 2017); *The Prosecutor-General v Kamunguma* (POCA 01/2016) [2017] NAHCMD 302 (20 October 2017); *The Prosecutor-General v Xinping* (POCA 4/2013) [2013] NAHCMD 300 (October 2013); *The Prosecutor General v Paulo* (POCA 13/2015) [2017] NAHCMD 337 (22 November 2017); *Namibia Wildlife Resorts Ltd v Government Institutions Pensions Fund* (A323-2010) [2014] NAHCMD 379 (9 December 2014); *The Prosecutor-General v Xinping* (POCA 4/2013) [2013] NAHCMD 300 (October 2013); *Ellis In His Capacity As Trustee Of The Eldo Trust, Badenhorst In His Capacity As Trustee Of The Eldo Trust And Dos Santos In His Capacity As Trustee Of The Eldo Trust v Noabeb* SA 28/2014; *Prosecutor-General v Kamunguma and Mckuma and Lenga Trading CC* SA 62/2017; *Ellis in his Capacity as Trustee of Eldo Trust v Noabeb* (I 3565/2013) [2014] NAHCMD 81 (12 March 2014).

[165] (A 54/2011) [2012] NAHC 31 (20 February 2012).

[166] Act No. 8 of 2003. Ibid.

[167] *S v Goabab and Another* SA 45/2010.

[168] Ibid.

[169] The AU Convention on Preventing and Combating Corruption *op cit* note 86.

[170] Ibid.

[171] United Nations Convention against Corruption *op cit* note 72.

[172] Supra note 169.

[173] Ibid.

This case would have been a perfect opportunity for the court to explicitly adopt a definition by one of the Conventions that it relied on for its reasoning. Unfortunately, the court missed this opportunity and to date, this definition has not been settled in law, especially since the definition in the *Goabab* case was explicitly only made applicable to that specific case. Generally, regarding using rules of international law to decide cases, Namibian courts (and law enforcement authorities) seem hesitant, if not completely unwilling in certain instances, to expand the country's legal jurisprudence by way of implementing general and specific rules of international law in its territory.

The next chapter analyses Namibia's anti-IFF legislation as well as the legislation that regulates its natural resources sector. This exercise will identify gaps in these laws. Analyzing the relevant legislation will determine whether Namibia's laws comply with the international best practice standards discussed in this chapter.

3. CHAPTER THREE

3.1. Introduction

This chapter analyzes the domestic legal framework for IFFs in the natural resource sector. The effectiveness test, as discussed in Chapter One, will guide this chapter in identifying the weaknesses in the conceptualization and the design of the legislation; as well as possible regulatory failures.[1] As such, this chapter examines the nexus between legislation that is in force and its actual results versus its desired results.[2] Further, Chapter Two's discussion of the international laws and international best practice standards informs the criterion that this chapter employs to measure the effectiveness of Namibia's anti-IFFs legislation in its natural resources sector. Following chapter 3, chapter 4 puts forth recommendations on how to remedy the weaknesses identified in this chapter.

To fulfil the purpose of this chapter, the discussion is divided into three parts. Part One presents the legal framework of Namibia's natural resource sector. Part Two discusses the laws that Namibia has in place that aim to combat and prevent IFFs. Part One and Two also identifies where the legislation falls short of the international best practice standards discussed in Chapter Two, while Part Three concludes by succinctly summarizing the gaps identified.

3.2. PART ONE: Namibia's Natural Resources Legislative Framework

This section discusses the legal framework of Namibia's natural resource sector. The legislation discussed will be evaluated against the international best practice standards discussed in Chapter Two. As discussed in Chapter One, under the theoretical framework, this dissertation did not conduct empirical research. As such, this dissertation will not delve into the authorities who are tasked to implement, vet, monitor, and enforce the legislation discussed. To engage in such an evaluation, extensive empirical research, and engagement with those authorities themselves are required; a study like that could be the subject of future research.

Article 100 of the Constitution provides that "all the natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State if they are not otherwise lawfully owned".[3] However, in *Rostock CC and Another v Van Biljon,* Article 100 was challenged and the court held that all the natural resources in

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[1] Maria Mousmouti *Designing Effective Legislation* (2019) 5.
[2] Ibid.
[3] The Constitution of the Republic of Namibia 1990, as amended.

the territory are managed by the state for the benefit of the Namibia people.[4] This judgment effectively makes Namibia's resource holding model a custodianship. The discussion below takes place given this judgement.

3.2.1. The Minerals (Prospecting and Mining) Act (the Mining Act)[5]

This Act provides for, inter alia, "the reconnaissance, prospecting and mining for minerals in Namibia".[6] Furthermore, this Act vests all rights concerning reconnaissance, prospecting, mining, sale, disposal, and control over any mineral in the State.[7]

Section 3 prescribes that no person will exercise any reconnaissance, prospecting, or mining operations in Namibia if they are not accordingly licensed to carry out such operations. Finally, no interest in a mining claim, license, or interest and no interest in an exclusive prospecting right may be transferred, granted, ceded, or assigned without the written approval of the Minister.[8]

The Act provides that both natural persons and companies may apply for rights envisaged therein.[9] However, section 7 prohibits the Commissioner, all officers employed in the Ministry of Mines and Energy, and their spouses from acquiring rights or interests in or holding any share or interest in a company that holds, any non-exclusive prospecting, mining claim, or mineral license.[10]

This section does not address whether this prohibition applies to the Minister himself. Section 7 is a noteworthy attempt to prevent possible corruption. However, this section is a far cry from the internationally accepted standards for preventing Politically Exposed Persons (PEPs) from benefitting from their positions or from their connection to persons that hold a political office.[11] Moreover, whether the Minister himself qualifies as an "officer employed in the Ministry of Mines and Energy" is not easily ascertainable from the Act.

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[4] *Rostock CC and Another v Van Biljon* [2011] NAHC 259 (14 June 2011).
[5] Act No. 33 of 1992.
[6] Ibid at the Long Title.
[7] Ibid at section 2.
[8] Ibid at section 3 (b).
[9] Ibid at section 17, 32, 46, 59 (1) (a), 78, 79, 84, 85, 88, 91, 96, 97, 109 and 121.
[10] Ibid at section 7.
[11] According to the FATF "a politically exposed person as an individual who is or has been entrusted with a prominent public function or their family member. Due to their position and influence, it is recognised that many PEPs are in positions that potentially can be abused for the purpose of committing money laundering (ML) offences and related predicate offences, including corruption and bribery". See FATF Guidance 'Politically Exposed Persons: Recommendations 12 and 22' (2013). Also see Theodore S. Greenberg, Larissa Gray, Delphine Schantz, Michael Latham and Carolin Gardner 'Politically Exposed Persons: A Policy Paper on Strengthening Preventive Measures' (2009) *Stolen Asset Recovery Initiative*. Also see The Wolfberg Group *Wolfsberg Guidance on Politically Exposed Persons* (2017). Also see *Financial Service Intelligence Watch* 'Anti-Money Laundering (AML) Focuses on Prominent Influential Persons or Politically Exposed Persons' (2019 No. 98) *CompliNEWS.*

In this regard, the Constitution offers a solution. Article 42 prohibits Ministers from taking up any other paid employment, engaging in any activity inconsistent with their Ministerial positions, or exposing themselves to any situation which carries with it the risk of a conflict of interest.[12] Further, Ministers must not use their Ministerial positions directly or indirectly to enrich themselves.[13] However, the Article does not address whether a Minister's family members may hold an interest in the sector for which that Minister is responsible. The article also does not address whether disclosing a potential conflict of interest will shield the Minister from possible claims of corruption. The Anti-Corruption Act,[14] which is discussed later in this chapter, may offer a more definitive answer.

Sections 33, 41, 50, 60, 68, and 79 all address the registration, application, and terms and conditions of the various rights, claims, and licenses administered by the Act. These sections all prescribe that the companies applying for these various rights, claims, or licenses must submit to the Commissioner, *inter alia*, the particulars of the company's incorporation and registration; its registered address and principal place of business in Namibia; the full names and nationality of the directors of the company; the share capital of the company and the full names and nationality of any person who is a beneficial owner of more than five per cent of the company's shares.[15]

Furthermore, section 49 provides that before a mineral license being issued and at the request of the applicant, the Minister may agree with the applicant.[16] Such an agreement must contain the terms and conditions provided in sections 48(4) and (5). The agreement must be consistent with the Act. Additionally, the agreement must contain the full particulars of the person.[17] In the case of a company the agreement must reflect details of the company's incorporation and registration; its registered address and principal place of business in Namibia; the full names and nationality of its directors; its share capital and the full names and nationality of any person who is the beneficial owner of more than five per cent of its shares.[18]

In the case of claims and licenses held by foreign-owned companies, section 45 and section 101 prescribes that the holder of a prospecting or mining license must keep an address in Namibia.[19] Furthermore, all companies are required to keep a proper record of all employees.[20] The Act requires

[12] Article 42 of the Constitution of the Republic of Namibia.
[13] Ibid.
[14] Act No. 8 of 2003.
[15] Supra note 5 at sections 33, 41, 50, 60, 68 and 79.
[16] Ibid at section 49.
[17] Ibid at section 49 (2) (a).
[18] Ibid.
[19] See sections 45 and 101.
[20] Ibid.

that the holder of a prospecting or mining license must disclose the full names, addresses, nationality, and ages of, remuneration, and other benefits of the employees of such prospecting operations.[21]

The Act also requires that prospecting and mining businesses annually prepare and submit to the Commissioner within sixty days after 31 December, financial statements, a balance sheet, profit and loss accounts, and such other financial statements as the Commissioner may require.[22] However, this Act does not require that the financial records that are submitted must be audited before submission. Nor does it give the Commission or Minister the authorization to have the same audited.

