

BILL

To provide for the promotion and facilitation of foreign and Namibian investment to enhance sustainable economic development and reduce unemployment; to provide for the designation of certain economic sectors and business activities as reserved for certain categories of investors; to provide for approval of investments in designated economic sectors and business activities; to stipulate the rights and obligations of investors; to provide for dispute resolution mechanisms involving investments; and to provide for incidental matters.

(Introduced by the Minister of Industrialisation and Trade)

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BE IT ENACTED as passed by the Parliament, and assented to by the President, of the Republic of Namibia as follows:

PART 1
INTRODUCTORY PROVISIONS

Definitions

1. In this Act, unless the context otherwise indicates -

“Agency” means the Namibian Investment Promotion Agency referred to in section 6;

“approval” means approval of an investment proposed by an investor in terms of this Act;

“approval certificate” means an approval certificate for an investment issued under section 16(2);

“business activity” means any activity conducted in Namibia -

- (a) that involves the commitment of capital, the expectation of gain or profit and the assumption of risk; and
- (b) that creates a contribution to the economic development of Namibia;

“change of control” in relation to an existing investment occurs when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the investment of another undertaking;

“Competition Act” means the Competition Act, 2003 (Act No. 2 of 2003);

“enterprise” means any organised business undertaking, legally established in Namibia or any country other than Namibia, as the case requires;

“expansion of an existing investment,” for the purposes of the definition of “investment” as described in section 2, includes -

- (a) an expansion of facilities beyond the original investment plan or size of a pre-existing investment so as to require new approvals under any other applicable law;
- (b) an expansion of an investment into new business sectors not included in the original proposal or the previous activities of an investment;
- (c) where a business re-injects capital in an entity or enterprise towards expansion in the same business;

“expropriation” means the expropriation of property contemplated in Article 16(2) of the Namibian Constitution;

“fair market value” means the amount for which an asset would most probably be purchased by a willing and informed buyer from a non-related seller in good faith based on market value;

“foreign investor” means -

- (a) a natural person, who is not a Namibian, who has made or is seeking to make an investment in Namibia; or
- (b) an enterprise incorporated, registered or constituted in accordance with the laws of -
 - (i) Namibia; or
 - (ii) any country other than Namibia,

that is not directly or indirectly owned or controlled by a Namibian and that has made or is seeking to make an investment into Namibia in terms of this Act;

“freely convertible currency” means any currency recognised as such through international trade and usage;

“inspector” means a person appointed or designated as such under section 7;

“integrated client service facility” means the one-stop-shop online portal as contemplated in section 10 for foreign and Namibian investors when establishing their business operations in Namibia as contemplated in section 10;

“investor”, if used without a reference to foreign or Namibian, includes both foreign and Namibian investors;

“investment” means an investment as described in section 2;

“investment proposal” means any proposal that is required to be submitted under this Act to the Minister for approval;

“measure” means any form of legally binding act of State directly affecting an investor or an investment, and includes any law, regulation, procedure, requirement, judicial decision or binding executive decision or agreement, unless otherwise excluded from the scope of this Act;

“merger” has the same meaning given to it in section 42 of the Competition Act;

“Minister” means the Minister responsible for industrialisation and trade;

“Ministry” means the Ministry administering investment matters in accordance with this Act;

“Namibian” means -

- (a) a natural person who is a citizen of Namibia;
- (b) a natural person who is a permanent resident of Namibia by virtue of holding a permanent residence permit issued to him or her in terms of the Immigration Control Act, 1993 (Act No. 7 of 1993), or who is domiciled in Namibia; or
- (c) an enterprise incorporated, registered or constituted in accordance with the applicable laws of Namibia or any country other than Namibia -
 - (i) of which the majority of the issued share capital is directly or indirectly owned by a Namibian who benefits in the form of income or addition to capital or otherwise; or
 - (ii) which is directly or indirectly controlled by a person referred to in paragraph (a) or (b);