3.2.2. The Petroleum (Exploration and Production) Act[23]

This Act provides for the reconnaissance, exploration, production, disposal of, and control over petroleum in Namibia.[24] Regarding the ownership of petroleum resources in Namibia, section 2 provides that all exploration, reconnaissance, production, disposal, and control rights of petroleum vests in the State.[25]

The Act has similar provisions as the Minerals Act concerning prohibiting officials from holding interests in licenses or in companies holding licenses. However, this Act expands on section 7 of the Minerals Act. In this regard, section 6 provides that any document or transaction that grants any right or interest in any license, or any share in a company that holds a license, to the Commissioner, the Chief Inspector, or any employee of the Ministry of Mines and Energy shall be null and void.[26] Furthermore, the arguments regarding Article 42 of the Constitution advanced under the discussion of the Mining Act apply *mutatis mutandis* to the Minister's conduct concerning the Petroleum Act.

Unlike the Minerals Act, this Act dictates that, except for reconnaissance licenses, all other licenses will only be issued, and can only be transferred to companies.[27] Further, any interest in licenses issued in terms of the Act can only be granted, ceded, or assigned to a company.[28] Consequently, natural persons are precluded from obtaining interests in licenses.

Sections 24, 32, and 46 require that applications by companies for licenses regulated by the Act must contain the name of such company, the particulars of its incorporation, and registration.[29] It must also

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[21] Ibid.
[22] Ibid at section 45 (1) (e) (i) and (ii).
[23] Act No. 2 of 1991.
[24] Ibid at Long Title.
[25] Ibid at section 2.
[26] Ibid at section 6.
[27] Ibid at sections 11, 27, 34, 35, 50, and 51.
[28] Ibid.
[29] Ibid at sections 24, 32, and 46.

contain the names and nationality of the company's directors, its share capital, and the name of any person who is the beneficial owner of more than five per cent of its shares.[30]

However, the Act does not specify whether companies must be public, private, listed, Namibian, or foreign. Explicitly requiring that the company be public, private, listed, Namibian, or foreign would have implications relating to the disclosure of the company's annual financial statements. It is crucial to note that public companies are required by section 50 of the Companies Act to submit certified copies of their annual financial statements to the Registrar of Companies.[31]

The Act grants the Minister extensive discretionary powers *vis-à-vis* the renewal, transferring, granting, ceding, and assigning of a license and the joining to a license.[32] The Minister may also, via written notice, require an applicant to furnish him with whatever information that the Minister in his discretion deems necessary to enable him to determine who has, in the case of a company, the controlling interest in the affairs of such company.[33] This notice may also require the applicant to produce, *inter alia*, any other information that the Minister may in his or her discretion deems necessary for purposes of considering such application.[34] The Minister may start investigations or negotiations deems necessary per his or her discretion. [35]

In addition to building on the licensing regime created by the Minerals Act, this Act also establishes a contractual regime. Thus, Namibia has a dual system of licenses and contracts as it relates to the petroleum industry. In this regard, section 13 of this Act provides that before licenses are issued the Minister must agree with the applicant in line with the provisions of this Act.[36]

This agreement must stipulate the terms and conditions agreed upon by the Parties.[37] However, the terms and conditions of this agreement must be consistent with section 12(4) of the Act.[38] Further, section 13(2) requires that the agreement must include, *inter alia*, the method that will be used to, from time to time, establish the market value of petroleum.[39] This section also requires that the agreement must include the particulars of the company concerned and its directors, as well as any person who is a

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[30] Ibid at section 13.
[31] Companies Act, No 28 of 2004. "… and the group financial statements of the group of companies to which the public company form part, if any, and the annual financial statements of every private company which is a subsidiary of that public company".
[32] Ibid at sections 12 and 39.
[33] Ibid.
[34] Ibid.
[35] Ibid.
[36] Ibid at section 13.
[37] Ibid.
[38] Ibid.
[39] Ibid.

beneficial owner of more than five per cent of the shares issued by such company.[40] It must also specify, *inter alia*, how the company will go about ensuring that it complies with its obligations, as well as the company's financial and insurance arrangements.[41] Finally, this section provides that any clause in the agreement that is inconsistent with the Act will be null and void and that no provision in the agreement absolves either party from any requirement stipulated by law.[42]

Lastly, similar to the Minerals Act, this Act also provides that a report must be kept wherein a series of information must be recorded.[43] This information includes the holder's name, the conditions of the license, the names of all persons who have an interest in a license and the nature of such interest, and whatever other particulars that the Minister deems necessary.[44] However, unlike the Minerals Act that requires that financial records should be kept, section 18 of the Petroleum Act only requires that the license holder keeps a record of their operations.[45] Moreover, neither section 38 or 53, which respectively prescribes the obligations of holders of exploration and production license, explicitly require that financial records be kept or submitted. Thus, this Act also does not require that the license holders have their financial records audited nor does it require that audited financial records be submitted to the Commission or Minister.

3.2.3. The Diamond Act[46]

This Act provides, inter alia, "for control measures in respect of the possession, purchase, sale, processing, importing and exporting of diamonds".[47] Unlike the Minerals Act, but similarly to the Petroleum Act, this Act has no provisions requiring companies to report their financials. Moreover, like the Minerals and the Petroleum Acts, this Act also do not provide for the auditing of financial statements of the companies licensed by it.

3.2.4. The Marine Resources Act[48]

This Act provides for the responsible and sustainable utilization of Namibia's marine resources. Section 32 prescribes no person will harvest any marine resource for commercial purposes in Namibia or Namibian waters, except under a right granted, or a fisheries agreement entered, in terms of this Act.[49]

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[40] Ibid.
[41] Ibid.
[42] Ibid.
[43] Ibid at section 18.
[44] Ibid.
[45] Ibid.
[46] The Diamond Act No. 13 of 1999.
[47] Ibid at Long Title.
[48] Act No. 27 of 2000.
[49] Ibid at section 33.

The Act prescribes that the Permanent Secretary must keep a register showing whatever particulars, in respect of every right, exploratory right, quota, and license, are prescribed.[50] Furthermore, section 48 requires that all holders of rights in terms of the Act must keep records and submit same to the Permanent Secretary, or any staff member of the Ministry authorized in writing thereto by the Minister when required.[51]

Although this Act refers to reports that must be prepared and submitted to the Permanent Secretary or any authorized staff member it does not make any specific reference to financials. Additionally, like the Minerals and Diamonds Acts, this Act does not require companies to have their financials audited. Neither does the Act provide the Minister with the power to have the same audited post-submission.

3.3. PART TWO: Namibia's Anti-IFF Legislative Framework

3.3.1. The Financial Intelligence Act[52] (FIA)

This Act establishes the Financial Intelligence Centre (FIC) and the Anti-Money Laundering and Combating of the Financing of Terrorism and Proliferation Council (Council).[53] The Act regulates suspicious financial transactions that relate to money laundering and terrorism funding only.[54]

The FIA positions itself as the apex law regulating suspicious financial transactions and associated activities. Section 6 dictates that where "any conflict relating to the matters dealt with in this Act arises between this Act and any other law, a provision of this Act prevails". To achieve its purpose, the FIA places certain duties on persons and institutions that it identifies as accountable and reporting institutions and regulatory and supervisory bodies.

Money laundering and money laundering activity are defined as the act of a person engaging, directly or indirectly, in a transaction involving the proceeds of any unlawful activity.[55] The definition includes

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[50] Ibid at section 43.

[51] Ibid at section 48. Further, section 52 criminalizes the failure to keep records and to report when required to do so. The supply false information, bribing or attempting to bribe an inspector, an observer or a staff member; as well as accepting or attempting to accept any bribe offered is also criminalized. This section prescribes that upon on conviction the offender is liable to a fine not exceeding N$1 000 000. Section 53, however, dictates that the monetary value of court must ascertain the monetary value of the advantage concerned in the case and, in addition to any penalty that may be imposed in respect of that offence, impose a fine three times the sum of the monetary value determined by the court. This additional fine may be recovered as a civil judgement. Moreover, section 54 prescribes that in addition to penalty imposed the court may order that the marine resource, fishing gear, vessel, vehicle or item involved in the commission of the offence be forfeited to the State.

[52] Act No. 13 of 2012.

[53] The FIC is established in terms of section 7, and the Council is established in terms of section 17.

[54] See section 8 of the Act, as well as its Long Title.

[55] "Proceeds of unlawful activities has the meaning attributed to that term in section 1 of the Prevention of Organized Crime Act No. 29 of 2004 (POCA)". The POCAs definition is, "any property or any service, advantage, benefit or reward that was derived, received or retained, directly or indirectly in Namibia or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on

actions whereby a person uses, acquires, possesses, or removes the proceeds of any unlawful activity into or out of Namibia.[56]

Additionally, it includes concealing, disguising, or impeding the efforts to ascertain the true ownership, title of, rights concerning, origin, location, nature, movement, or disposition of proceeds of any unlawful activity.[57] The definition is made applicable to persons who are reasonably expected to have been aware that the proceeds are derived from illicit activities or, failed to take reasonable steps to ascertain whether property or proceeds are derived from any unlawful activity.[58] Further, the definition also covers activities classified as offences in terms of sections 4, 5, or 6 of the Prevention of Organised Crime Act.[59] Lastly, "financing of terrorism" carries the same definition ascribed to it in an Act of the Parliament criminalizing the act of terrorist financing.[60]

Section 4 provides that the Business and Intellectual Property Authority (BIPA) must annually solicit and store information regarding the shareholders, directors, members, and beneficial owners of companies and close corporations.[61] BIPA must also forward all changes to this information to the Registrar of Deeds for all companies and close corporations that own immovable properties, and it must avail all this information to the relevant authorities whenever same is requested.[62] This section supplements sections 33, 41, 49, 50, 60, 68, and 79 of the Minerals Act, and sections 13, 24, 32, and 46 of the Petroleum Act, as well as section 33 of the Marine Act to a certain extent.

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by any person, and includes any property representing property so derived and includes property which is mingled with property that is proceeds of unlawful activity".

[56] Ibid.

[57] Ibid.

[58] Supra note 52. ""Property" has the meaning attributed to that term in section 1 of the POCA". The POCAs definition is, "money or any other movable, immovable, corporeal or incorporeal thing and includes any rights, privileges, claims and securities and any interest in the property and all proceeds from the property".

[59] Ibid.

[60] In this regard, the Prevention and Combating of Terrorist and Proliferation Activities Act No. 4 of 2014 defines "funding of terrorism as the provision of funds, assets or financial services which are used, in whole or in part, for terrorist activity as contemplated in section 2". The definition includes "providing or collecting funds with the intention or knowledge that such funds will be used, or will be attempted, to carry out any act of terrorism as defined in the Organization for African Unity (OAU) Convention on the Prevention and Combating of Terrorism of 1999".

[61] Ibid. The Act defines beneficial owner as "(a) a natural person who owns or effectively controls a client, including the natural person on whose behalf a transaction is conducted; or (b) a natural person who exercises effective control over a legal person or trust, and a natural person is deemed to own or effectively control a client when the person - (i) owns or controls, directly or indirectly, including through trusts or bearer share holdings for any legal person, 20% or more of the shares or voting rights of the entity; (ii) together with a connected person owns or controls, directly or indirectly, including through trusts or bearer share holdings for any legal person, 20% or more of the shares or voting rights of the entity; (iii) despite a less than 20% shareholding or voting rights, receives a large percentage of the person's declared dividends; or (iv) otherwise exercises control over the management of the person in his or her capacity as executive officer, non-executive director, independent non-executive director, director, manager or partner".

[62] Ibid.

Section 9 lays out the functions and powers of the Centre. These are, *inter alia*, collecting, requesting, receiving, processing, analyzing, and assessing requests for information, reports, and information.[63] These requests, reports, or information can be received from persons, government offices ministries or agencies, reporting institutions, accountable institutions, or any other competent authorities and any foreign agencies.[64] The requests, reports or information can be requested, received, collected, processed, assessed, and analyzed in terms of the FIA or any other law.[65]

The Centre may collect records and statistics, initiate an analysis, disseminate information, and make recommendations.[66] The Centre may also monitor, supervise, and enforce compliance with the FIA and its directives, regulations, notices, determinations, or circulars by accountable and reporting institutions.[67] Interference with the Centre's powers and functions is criminalized in terms of sections 4 and 5.

Section 21 prohibits an accountable institution from establishing business relationships or concluding transactions[68] with anyone, unless it takes reasonable steps to ascertain - *(a)* [t]he identity of the prospective client,[69] by obtaining and verifying identification and any further information; or if an agent is acting on behalf of the prospective client, the identity of the agent and the prospective client must be established as well as the authority upon which the agent is acting; and any other information of the prospective client and the agent.[70] The section forbids anonymous, fictitious, false, or incorrect accounts.[71] Similarly, section 26 prescribes a range of information that accountable and reporting institutions must establish and acquire before entering into a business relationship with, or concluding any transaction, for a client.[72] This section further requires that these institutions keep records of this information and provide the same to the Centre upon request.[73]

Furthermore, section 23 advances that accountable institutions must employ adequate monitoring and risk management systems to identify activities of clients or beneficial owners that pose a risk of money

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[63] Ibid ta section 9.
[64] Ibid.
[65] Ibid.
[66] Ibid.
[67] Ibid.
[68] Ibid at section 21 (1). A single transaction is "multiple cash transactions in the domestic or foreign currency which, in aggregate, exceed the amount determined by the Centre if they are undertaken by or on behalf of any person during any day or such period as the Centre may specify".
[69] Where the prospective client is a company, the accountable or reporting institution must establish "its legal existence and structure, including verification of – (a) the name of the legal person, its legal form, address, directors, partners or senior management; (b) the principal owners and beneficial owners; and (c) provisions regulating the power to bind the entity and to verify that any person purporting to act on behalf of the legal person is so authorized, and identify those persons".
[70] Ibid.
[71] Ibid.
[72] Ibid at section 26.
[73] Ibid.

laundering.[74] Further, when a client or beneficial owner is identified as high risk for money laundering owners or senior management of that accountable institution must grant their approval for the establishment of a business relationship with such a new client.[75] Where such a discovery is made in terms of an existing client the owners or senior management of the accountable institution must still grant their approval for the continuation of the business relationship with the client.[76]

Additionally, section 24 requires that accountable institutions maintain adequate and up-to-date records relating to all their clients and affiliated beneficial owners.[77] They must also monitor the transactions a client makes to ensure that same is not inconsistent with the institution's knowledge of that client, their commercial or personal activities, and their risk profile.[78] Further, accountable institutions must pay special attention to complex and unusually large transactions, as well as transactions with unusual patterns that do not appear to have an economic or visible lawful purpose.[79]

The Act also requires accountable institutions to regularly conduct risk assessments.[80] These assessments must take into account the type of clients, products, and services that the institution offers, as well as the jurisdictions from where these clients and their business dealings originate.[81] Further, these institutions must create and implement customer acceptance policies and procedures to effectively mitigate these risks.[82] A mitigation tactic required by the Act is that the employees of these institutions must undergo training to recognize and appropriately deal with suspected cases of money laundering and financing of terrorism activities.[83]

When an accountable institution reports a suspicious transaction to the Centre, the Centre may direct the institution to halt processing the transaction until the transaction has been investigated and cleared.[84] However, the Centre may direct the institution in writing not to proceed with the transaction, or any other transaction in respect of the funds affected by that transaction, for a period not exceeding twelve working days.[85] This timeframe is inadequate. What often happens is that persons are charged under the FIA, the Prevention of Organized Crime Act, and the Exchange Control Regulations.[86] These

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[74] Ibid at section 23.
[75] Ibid.
[76] Ibid.
[77] Ibid at section 24.
[78] Ibid.
[79] Ibid.
[80] Ibid at section 38.
[81] Ibid.
[82] Ibid.
[83] Ibid at section 9 (d).
[84] Ibid at section 41.
[85] Ibid at section 42.
[86] See *Amushelelo v The Magistrate, Windhoek* (HC-MD-CIV-MOT-REV-2019/00397) [2019] NAHCMD 475 (08 November 2019; *State v Henock and Others* (CR 86/2019) [2019] NAHCMD 466 (11 November 2019); and *The*

regulators then act in a concerted manner to combine the respective time periods in their various enabling laws to increase the timeframe that they can seal off the funds under investigation.[87] This is a sloppy solution to an issue that demands a much more nuanced remedy. This situation could also potentially result in the violation of suspects' human rights, such as the right to a fair trial and the right not to be unlawfully detained.

Regarding cross-border transactions, the Minister may direct accountable institutions to enhance their oversight regarding transactions from countries that do not sufficiently apply international best practice standards to combat money laundering.[88] Furthermore, accountable institutions must investigate the activities of the respondent institution, evaluate their reputation and the nature of supervision that it is subject to.[89] The accountable institutions' directors, partners, or senior management must provide approval for the establishment of the correspondent banking relationship.[90] The accountable institution must also evaluate and establish an agreement with the respondent institution regarding anti-money laundering and combating the financing of terrorism controls.[91]

Accountable and reporting institutions are obliged to report to the Centre all particulars of a transaction when the transaction exceeds the threshold amount set by the Centre.[92] They must also report transactions where the funds are reasonably suspected to derive from unlawful activities or be destined for the furthering of money laundering activities.[93] Failure to report such transactions is a criminal offence. The transactions envisaged in the Act cover both physical and electronic transactions.[94] However, a major shortfall of this Act is that it does not address cryptocurrency transactions. Namibia has no legislation regulating cryptocurrency transactions. However, the country's central bank, the Bank of Namibia, has issued several opinions advising the public that there is no recourse in the law dealing with cryptocurrency offences.[95]

Furthermore, section 35 provides that a supervisory body must inform the Centre when it suspects an accountable or reporting institution of knowingly or unknowingly concluding or attempting to conclude a

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Prosecutor-General v Kamunguma and Another (POCA 01/2016) NAHCMD 302 (20 October 2017) for examples of 'bundling up' of charges under these different Acts.

[87] Ibid.

[88] Supra note 52 at section 24.

[89] Ibid at section 25 provides that "an accountable institution must identify and verify the identity of respondent institutions with which it has a correspondent banking relationship".

[90] Ibid.

[91] Ibid.

[92] Ibid at section 32.

[93] Ibid at section 33.

[94] Ibid at section 34.

[95] Bank of Namibia *Revised Position on Cryptocurrencies* May 2018 available at *https://www.bon.com.na/CMSTemplates/Bon/Files/bon.com.na/9a/9ab34d1a-07d7-45b3-859a-6e51814d690b.pdf* accessed on 29 January 2021.

transaction where the proceeds may be from unlawful activities.[96] A supervisory body must also adopt the necessary measures to prevent a person who is not fit and proper from controlling or participating as a director, manager, or officer in the operations of an accountable institution.[97] Lastly, supervisory bodies are required to report all information received from accountable or reporting institutions that contain inferences of any activity that is deemed an offence under this Act.[98]

If a supervisory body fails to comply with its duties in this Act the Centre may penalize said body by imposing a fine.[99] In this regard, subsection 18 provides that supervisory bodies and accountable or reporting institutions that contravene or fail to comply with subsection (1), (2), (7), (8), (15), (16), or (17) or subsection (6)(b) commit an offence.[100] This provision prescribes that a penalized supervisory body will not have recourse to Court. This dissertation posits that this provision is an overreach, and contrary to the rule of law and the separation of powers doctrine.