“Namibian investor” means a Namibian who has made or is seeking to make an investment in Namibia;

“office, ministry or agency” means any office, ministry or agency as defined in section 1 of the Public Service Act, 1993 (Act No. 13 of 1995);

“performance agreement” means an agreement contemplated in section 8(1);

“prescribe” means prescribe by regulation made under this Act;

“public enterprise” means a public enterprise as defined in section 1 of the Public Enterprises Governance Act, 2019 (Act No. 1 of 2019);

“public entity” means any office, ministry or agency *of the Government, and includes -*

- (a) *a local authority as defined in section 1 of the Local Authorities Act, 1992 (Act No. 23 of 1992);*
- (b) *a regional council as defined in section 1 of the Regional Councils Act, 1992 (Act No. 22 of 1992);*
- (c) *a public enterprise as referred to in section 2(1) of the Public Enterprises Governance Act, 2019 (Act No. 1 of 2019);*
- (d) *a body or trust that is owned or controlled by the Government, when engaged in any procurement individually or in consortium; and*
- (e) *an entity declared as public entity in terms of section 5 of Public Procurement Act, 2015 (Act No. 15 of 2015);”*

“rate” in relation to simple interest as contemplated in section 24(5) means the percentage rate to be paid by reference to the rate determined in accordance with applicable international rates or as provided for in an agreement between the investor and the Minister;

“regulation” means a regulation made under section 37;

“State” means the Republic of Namibia, whether acting in a commercial or sovereign capacity, and includes any public entity;

“this Act” includes any regulation; and

“undertaking” means any business carried on for gain or reward by an individual, a body corporate, an unincorporated body of persons or a trust in the production, supply or distribution of goods or the provision of any service.

Meaning of “investment”

2. (1) For the purposes of this Act, but subject to subsections (2) and (3), an investment includes –

- (a) any enterprise -
 - (i) lawfully established, acquired or expanded by an investor in accordance with the applicable laws of Namibia; and
 - (ii) that carries out a business activity through a substantial operation in accordance with the investment proposal and the nature of the business in Namibia; or
- (b) any enterprise in Namibia that an investor is seeking to -
 - (i) establish, acquire, merge with or expand, whether through the constitution, maintenance, merger with or acquisition of a juristic person inside Namibia or outside Namibia having an effect in Namibia; or
 - (ii) acquire shares, debentures or other ownership instruments directly or indirectly;
- (c) the acquisition by any means of any license, permit or concession issued by the State directly related to the operation of an investment in Namibia, including such instruments relating to the exploration or exploitation of natural resources;
- (d) the acquisition by any means of a minority ownership interest or joint venture interest in accordance with this Act, in relation to any of the enterprises or licence, permit or concession referred to in paragraphs (a) to (c), but such interest must constitute more than 10% of the shares of the enterprise or business venture and the investor must exercise effective management, or influence on the management, of the investment; or

- (e) any other business activity that the Minister has declared under subsection (4) to be an investment for purposes of this Act.

(2) For purposes of subsection (1), a foreign enterprise is not constituted in Namibia by the mere holding of ownership of the following assets in Namibia, even though they may be considered as assets for an enterprise incorporated in Namibia:

- (a) shares, stocks, debentures and other equity instruments of the enterprise or another enterprise;
- (b) a debt security of another enterprise;
- (c) loans to an enterprise;
- (d) movable or immoveable property and other property rights such as mortgages, liens or pledges;
- (e) claims to money or to any performance under a contract having a financial value;
- (f) copyrights, know how, goodwill and industrial property rights such as patents, trademarks, industrial designs and trade names, to the extent that they are recognised under the law of Namibia;
- (g) returns such as profits, dividends, royalties and income yielded by an investment; and
- (h) long term leases over land or other property.