Additionally, there is the question of who penalizes the Centre when it fails to comply with the duties imposed on it by this Act? Section 48 requires that the Centre discloses information that may have a bearing on the economic stability of the national security of Namibia to the relevant investigating or regulatory bodies.[101] However, it still does not address possible consequences that the Centre may face if it fails to fulfil this or any other duty. While the traditional administrative law route does exist, this dissertation advances that it would still be prudent for some checks and balances to be in place for the work of the Centre.

The FIA empowers the Centre to exchange information with other institutions and countries.[102] This is an internationally recommended requirement for financial intelligence agencies across the world in the fight against IFFs.[103] This exchange of information may be done in terms of an agreement.[104] Furthermore, the terms and conditions of this agreement may not deviate from the FIA.[105]

The Centre or other supervisory bodies are also empowered to impose administrative sanctions on the institutions and other persons that fail to comply with the FIA.[106] This sanction does, however, not

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[96] Ibid at section 35.
[97] Ibid.
[98] Ibid at section 35 (17).
[99] Ibid.
[100] Ibid at section 35 (18).
[101] Ibid at section 48.
[102] Ibid.
[103] See FATF Recommendation 2012 available at *http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html* accessed 27 November 2020.
[104] Supra note 52 at section 48.
[105] Ibid.
[106] Ibid at section 56.

constitute a conviction as contemplated in the Criminal Procedure Act (CPA).[107] Additionally, if a legal person, trust, or association commits an offence it is deemed that the director, controller, or partner that is responsible for managing the affairs of the corporation has committed that offence.[108] Even when the corporation is not convicted, the individuals referred to above may still be prosecuted for the envisaged offence.[109] However, this does not affect the criminal liability of the corporation.[110]

To this end, the CPA provides for corporations to be held criminally liable.[111] Unfortunately, in Namibia's thirty years of independence, there has not been one such case. As such, this law seems to be on the country's books for ceremonial purposes.

Further, schedule one of the FIA sets out the accountable institutions as required by section 2.[112] These are, *inter alia*, legal practitioners who are in private practice, estate agents, accountants and auditors, trust and company service providers that act on behalf of their clients, banking institutions, casinos, money lenders, The Agricultural Bank of Namibia, The Development Bank of Namibia, The National Housing Enterprise, Mining, and Petroleum companies and persons who trade in minerals, persons that trade on markets and in foreign currency, investment firms, Namibia Post Limited, Members of a stock exchange licensed under the Stock Exchanges Control Act,[113] persons that carry on the business of electronically transferring money or value, persons regulated by the Namibia Financial Institutions Supervisory Authority and auctioneers.[114] Notably, companies operating in the fisheries and diamond sectors, both industries regulated on their own, are not on this list.

Finally, section 44 recognizes the common law right to professional privilege between a legal practitioner and his or her client.[115] As such, although legal practitioners are on this list, their duty to report to the Centre is significantly limited. It is debatable where this confidentially ends and where the legal practitioners' duty as an officer of the court begins. This dissertation is of the view that the law evolves along with the dynamics of society; therefore section 44 needs to be reviewed considering the involvement of legal practitioners in IFF-related crimes over the past decade. This issue will be discussed in greater detail in the following chapter.

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[107] Act No. 51 of 1977.
[108] Supra note 52 at section 65 (1).
[109] Ibid at section 65 (2).
[110] Ibid at section 65 (3).
[111] Supra note 107 at section 332.
[112] Supra note 52 at schedule 1.
[113] Act No. 1 of 1985.
[114] Supra note 52 at schedule 1.
[115] Ibid at section 44.

3.3.2. The Income Tax Act (Tax Act)

The Tax Act provides for an array of matters including the criminalization of tax evasion.[116] This Act does not provide for the exchange of information as envisaged by the relevant international treaties and conventions which advance the best practices in combatting IFFs. On the contrary, section 4 prescribes that all persons employed to further the objectives of this Act must preserve the secrecy of all matters that they are exposed to in the performance of their duties.[117]

In terms of the Act, income accrues to a person whether he directly receives said income and said income has only become due and payable but has not yet been actualized.[118] However, the major flaw of the Tax Act lies in the fact that the country's source-based system is not well-developed to address the manipulation since it is simply impossible for a 1981 Act to address modern-day issues comprehensively.[119] Continuous amendments are also not ideal and only aid in illustrating that the Act needs a comprehensive review and overhaul.

Additionally, the Act provides an array of exemptions that further cut down revenue derived from sources within Namibia.[120] Although some of these exemptions are valid in certain sectors, for example, non-profit and charity organizations, their blanket application to sectors such as the extractive industries often erode the tax base and undermine domestic resource mobilization efforts. This is a loophole that is heavily exploited, as shown by the Fishrot Files.[121] Court documents in the ongoing case show that the accused involved in the alleged scheme transferred significant revenues to affiliate companies in what is believed to be a tax-avoidance endeavour.[122] These documents further illustrate how the accused in the alleged scheme employed transfer mispricing techniques to under-or overestimate the value of goods and services to further lower their tax obligations to Namibia.[123]

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[116] Act No. 24 of 1981, as amended at Long Title.
[117] Ibid at section 4.
[118] Ibid at section 12.
[119] There two types of tax systems employed by countries, these are 1. Source based tax, and 2. Resident based tax. As a country that employs the source-based system only income from a source within Namibia or deemed to be within Namibia is subject to tax. See Tax Justice Briefing *Source and Residence Taxation* (15 September 2005) 1. "Residence taxation of income is based on the principle that people and firms should contribute towards the public services provided for them by the country where they live, on all their income wherever it comes from. Source taxation is justified by the view that the country which provides the opportunity to generate income or profits should have the right to tax it". See PwC 'Republic of Namibia, Individual - Taxes on personal income' *Worldwide Tax Summaries (*08 June 2020) available at *https://taxsummaries.pwc.com/republic-of-namibia/individual/taxes-on-personal-income* accessed on 10 08 2020.
[120] See sections 11 (rebate in respect of diamond profits); 16 (exemptions); and 72 (Burden of proof in respect of exemptions, deductions, and rebates).
[121] Supra note 19.
[122] Ibid.
[123] Ibid. The Natural Resource Governance Institute define transfer mispricing as "when the related parties distort the price of a transaction to reduce their taxable income". See The Natural Resource Governance Institute 'Transfer Pricing in the Mining Sector: Preventing Loss of Income Tax Revenue' (August 2016) *NRGI Reader* 1.

Finally, section 100 of the Act prevents double taxation. Under Article 32(3)(e) of the Constitution, this section provides for double taxation agreements. These agreements may afford persons with relief from being taxed twice for the same income when that person is liable for taxation from both Namibia and the other country to the double taxation agreement.[124] A person will usually be liable for double taxation where one country employs a source-based tax regime and the other employs a resident-based tax regime, for example, Namibia and South Africa.

3.3.3. The Exchange Control Regulations

Similar to the FIA, the Regulations require that persons desiring to buy or sell foreign currency provide certain information and documentation to Authorised Dealers (ADs) and Authorised Dealers with Limited Authority (ADLAs).[125] The Regulations also prescribe, via Circulars issued in this regard, certain financial controls.[126] For example, foreigners are only allowed to remit two-thirds of their income earned in Namibia to jurisdictions outside Namibia.[127] While persons travelling may only export or import N$/R250 000.00 per visit into or out of Namibia.[128] Further, Namibians are only allowed to export N$/R1 million per annum for personal use and N$/R4 million per annum for investment purposes.[129] There are no maximum controls for importing funds for both personal use and investment purposes. This is because the ultimate purpose of capital controls is to restrict the funds leaving the country and not to limit the funds entering the country.[130]

In this regard, section 3 prohibits all persons from, *inter alia*, making a payment to, or in favour, or on behalf of a person resident outside Namibia without having received authorization to do so from the Treasury.[131] Moreover, section 7 requires that all residents of Namibia who are, or becomes entitled to sell or to procure the sale of any foreign asset must declare same to Treasury.[132] This declaration must

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[124] Supra note 136 at section 100. Namibia has entered into double taxation agreements with Botswana, Malaysia, South Africa, France, Mauritius, Sweden, Germany, Romania, the United Kingdom, India, and the Russian Federation available at *https://taxsummaries.pwc.com/republic-of-namibia/individual/foreign-tax-relief-and-tax-treaties* accessed on 01 March 2021.
[125] The Exchange Control Regulations No. 61 of 1961 at section 2 and 19.
[126] Ibid at section 16.
[127] See Bank of Namibia Website available at *https://www.bon.com.na/Bank/Exchange-Control/Legal-Framework/Currencies-and-Exchanges-Act,-1933-(3).aspx* accessed on 29 January 2021.
[128] Ibid.
[129] Ibid.
[130] United Nations Conference on Trade and Development *Management of Capital Flows: Comparative experiences and implications for Africa* 2003 at 331 – 333.
[131] In practice this authorisation is sought through one's banking institution from the Exchange Control Division at the Bank of Namibia. The Bank is appointed as the Ministry of Finance's agent by the Regulations and thus administers same.
[132] Supra note 126 at section 7.

provide the particulars of such a sale or acquisition, including the details of the acquisition of the foreign asset and where it is held.[133]

Section 7 is especially relevant since the Fishrot case has exposed that monies received from alleged brides by the accused would often be deposited into foreign bank accounts.[134] From there the monies were used to acquire properties in foreign countries, thus never actually making it to Namibian shores.[135] For illustration purposes, audits from one suspect of the case revealed that he increased his property portfolio from two to twenty-two properties; many of which are based in South Africa and Dubai.[136]

These revelations beg the question, does section 7 adequately cure the mischief that it addresses? If not, how can it be buttressed? More significantly, if section 7 withstands scrutiny, does the deficiency lie within the monitoring systems and agencies themselves? If so, how can this mischief be cured? The next chapter critically addresses these concerns and attempt to provide an answer.

Finally, although section 22 criminalizes the contravention of any provision of these regulations.[137] Criminalization is not sufficient. The recovery and return of assets are at the forefront of Sustainable Development Goal no. 16.4, which addresses the need to reduce and combat IFFs.[138] As such, Namibia must go further than prosecuting persons who cause or participate in the illicit financial flows and endeavour to trace and recover the monies involved in these schemes. Thus, although section 22A provides for the attachment of monies and goods and section 22B provides for the forfeiture of this money and goods to the state; these Regulations fail to provide for the recovery and return of money and goods exported from Namibia illicitly.

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[133] Ibid.

[134] Ogone Tlhage 'ACC guns for Fishrot Foreign Assets' *SUN Newspaper* (03 February 2020) available at *https://www.namibiansun.com/news/acc-guns-for-fishrot-foreign-assets2020-02-03* accessed on 10 August 2020. See the Namibian 'State hunts Fishrot assets in Dubai' (27 January 2020) 1 available at *https://www.namibian.com.na/197336/archive-read/State-hunts-Fishrot-assets-in-Dubai* accessed on 10 August 2020. Also see Tutaleni Pinehas 'Namibia: The Spoils of Fishrot ... Suspects Bought Property after Property' *The Namibian* (10 July 2020) available at *https://allafrica.com/stories/202007100797.html* accessed on 10 August 2020. Also see Editorial 'Fishrot uncovers massive purchase of property from officials and relatives' *The Namibian* (13 July 2020) available at *https://www.fis.com/fis/worldnews/worldnews.asp?monthyear=&day=13&id=108572&l=e&special=0&ndb=0* accessed on 10 August 2020.

[135] Ibid.

[136] Ibid.

[137] Supra note 126 at section 22.

[138] See The 17 Goals available at *https://sdgs.un.org/goals* accessed on 29 January 2021.

3.3.4. The Banking Institutions Act (BIA)

The BIA provides for the control, supervision, and regulation of banking institutions.[139] Banking institutions must, upon direction from the Bank of Namibia (Bank), report suspicious transactions.[140] In this regard, section 56 provides that if a banking institution conducts its business contrary to the BIA or of any other Act regulating banking business the Bank may:

- direct the banking institution to take or seize a certain action;[141]
- assume control, either wholly or partially, of the banking institution, its business, and affairs;[142]
- conduct, or appoint a person to conduct, the business of the banking institution in the name of the Bank.[143]

Moreover, subsection 7 requires that the banking institution cooperates fully with the Bank, or the person appointed by the Bank to conduct the business of the banking institution. On the other hand, section 73 criminalizes noncompliance by a banking institution with any provision of this Act, it also provides for the 'piercing of the corporate veil' to a degree in subsection 3. Herein, the Act provides that any officer, director, or substantial shareholder of the banking institution or controlling company who gave instructions, consent, or connivance for the non-compliant behaviour by the institution or company is guilty of the same offence and will be subjected to the same penalty as the institution or company.[144]

Similarly, section 72 provides that if an officer, employee, or agent of the banking institution or controlling company is convicted of an offence and they prove that they acted on the instruction of a director or a substantial shareholder then the director or substantial shareholder will be guilty of the same offence, and subjected to the same penalty as the officer, employee or agent.[145] In addition to the criminalization of noncompliance, section 73A provides for administrative action by providing for instances where fines can be imposed. The imposition of this fine is subject to the general principles of Administrative Law.[146]

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[139] Banking Institutions Act No. 2 of 1998.
[140] Ibid at section 50
[141] Ibid at section 56 (2) (a).
[142] Ibid at section 56 (2) (b).
[143] Ibid.
[144] Ibid at section 73 (3).
[145] Ibid at section 73 (4).
[146] Ibid at section 73A (2) – (6).

3.3.5. The Anti-Corruption Act (ACA)

The ACA establishes the Anti-Corruption Commission (Commission) and its functions.[147] It also provides for the prevention and punishment of corruption.[148] The Commission is tasked with investigating alleged or suspected corruption and referring or recommending a case to the competent authority for further investigation or prosecution.[149] Finally, it must co-operate with the relevant authorities as needed and take appropriate measures to prevent corruption in public and private institutions.[150]

The ACA recognizes the importance of whistleblowers in the prevention and combating of corruption in section 17. Herein, persons may provide the Commission with either oral or written information regarding possible and suspected corrupt activities.[151] Similarly, section 48 places a duty on public officials to report corrupt transactions, while section 52 offers protection for informers. Conversely, while Namibia enacted its Whistleblower Protection Act[152] and its Witness Protect Act[153] in 2017 these laws have not yet been brought into force. Namibia's Justice Minister primarily cites the Public Service Commission's delay in approving the Acts administrative structures.[154] However, the envisaged financial burden of these structures was also cited as a hurdle to the Acts implementation and poses questions about the prospects of success that the Acts have.[155]

In any event, upon receiving the information from the whistleblower, the Commission must examine the alleged corrupt activity and conclude, on reasonable grounds, whether the same warrants an investigation.[156] The 'reasonable grounds' of the Commission's decision must take into account whether the allegation is made in good faith, the seriousness of the activity and if "an investigation is justified and in the public interest".[157] Additionally, the Commission must guard against duplication of investigation efforts and double jeopardy,[158] and observe the rules of Administrative Justice.[159]

The standard that the Commission must use to establish whether an investigation would be "in the public interest" is unclear. Marrying this to the fact that the Commission is established as an agency in

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[147] Act No. 8 of 2003 at section 2.
[148] Ibid at Long Title.
[149] Ibid at section 3.
[150] Ibid.
[151] Ibid at section 17.
[152] Whistleblower Protection Act No. 10 of 2017.
[153] Witness Protection Act No. 11 of 2017.
[154] Sakeus Iikela 'Namibia: Whistleblower Laws to Cost N$160m Per Year' (1 October 2020) *The Namibian.*
[155] Ibid. Unfortunately the prospects of success of these laws are not within the scope of this dissertation's research but it warrants further research, and possibly calls for comparative studies with countries with similar constraints and means that have managed to make a success of their endeavours in this area.
[156] Supra note 150 at section 18.
[157] Ibid.
[158] Ibid.
[159] Ibid at section 19.

the Public Service, its Director-General and Deputy Director-General is political appointees,[160] its staff is subject to the Public Service Act (PSA), and it has an Executive Director that is appointed in terms of the PSA,[161] this ambiguity becomes a major flaw and diminishes public confidence in the Commission. Consequently, making the ACA part of the Public Service More so, that the Legislature made a grave error in the wording of the ACA.

The independence of anti-corruption agencies is an international best practice.[162] The importance of this independence is advocated for in the various anti-corruption conventions discussed in Chapter 2, that Namibia is a party to. The ACA falls short by not establishing the Commission as an independent body. This lack of independence is evident because the Commission's top executives and staff's employment appointment, termination, and re-appointment are tied to politically elected office bearers. This casts doubt on where the loyalties of the Commissions' employees lie when they are tasked to investigate the political officer bearer that may hire or fire them on a moment's notice. It was reckless and negligent of the Legislature to rely on the sentimental ideal that all employees of the Commission will have the ethics that are above reproach.[163] However, in this regard, section 31 makes it compulsory for the Director-General to refer a matter to the Prosecutor-General when "it appears to the that a person has committed an offence of corrupt practice under Chapter 4 or any other offence discovered during the investigation".[164]

3.3.6. The Prevention of Organized Crime Act (POCA)

The POCA introduces several crimes, but for this dissertation's purposes only Chapters 3 and 8 that deals with money laundering and the Criminal Assets Recovery Committee (Committee) will be discussed.[165] The Act makes it an offence to "disguise the origin of property, assist a person to benefit from illegal activities, and acquire, possess, or use funds from such activities".[166] The Act further provides that if an offence in this Chapter is committed by a corporation every person that acted in an official capacity, at the time of the offence, commits that offence.

Chapter 8 establishes the Committee. The Committee advises Cabinet on the confiscation or forfeiture of property and on the financial assistance needed from Cabinet to law enforcement and other

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[160] Ibid at section 4.
[161] Public Service Act No. 13 of 1995 at schedule 3.
[162] See Organisation of Economic Cooperation and Development 'Specialised Anti-Corruption Institutions: Review of Models' (2008) 3 24 – 26. Also see Patrick Meagher *Anti-Corruption Agencies: A Review of Experience* (2002) 11 – 13.
[163] Open Society Initiative for Southern Africa *Effectiveness of Anti-Corruption Agencies in Southern Africa: Angola, Botswana, DRC, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia and Zimbabwe* (2017) 194.
[164] Supra note 150 at section 31.
[165] Act No. 29 of 2004.
[166] Ibid at section 4.

regulators to combat the crimes covered by the Act.[167] The Committee may recommend policies that need to be adopted relating to the forfeiture, confiscation, realization, and transfer of property to the Fund in terms of the POCA or any other Act.[168]

The Act further provides for property tracking orders. Section 84 provides that the Prosecutor-General may apply to the court for any document relevant to locating, identifying, or quantifying property or its transfer to be made available to investigating authorities.[169] The Prosecutor-General may also apply for an order that a financial institution produces any "information obtained by the institution about any transaction conducted by or for that person with the institution during any period before or after the date of the order".[170] However, similar to the FIA the Act upholds the sanctity of 'professional privilege' between a legal practitioner and their client.[171]

3.4. PART THREE: Conclusion

3.4.1. Namibia's Natural Resources Legislative Framework

The primary issue with the Mineral, Petroleum, and Fisheries Acts is that they do not require that the financial statements that are submitted be independently audited before submission. Requiring the submission of independently audited financial statements are in line with the international best practice standards discussed in Chapter Two.