(3) Despite subsection (1), an investment does not include -

- (a) assets that are of a personal nature, unrelated to any business activity;
- (b) debt securities issued by a government or loans advanced to a government;

- (c) portfolio investment, which is investment that constitutes less than 10% of the shares of the company or otherwise does not give the investor the possibility to exercise an effective management or influence on the management of the investment;
- (d) claims to money or commission that arise solely from commercial contracts for the sale of goods or provision of services by a natural person or an enterprise outside Namibia into the territory of Namibia, or the extension of credit in connection with a commercial transaction; or
- (e) claims to money for the performance of services or provision of goods to any branch of government procured through tender, contract including public-private partnership agreements or any other means.

(4) For the purposes of subsection (1)(e) the Minister, on his or her own volition or on the recommendation of the Agency may, subject to subsections (2) and (3), by notice in the *Gazette* declare any business activity to be an investment to which the provisions of this Act apply.

Objectives of Act

- 3.** The objectives of this Act are to -
- (a) provide a clear and transparent framework for sustainable investment in Namibia;
 - (b) promote Namibia as an attractive and efficient investment and business destination;
 - (c) provide strong institutional support for strategic economic planning and ensure greater coherence and effectiveness in economic policy formulation;
 - (d) provide for an efficient dispute resolution mechanism involving investments;

- (e) enhance the investment facilitation process, aftercare and ensure a conducive and seamless business environment;
- (f) provide for a mechanism for inter-ministerial coordination on regulatory provisions and incentives and support mechanisms for investments;
- (g) allow for designation of certain sectors of the economy to be reserved for certain investors and investments;
- (h) promote sustainable economic development and growth through the mobilization and attraction of domestic and foreign investments that -
 - (i) enhance the economic development objectives of Namibia to build a prosperous, industrialised society with adequate direct investment to, among other things, encourage the creation of employment, wealth, technology transfer, capacity building, value addition to natural resources and foreign currency generation;
 - (ii) reduce unemployment, poverty and economic inequality in Namibia;
 - (iii) accelerate the growth and diversification of the Namibian economy;
 - (iv) facilitate Namibian investments, particularly in priority economic sectors;
 - (v) provide for other matters on investment promotion, admission, treatment and management;
- (i) support the development of local entrepreneurs and small and medium enterprises and to assist local enterprises to expand and upgrade their operations; and
- (j) promote the development of innovation and encourage businesses to upgrade their skills and technological levels through investment in technology, automation, training, research and product development activities.

PART 2
ADMINISTRATION OF ACT

Administration and implementation of Act

4. (1) The Minister is responsible for the administration of this Act and is empowered to formulate policies and to make or issue regulations and other related subordinate measures to give effect to this Act.

(2) The Agency is responsible for the implementation of the provisions of this Act and any regulations and related subordinate measures, as provided for in this Act.

(3) The Minister may in writing delegate any power, except the power to make regulations or a power which relates to policy, or assign any function -

(a) to the Agency, or

(b) to a body designated by the Minister for that purpose by notice in the *Gazette*;

(4) The Minister

(a) is not divested of a power delegated or a function assigned under subsection (3);

(b) may, without prejudice of a right, vary or set aside a decision made under the power so delegated, or perform a function so assigned; and

(c) may at any time and in writing, withdraw the delegation of a power or the assignment of a function.

Powers and functions of Minister

5. Without derogating from the generality of section 4(1), the functions of the Minister are to -

- (a) formulate incentive programmes for investments in Namibia;
- (b) assess and approve economic sectors for investment potential, opportunities and social economic impact, including private and public sector participation;
- (c) in consultation with sectoral ministers or functionaries, set out the terms and conditions of investing in economic sectors and business activities designated under section 12;
- (d) undertake periodic reviews on investment policies and trends in Namibia and globally in achieving the overall objectives of this Act, including the review of levels of domestic and foreign investment in different sectors and the development benefits of these investments;
- (e) appoint inspectors to ensure compliance with the provisions of this Act or of any investment approval;
- (f) identify and designate sectors that are reserved for certain categories of investors and investments; and
- (g) periodically undertake a multi-stakeholder review of the operation and effectiveness of this Act.