The Mineral, Petroleum and Fisheries Acts require that annual financial statements be submitted to the Commissioner; the possibility of the Commissioner auditing same is impractical because the office of the Commissioner does not have the capacity nor the resources to perform such audits, and it is also not good governance practice for the Commissioner to perform this task. On the other hand, the Intergovernmental Forum on Mining, Minerals, Metals, and Sustainable Development posits that the Auditor-General (AG) can audit results reported by mining companies.[172] However, this argument is flawed because the relevant legislation does not give the AG this authority as required by the State Finance Act.

Section 25 of the State Finance Act explicitly provides that the Auditor-General must examine and audit all financial records that are held or prepared in terms of any law.[173] However, the law in terms of which

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[167] Ibid at section 81.
[168] Ibid.
[169] Ibid at section 84 (1)(a).
[170] Ibid at section 84 (1)(b).
[171] Ibid at section 84 (5).
[172] Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development 'IGF Mining Policy Framework Assessment' (September 2018) The International Institute for Sustainable Development.
[173] State Finance Act No. 31 of 1991.

the financial records are prepared must require that the Auditor-General conducts the envisaged examination and audit.[174] Unfortunately, the Acts discussed above lacks that specific provision.

This problem is partially catered for by section 50 of the Companies Act.[175] This section requires that a certified copy of the annual financial statements of a public company be submitted to the Registrar,[176] however, this does not apply to private companies or closed corporations. Unfortunately, these are primarily the types of corporations that were used as money laundering vehicles in the Fishrot case.[177]

The Ministry of Finance has divisions devoted to investigating large taxpayers and to combatting transfer pricing. However, due to the rampant nature of these crimes, this dissertation advances that these divisions are woefully underperforming. There are several probable reasons for this underperformance, namely political interference, underfunding, understaffing, and skills shortage.[178]

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[174] Ibid at section 25.

[175] Companies Act No 28 of 2004.

[176] Ibid. "… and the group financial statements of the group of companies to which the public company forms part, if any, and the annual financial statements of every private company which is a subsidiary of that public company".

[177] This case is ongoing, but from court documents at the time that this dissertation was published these are the facts: Two Cabinet members, the Minister of Justice, and the Minister of Fisheries, along with several other politically exposed persons, including relatives, acted in concert to allegedly receive brides from an Islandic Fishing Company, Samherji, launder those brides and conceal related illicit activities. The bail applications of this case have been finalized and can be found at *https://ejustice.jud.na/ejustice/f/caseinfo/publicsearch.* These cases are *Bernardt Martin Esau and 5 Others v Magistrate of Windhoek and 5 Others HC-MD-CIV-MOT-GEN-2019/00490.* Also see *Bernard Martin Esau and Tomas T Hatuikulipi V the State* Hc-MD-CRI-APP-CAL-2020/00082. These activities were exposed by investigative journalists from Aljazeera. Further documentation provided by the Whistleblower in the case has since been published on WikiLeaks. However, as mentioned this is an ongoing case and as such new facts continue emerging as the case progresses. See Al Jazeera Investigations' 'Anatomy of a Bribe' (1 December 2019) on YouTube and see WikiLeaks website 'Fishrot Files' available at *https://wikileaks.org/fishrot/releases/* accessed on 18 March 2020. See Shinovene Immanuel, Lazarus Amukeshe and Werner Menges 'Fishrot firms paid N$93m to investment entities' *The Namibian* (22 July 2020) 1 available at *https://www.namibian.com.na/202840/archive-read/Fishrot-firms-paid-N$93m-to-investment-entities* accessed on 29 January 2021. Also see Will Neal 'Leaked Affidavit Implicates Namibian President in Fishrot Scandal' (19 January 2021) *Organized Crime and Corruption Reporting Project* available at *https://www.occrp.org/en/daily/13669-leaked-affidavit-implicates-namibian-president-in-fishrot-scandal* accessed on 29 January 2021. Also see Mathias Haufiku and Tileni Mongudhi 'Lawyer De Klerk in N$20 billion Fishrot deal' *The Namibian* (05 September 2020) 1 available at *https://www.namibian.com.na/200772/archive-read/Lawyer-De-Klerk-in-N$20-billion-Fishrot-deal* accessed on 29 January 2021. And see Sakeus Iikela and Timo Shihepo 'Fishrot: Namandje confirms Swapo payments' *The Namibian* (25 January 2021) 1 available at *https://www.namibian.com.na/98316/read/Fishrot-Namandje-confirms-Swapo-payments* accessed on 29 January 2021. Also see The Namibian 'Samherji's fishy business … Shifting profits out of Namibia' (21 July 2020) 1 available at *https://www.namibian.com.na/92960/read/Samherjis-fishy-business-%E2%80%A6-Shifting-profits-out-of-Namibia* accessed on 10 August 2020. See WikiLeaks 'Fishrot Files' available at *https://wikileaks.org/fishrot/database/docs/9fbe6bcf7ab0014436d45e1d4a159363_fishrot_email_doc* accessed on 10 August 2020. And see Margot Gibbs 'A Fishy Business: Shifting Profits out of Africa' *Organised Crime and Corruption Reporting Project* (20 July 2020) available at *https://www.occrp.org/en/investigations/a-fishy-business-shifting-profits-out-of-africa* accessed on 10 August 2020.

[178] However, investigating the reasons for this underperformance is beyond this dissertations' scope and could be the subject of future studies.

3.4.2. Namibia's Anti-IFF Legislative Framework

The laws in Namibia meant to combat IFFs have been recognized as competent.[179] Consequently, the Financial Action Task Force (FATF) has delisted Namibia as a country that has strategic AML deficiencies.[180] However, the FATF recognizes that several issues that contain an element of money laundering, or are done primarily to further money laundering, remain to be addressed by Namibia.[181] These issues are, *inter alia*, the misuse or falsification of identity documents, trafficking of wildlife, precious metals and gems, customs violations, stolen vehicles, and illegal drugs.[182]

Further, as mentioned in this chapter's introduction, regional criminal activities significantly increase IFFs related crimes in Namibia. As such, it comes as no surprise the FATF's report links the majority of these crimes directly to South Africa.[183] To be sure, one of Namibia's biggest banking scandals to date, the *Bank of Namibia v Small & Medium Enterprises Bank Limited and Others* case,[184] has shown that more than N$270 million of the monies looted from the SME Bank was deposited into VBS Mutual Bank of South Africa.[185] These funds were then allegedly further dispersed to various actors, many of whom allegedly include prominent South Africans.[186]

The FIA and the BIA were used in the prosecution of this case, and while the persons that were linked to the SME Bank were held liable, the Bank itself as a legal entity was not prosecuted. Furthermore, although affidavits and court documents named the persons that were involved from South Africa, the Namibia authorities never issued any warrants in this regard. The reasons for this were never made public. However, the Centre may have missed an opportunity to invoke section 64 (2) (c) regarding how persons outside Namibia ought to be held accountable for their part in money laundering and related offences in Namibia.

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[179] See FATF's 'Namibia' report available at *http://www.fatf-gafi.org/countries/#Namibia* accessed on 01 March 2021.

[180] *Know Your Country 'Namibia' available at https://www.knowyourcountry.com/namibia1111 accessed on 23 May 2020.*

[181] Ibid.

[182] Ibid.

[183] Ibid.

[184] *Bank of Namibia v Small & Medium Enterprises Bank Limited and Others* (HC-MD-CIV-MOT-GEN-2017/00227) NAHCMD 187 (10 July 2017); *Bank of Namibia v Small & Medium Enterprises Bank Limited and Others* (HC-MD-CIV-MOT-GEN-2017/00227) NAHCMD 184 (07 July 2017); *Bank of Namibia v Small & Medium Enterprises Bank Limited and Others* (HC-MD-CIV-MOT-GEN-2017/00227) NAHCMD 191 (11 July 2017); *Bank of Namibia v Small and Medium Enterprises Bank Ltd and 6 Others* (HC-MD-CIV-MOT-GEN-2017/00227) [2017] NAHCMD 350 (04 December 2017); *and Metropolitan Bank of Zimbabwe Ltd and Another v Bank of Namibia* (SA 77/2017) [2018] NASC 407 (23 October 2018).

[185] Ibid.

[186] Bill Corcoran 'Bankers, Politicians and Tribal Royalty Linked to VBS Bank Looting' *The Irish Times* (23 October 2018) available at *https://www.irishtimes.com/business/financial-services/bankers-politicians-and-tribal-royalty-linked-to-vbs-bank-looting-1.3672120* accessed on 29 January 2021.

The FIA also does not define or address the concept of IFFs, and its scope is extremely limited. For example, it does not address any of the other crimes or activities that are traditionally grouped as IFFs along with money laundering and terrorism financings such as tax avoidance, tax evasion, fraud, and funds derived from corruption or smuggling. This is a significant flaw in this law. Other shortcomings of the FIA include the liability that can be extended to legal practitioners, the methods used to monitor investment firms, and the lack of oversight of cryptocurrency transactions.

Finally, with all the requirements levied against accountable institutions in the FIA, it is alarming to notice that the Centre has, since its inception, not lodged one court application against any accountable institution for, intentionally or negligently, facilitating money laundering or related offences. If the Centre has fined accountable institutions for, intentionally or negligently, facilitating these crimes this information is not in the public domain. Despite this, the Centre does make sure that the perpetrators, albeit not the conduits, of these crimes get their day in court.

3.4.3. Conclusion

Case law referenced throughout this chapter prove that the proceeds of criminal activities are laundered through Namibian financial institutions. This reality points to a major monitoring deficit exasperated by key omissions in regulatory authorities' empowering legislation. After reviewing the legislation, this issue seems to have more to do with capacity and enforcement than with legislative inadequacy. Possible solutions for all these issues, together with those highlighted in the previous chapter, will be discussed in the following chapter.

4. CHAPTER FOUR

4.1. Introduction

This chapter explores solutions for the issue highlighted throughout this dissertation. It further evaluates recommendations for the problems identified in the previous chapters of this dissertation. This is done by evaluating recommendations submitted by other organizations, as well as putting forward new recommendations. However, before embarking on this exercise, this dissertation presents all the issues identified coherently for ease of reference.

4.2. Findings

4.2.1. Ineffective Application of the Law

Article 144 of the Namibian Constitution espouses that Namibia will employ a Monist approach. However, the Supreme Court of Namibia recognized in *South African Poultry Association (SAPA) v The Ministry of Trade and Industry* that a conflict exists in the interpretation of Article 144.[1] Despite this, in March 2020 the Supreme Court yet again, in *Minister of Trade and Industry & Ors v Matador Enterprises (Pty) Ltd & Ors*,[2] reiterated the importance of Namibia respecting its obligations in the international treaties that its party to.

Chapter Two concluded that Namibia is a Monist. This leaves one question, is there an obligation on the Namibian judiciary and government to apply international law in court, governance, and policy? This is one of the issues that this chapter addresses.

From the discussion in Chapter, it is evident that there is a need to amend the laws regulating minerals, hydrocarbons, and fisheries to allow for the auditing of license holders' financials. Additionally, this Chapter also discusses the possibility of 'piercing' the attorney-client privilege 'veil' as it relates to legal practitioners' role in facilitating illicit financial flows (IFFs). Chapter Three also shows that there is a disconnect between the laws that combat IFFs and the laws that regulate the extractives industry.

4.2.2. Ineffective Administration

First, by applying the reasonableness qualification, what are the possibilities of the Bank of Namibia (Bank) and the Financial Intelligence Centre (FIC) imposing administrative fines on banking institutions and holding them accountable as accomplices after the fact when they are negligent in their reporting duties and consistently do not flag IFFs up to a certain value or for a certain period? Secondly,

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[1] See Chapter Two of this dissertation for the full discussion of this case.
[2] (SA 44/2014) [2020] NASC 2 (19 March 2020).

buttressing the efforts of the Bank and the FIC in keeping track of Politically Exposed Persons (PEPs) by marrying section 7 of the Exchange Control Regulations to the PEP Directive of the FIC.

Thirdly, a need exists for the FIC to adopt newer technologies and to use existing ones to their full capability. This entails using infrastructures such as telecommunications and information technology, immigration servers, and the tax system to better track suspicious transactions, suspects, and assets. Further, systems of the different stakeholders must be integrated to streamline efforts. For example, Namibia has a fully online tax system, this system alone holds immense possibilities for the curbing of IFFs. The tax system could be linked to the banking and customs and excise systems. Granted, certain privacy concerns exist with such a system. However, with the proper controls in place, the right to privacy can be significantly limited.[3]

4.3. Recommendations

4.3.1. Namibia's Duty to Uphold International Anti-IFF Laws

This dissertation concluded in Chapter Two that Namibia is a monist state. As recapped in section 4.2.1 above, it was also established in Chapter Two that a positive duty rests on the Namibian government to enforce and comply with international law and treaty obligations consistent with Article 144. The conventions and treaties discussed contain a wealth of regulations that Namibia can draw from to enrich the anti-IFF legislation in its natural resources sector. Implementing just this one finding would make more than two-thirds of the recommendations offered in this dissertation redundant because little to no law reform will be required since most of the international best practice standards stem from these international conventions and treaties.

4.3.2. Transparency

The Sustainable Development Solutions Network (SDSN)[4] proposes that states must make publicly available information relating to the beneficial ownership of proportions of legal persons. Specific legislation is required in this regard, however, in pursuance of this goal Namibia must set a date for its first automatic exchange of tax information as required by the Common Reporting Standards (CRS).[5]

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[3] Article 25 of the Constitution, and chapter 2 of the Criminal Procedure Act No. 51 of 1977.
[4] The Sustainable Development Solutions Network available at *unsdsn.org* accessed on 31 January 2021.
[5] See OECD 'Common Reporting Standard User Guide' (2014) *Standard for Automatic Exchange of Financial Account Information in Tax Matters* available at *https://doi.org/10.1787/9789264216525-10-en* accessed on 01 March 2021.

An Access to Information Act will address the SDSN's proposal as well as several other issues.[6] Such an Act must require the regular publication of data, including the beneficial ownership of large corporations and the financial records of PEP. This Act must also provide for the country to join international organizations that promote transparency such as the Extractive Industries Transparency Initiative. The administration of this Act must be tantamount to the application of Article 18 of the Constitution concerning the Duties of Administrative Bodies. As such, if a public institution does not comply with its duties of transparency espoused in this Act that non-compliance should be equivalent to them not adhering to the 'right to be given reasons and the 'right to be informed of a decision under Administrative Law. Consequently, the failure to be transparent by a public institution must be justiciable.

4.3.3. International Relations

Namibia must engage with and strengthen its relationship with non-African intergovernmental bodies and governments. Negotiations (either directly or through its regional block) must be initiated and ongoing relationships established with these parties to ensure that their practices do not directly or indirectly encourage IFFs from Namibia. These efforts will also lead to greater transparency and may result in the exchange of skills and information.

4.3.4. Strengthening Authorities

Namibia has an outstanding online tax system.[7] However, this system needs to be updated and made more user-friendly for ease of business. Additionally, for transparency, domestically registered companies and their foreign-affiliated party's information must be made publicly available, and to ease access to existing information the Business and Intellectual Property Authority (BIPA) must move to internet-based services. Further BIPA, Exchange Control, Customs and Excise, and Inland Revenue databases must be linked for ease of streamlining tax information. Namibia must also strengthen its transfer pricing unit and its Customs and Excise authority as a matter of extreme urgency.

Moreover, the institutions created to combat IFFs must be strengthened and made independent from other organs of state. This dissertation advances that the FIC must be divorced from the Bank of Namibia. This recommendation draws from the international best practices discussed in Chapter Two which advance that the independence of a country's financial intelligence centre is paramount to successfully combatting IFFs. The current arrangement that the Bank is administratively responsible for

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[6] See Namibia Press Agency 'Media Want Enactment of Access to Information Law' (06 May 2020) 6 available at *https://www.namibian.com.na/200657/archive-read/Media-want-enactment-of-access-to-information-law* accessed on 16 December 2020.

[7] SAGE 'Namibia Integrated Tax Administration System (ITAS)' 7 December 2018 available at *https://customerzone.sagevip.co.za/doclib/Legislation/Namibia_ITAS_all%20products.pdf* accessed on 09 March 2021.

FIC makes the FIC vulnerable to political interference because of the influence that the Ministry of Finance has on the Bank. The Director of the FIC and the Governors of the Bank must be appointed by panels comprising of independent experts. These officials must also have limited mandatory functionary engagements with the Minister of Finance and Presidency.

However, this independence does not mean these institutions must not co-operate. Engagements must be required by law, but same must be information sharing, consultations, reporting, and advisory. Currently, several inter-agency taskforces exist but better systems and the accompanying law reform are needed for streamlining information and operations.

4.3.5. Law Reform

THE LAW REFORM PROCESS

The Law Reform and Development Commission (Commission) and the law reform process require drastic change. The culture of law-making in Namibia is a slow process because it is riddled with bureaucratic redundancies.[8] This itself requires reform. The Commission functions are underfunded and understaffed.[9] This results in law reform taking years, and laws being tabled in and passed by Parliament that contains considerable errors and often require amendment soon after being promulgated.[10] The circularity of this exercise results in the loss of valuable resources and delays the law reform process further.

Apart from greater financial support, to make the law reform process more seamless a set period for the revision of laws must be scheduled. This review must be comprehensive and target provisions which the regulators and law enforcement have noticed or experienced as problematic in the course of executing their duties. It must also address provisions that the Court has singled out as being problematic, as well as those that have proved to be ineffective in court cases. This review can be scheduled every three or five years, if not annually.

LAWS THAT REQUIRE REFORM

First, it has been shown throughout this research that minerals are used as vehicles for money laundering.[11] However, the Fishrot case has also now shown a light on systemic corruption and money

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[8] Ingolf Diener and Olivier Graefe *Contemporary Namibia: The First Landmarks of a Post-apartheid Society* (2001) 30.

[9] Hugh Corder and Justice Mavedzenge *Pursuing Good Governance: Administrative Justice in Common-Law Africa* (2019) 41.

[10] Institute for Public Policy Research 'Law Making: How Laws Are Made' (2017) Issue No. 7 *Perspectives on Parliament*.

[11] *Know Your Country 'Namibia' available at https://www.knowyourcountry.com/namibia1111 accessed on 23 May 2020*

laundering activities in the fishing sector. It is thus concerning that the Financial Intelligence Act (FIA) does not include fishing companies in its list of accountable institutions.[12] Despite the Fishrot, this discovery is alarming because the fishing sector is one of Namibia's biggest industries in terms of both revenue attraction and employment creation.[13] One would think that at least the economic activity within the fishing sector would be sufficient to warrant oversight of this sector by the FIA. These sectors must therefore be included in the FIA's list of reporting institutions.

Furthermore, companies in the natural resources sector must be required to ensure that their foreign trade partners comply with 'Know Your Customer requirements, as provided for in the FIA, during the contract negotiation stage. Additionally, the Mineral, Petroleum and Fisheries Acts need to be amended to require companies licensed under these Acts to submit independently audited financial statements annually – qualified audit reports must be grounds for suspension or revocation of a license.

Secondly, Namibia must amend its existing anti-IFF laws to explicitly criminalize intentionally providing false information regarding the quantity, price, quality, or any other aspect of goods and services that are traded.[14] Especially where this is done to move money out of the country or to evade, avoid, or manipulate taxation, or customs and excise duties. The amendment must also address the issue of the return and recovery of stolen asset operations.