Namibia Investment Promotion Agency

6. (1) The entity known as the Namibian Investment Promotion and Development Board (a non-profit association incorporated under section 21 of the Companies Act, 2004(Act No. 28 of 2004) with registration number 21/2020/0929) and declared as a public enterprise in terms of section 2(1)(c) of the Public Enterprises Governance Act, 2019 (Act No. 1 of 2019) is designated as the Namibia Investment Promotion Agency for the purposes of this Act.

- (2) The functions of the Agency are to -

- (a) coordinate the implementation of this Act and exercise the powers or perform the functions conferred or imposed on the Agency by this Act or delegated or assigned to the Agency by the Minister;
- (b) provide support services to investors and investments before and after establishment in order to assist them in their on-going relations with the State;
- (c) assess investment proposals and projects for investment potential, opportunities and social economic impact, including private and public sector participation;
- (d) enter into performance agreements with investors including agreeing on the terms and conditions of incentives allowed in accordance with the applicable provisions of this Act;
- (e) advise the Minister, on a periodic basis, on matters relating to the national investment policy and strategy for Namibia, including increases in both domestic and foreign investment levels;
- (f) assess periodically the competitive position of Namibia as an investment destination;
- (g) periodically evaluate the effectiveness of this Act in terms of attracting sufficient levels of Namibian and foreign investment and sustainable development benefits therefrom;
- (h) in the prescribed manner –
 - (i) register potential investors and maintain the investor register;
 - (ii) register and maintain a register of prescribed accredited small and medium enterprises that may benefit from investments;
 - (iii) register and maintain a register of prescribed accredited Namibian enterprises that that may partner with investors; and

- (i) review compliance with any approval and conditions by investors and investments.

Inspectors

7. (1) The Minister may –

- (a) subject to the Public Service Act, 1995(Act No. of 1995), designate a staff member of the Ministry; or
- (b) subject to such conditions as may be agreed between the Minister and the person appointed, appoint any other person,

as an inspector responsible for ensuring compliance with the provisions of this Act.

(2) Without derogating from the generality of subsection (1) the functions of an inspector are to -

- (a) assist the Minister and the Agency in the administration and implementation of this Act;
- (b) ensure the effective enforcement of, and compliance with, the provisions of this Act;
- (c) investigate, and report on, any contraventions of the provisions of this Act to the Minister and the relevant law enforcement agencies; and
- (d) perform such other functions as may be prescribed or determined by the Minister.

(3) For an inspector to efficiently perform his or her functions under this Act the inspector may request for the assistance and cooperation that may reasonable required for that purpose, of any public entity, including a law enforcement agency, and the requested entity or agency must render such assistance to the inspector.

Performance agreements with investors

8. (1) The Minister may, on behalf of the State and at the request of the Agency or an investor, enter into a performance agreement with any foreign investor seeking approval under this Act to agree on matters related to the contribution of the investment to the development objectives of Namibia.

(2) A performance agreement entered into under subsection (1) becomes binding on the parties at -

- (a) the time the investment is approved in accordance with this Act; or
- (b) the time the investor concerned may initiate work on the investment in accordance with section 16(2),

whichever is later.

(3) The Minister must publish or cause to be published the agreement concerned by notice in the *Gazette* and also on the website of the Agency within 30 business days of the agreement being entered into, but if the parties to a performance agreement agree that it contains confidential business information, they may agree to redact this specific information from the publication of the agreement.

(4) An agreement entered into in terms of subsection (1) must be in accordance with the applicable laws of Namibia.

(5) If an element of an agreement concerned relates to the application or implementation of another Act under the authority of another Minister, the Minister must consult with the other Minister prior to the conclusion of the agreement.