Legislative reform concerning the return and recovery of assets should draw from the efforts advancing the recovery and return of stolen assets by the joint World Bank/UNODC Stolen Asset Recovery Initiative, its Asset Recovery Watch database, and the Global Forum on Asset Recovery.[15] To be sure, as part of the Asset Recovery Inter-Agency Network of Southern Africa, Namibia has established an Intergovernmental Agency anti-IFF taskforce.[16] However, this specialized area requires full-time resources and needs the appropriate legislation to authorize its activities.

Thirdly, the role of banking institutions as conduits – knowingly or not – cannot be ignored any longer. It can also not be held confidential; the exposure of being held accountable is a deterrent in itself. The *Bank of Namibia v Small & Medium Enterprises Bank Limited and Others*[17] case (hereinafter the SME

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[12] Act No. 3 of 2007.

[13] See Blessing Chiripanhura and Mogos Teweldemedhin 'An Analysis of The Fishing Industry in Namibia: The Structure, Performance, Challenges, and Prospects for Growth and Diversification' *AGRODEP WORKING PAPER* (2016).

[14] See TPA Global *Transfer Pricing Country Summary: Namibia* (August 2018) for a summary of the country's existing transfer prising laws.

[15] Ibid.

[16] Ibid.

[17] *Bank of Namibia v Small & Medium Enterprises Bank Limited and Others* (HC-MD-CIV-MOT-GEN-2017/00227) NAHCMD 187 (10 July 2017); *Bank of Namibia v Small & Medium Enterprises Bank Limited and Others* (HC-MD-CIV-MOT-GEN-2017/00227) NAHCMD 184 (07 July 2017); *Bank of Namibia v Small & Medium Enterprises Bank Limited and Others* (HC-MD-CIV-MOT-GEN-2017/00227) NAHCMD 191 (11 July 2017); *Bank of Namibia v Small*

Bank case) is the apex case in Namibian law that illustrates the use of a banking institution in IFFs. However, this is not the only case wherein banking institutions have been cited as conduits for alleged financial crimes such as money laundering.[18] To mention a case in point, in 2013 the Bank of Namibia (Bank) reported receiving ninety-six intelligence reports of suspected money laundering and terrorism financing in Namibia.[19]

However, since 2012 when the FIA was promulgated, the Centre has taken over the responsibility of receiving, publishing, and investigating suspicious activity reports. In this regard, the FIC 2018/19 report recounts sending actionable intelligence to several foreign counterparts, domestic law Enforcement Agencies, and other public entities.[20]

According to the report, this information led to various successful prosecutions and seizures of proceeds and revenue of criminal origin.[21] Between 01 April 2018 until 31 March 2019, the Centre received 1,709,575 suspicious reports and from these, the Centre issued 338 intelligence reports.[22] The potential value of the crimes in these intelligence reports is N$ 6,296,429,366 and are currently under investigation by Law Enforcement Authorities. [23] The results of these investigations will be reported in the 2019/20 annual report of the Centre.[24]

Unfortunately, however, neither the Bank in terms of the Banking Institutions Act[25] or the FIC in terms of the FIA has taken legal action or reported publicly to holding reporting and accountable institutions administratively accountable for their role as conduits through which IFFs are channelled. Whether or not a reporting or accountable institutions' role is intentional or negligent requires further research by these institutions. By not holding these institutions accountable, the Bank and the Centre are doing a disservice to their efforts to combat IFFs. Further, the Bank and the Centre's inaction provides no disincentive for reporting or accountable institutions to buttress their internal detection mechanisms, nor does it guard against compliance fatigue. The lack of legal action also denies the court the opportunity to express itself on the role and responsibilities of these institutions in the fight against IFFs.

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and Medium Enterprises Bank Ltd and 6 Others (HC-MD-CIV-MOT-GEN-2017/00227) [2017] NAHCMD 350 (04 December 2017); *and Metropolitan Bank of Zimbabwe Ltd and Another v Bank of Namibia* (SA 77/2017) [2018] NASC 407 (23 October 2018).

[18] See *Amushelelo v The Magistrate, Windhoek* (HC-MD-CIV-MOT-REV-2019/00397) [2019] NAHCMD 475 (08 November 2019. Also see *State v Henock and Others* (CR 86/2019) [2019] NAHCMD 466 (11 November 2019). And see *The Prosecutor-General v Kamunguma and Another* (POCA 01/2016) NAHCMD 302 (20 October 2017).

[19] Bank of Namibia 'Annual Report' 2013 at 30.

[20] FIC 'Annual Report 2018/19' 2019 at 20.

[21] Ibid.

[22] Ibid.

[23] Ibid.

[24] Ibid.

[25] Act No. 2 of 1998.

However, the possibility that administrative action is being taken but kept out of the public domain under some misguided 'confidentiality' claim cannot be dismissed. Should this be the case same would fundamentally go against every right of Namibian citizens in Article 21 of the Constitution on the Right to Access to Information. It would also greatly undermine the Bank's responsibility to educate the public on financial literacy and the Bank would be foregoing an invaluable opportunity to rehabilitate the accountable institution and to deter other institutions from engaging in the same behaviour.

This dissertation recommends that appropriate operational risk management systems and processes must be mandatory for banks to identify and report suspicious activity with greater success. Failure to implement these systems and processes must result in fines, and after a certain number of 'strikes', a bank must be held criminally liable for its negligence. Additionally, it must be an aggravating factor when the IFF transaction constitutes a systemic portion of the bank's income for a given period, and the bank has facilitated the IFF scheme for more than a certain period.

Fourth, the Customs and Excise Act[26] also needs to be amended or repealed and replaced because it is an outdated law that does not reflect today's digital realities. Customs authorities must be capacitated to use the existing databases to compare the pricing of goods and services around the world in their operations to identify suspiciously priced commodities. Additionally, customs authorities must also connect to the Business and Intellectual Property Authority, Inland Revenue, and Exchange Control databases to streamline business and allow for easier cross-referencing of transactions.

Fifth, the 'attorney-client privilege' exists for several reasons.[27] However, this dissertation takes the considered view that allowing legal practitioners to further their clients' illicit dealings is simply not one of those reasons. This dissertation recommends that the FIA be amended to reflect explicitly that this professional privilege does not apply to future crimes, i.e., the date the client joined the lawyer's books versus the date on which the alleged crime was committed. In such instances, the lawyer must be liable not only professionally but as an accomplice, or at least an accomplice after the fact. However, the ultimate responsibility for this change requires the willingness of legal practitioners to conduct their business ethically, as required by the Legal Practitioners Act.[28] In this regard, the FIA must engage the Law Society, the Legal Education Board, and the Law Faculty at the University of Namibia to create a culture of accountability and ethical practice within the legal fraternity.

[26] Act No. 20 of 1998.
[27] Allan Kanner and Tibor Nagy 'Perspectives on the Attorney-Client Privilege and the Work -Product Doctrine' in Vincent S. Walkowiak (ed.) *Attorney-client Privilege in Civil Litigation: Protecting and Defending* (3rd ed.) 2004 at 383 – 445.
[28] Act No. 15 of 1995.

4.4. Conclusion

Namibia's anti-IFF legal framework in its resource sector generally complies with international standards set for effective legislation. However, this dissertation has shown that the courts have not always interpreted and upheld the laws at their disposal to their full benefit. In this regard, the pronouncement of the court on the monism and dualism debate will greatly advance the anti-IFF jurisprudence of Namibia.

Furthermore, the FIC and the related regulators enjoy a considerable rate of IFF identification success. Unfortunately, however, this identification more often than not happens post-transaction and does not necessarily lead to successful prevention, deterrence, and prohibition of IFFs. Finally, being a member of the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) and implementing the FAFT Recommendations are noteworthy milestones.

The FATF has recognized the natural resources sector as one that is used for money laundering activities.[29] As such, all stakeholders must make a concerted effort to safeguard this sector if the country ever hopes to realize its Vision 2030 and its Millennium Development Goals. The recommendations listed above show that there is still a great deal that can be done to strengthen Namibia's anti-IFFs response in the natural resources sector, but this dissertation has shown that the magnitude of IFFs lost in a single case such as the Fishrot case is a not a regular occurrence.

However, it is concerning that a large part of IFFs in Namibia's resource sector is tied to the political elite. Of even greater concern is that the political elite has ties to companies within the resource sector seems to be the norm, rather than the exception.[30] This reveals a deeply flawed system for awarding and monitoring licenses. It also reveals that lifestyle audits for politically exposed persons (PEPs) in Namibia are dismally ineffective. This is evident from the trends observed during the research process of this dissertation, which indicated that instances of political corruption and the looting of public funds by PEPs are an ever-increasing trend in Namibia. As such, greater oversight of PEPs is key to combatting IFFs in Namibia, and a wholly independent Anti-Corruption Commission is vital to the success of this increased oversight.

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[29] Emmanuel Mathias and Bert Feys *Implementing AML/CFT Measures in the Precious Minerals Sector: Preventing Crime While Increasing Revenue* (2014) 8.

[30] See Polus A D Kopinski and W Tycholiz 'Ready or Not: Namibia as a Potentially Successful Oil Producer' (2015) Vol. 50 No. 2 *Africa Spectrum* 31-55. Also see Barbara Paterson Carola Kirchner and Rosemary E. Ommer 'A Short History of the Namibian Hake Fishery - a Social-Ecological Analysis' (2013) Vol. 18 No. 4 *Ecology and Society*. And see Henning Melber 'Of Big Fish & Small Fry: The Fishing Industry in Namibia' (March 2003) Vol. 30 No. 95 *Review of African Political Economy: Africa, Imperialism & New Forms of Accumulation* 142-149. And see Walter Augusto Fernandes 'The Role of Mining in Economic Development In Namibia Post-2008 Global Economic Crisis' A research report submitted to the faculty of Engineering and the Built Environment, University of the Witwatersrand, Johannesburg, in fulfilment of the requirements for the degree of Master of Science in Engineering (2014) 109.

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