Investment promotion and facilitation

9. For purposes of promoting investments as contemplated in section 3, the Agency is responsible for -

- (a) identifying specific projects and inviting interested investors for participation in those projects;
- (b) undertaking, either in or outside Namibia, promotional activities to attract foreign investments that are beneficial to the economy and development objectives of Namibia;
- (c) coordinating the investment related functions of commercial or trade representatives of Namibia stationed abroad;
- (d) promoting investment incentives and export processing zones referred to in section 1 of the Export Processing Zones Act, 1995(Act No.9 of 1995) to investors and potential investors;
- (e) collaborating with other public entities in the promotion of investment into specific sectors in Namibia, including in relation to the above activities related to specific sectors; and
- (f) periodically hosting an inter-ministerial forum as well as forums with other stakeholders including private sector representatives on investment promotion activities and opportunities.

Integrated client service facility

10. (1) The Minister must establish and manage within the Ministry, an integrated client service facility for potential investors to -

- (a) facilitate the sharing of information between the State, investors and the public in relation to establishing an investment;

- (b) provide seamless and responsive online client services for investors to start a business in Namibia; and
- (c) facilitate service delivery via electronic platform that links different service providers and other public entities.

(2) In order to enhance the overall investment facilitation process the Minister must seek the cooperation of other relevant public entities to ensure inclusive online representation of investment related activities and requirements in the operation of the integrated client service facility.

(3) The integrated client service facility may provide a list of online applications related to licenses, permits and approvals issued or made under this Act or any other law, which may be applied through the integrated client service facility.

(4) An investor may apply online for a licence, permit or approval of investment that is available through the integrated client service facility.

PART 3

NAMIBIA INVESTMENT POLICY

National Investment Policy

11. (1) The Minister must prepare a National Investment Policy which must be approved by Cabinet.

- (2) The National Investment Policy must provide details of -
 - (a) the framework for all investments in Namibia; and
 - (b) investments that are acceptable and unacceptable in Namibia.

(3) The Minister may with the approval of Cabinet, amend or substitute the National Investment Policy.

PART 4

INVESTORS, ECONOMIC SECTORS AND BUSINESS ACTIVITIES

Designation of categories of economic sectors and business activities for certain categories of investors

- 12.** (1) The Minister, in recognition of -
- (a) the sustainable economic sectors, business activities and development objectives of Namibia;
 - (b) the ecological sustainability of the environment in Namibia;
 - (c) Namibia's national security interests; and
 - (d) the social inclusion of all inhabitants of Namibia;
 - (e) gender equality;
 - (f) enhancement of innovation capability in Namibia; or
 - (d) the public interest,

must recommend to Cabinet the designation of certain categories of -

- (i) economic sectors; or
- (ii) business activities,

as exclusive to certain categories of investors and investments as set out in subsection (2).

(2) The categories of designated economic sectors or business activities contemplated in subsection (1) are those designated as -

- (a) reserved for the State;
- (b) reserved for Namibians;
- (c) requiring a joint venture partnership, of which the percentage is set out in the regulations, between Namibian investors and foreign investors; and
- (d) reserved for strategic investments;
- (e) reserved for public private partnership projects as contemplated in the Public Private Partnership Act, 2017(Act No. 4 of 2017);
- (f) reserved for innovation; and
- (g) subject to approval of the investment in accordance with the criteria set out in section 18.

(3) On approval of the recommendation contemplated in subsection (1) by Cabinet, the Minister must, by regulation, designate the approved categories of economic sectors and business activities for the different categories of investors and investments.

- (4) Regulations contemplated in subsection (1) may set out -
 - (a) the economic sectors or business activities to be designated for each category of designated sectors or business activity;
 - (b) if appropriate, specific thresholds or criteria relating to the economic sectors or business activities to be covered including, but not limited to -
 - (i) the value of the investment;
 - (ii) the number of employees;

- (iii) the region as defined in section 1 of the Regional Councils Act, 1992 (Act No. 22 of 1992) or local authority area as defined in section 1 of the Local Authorities Act, 1992 (Act No. 23 of 1992), in which the investment is to be located; and
- (iv) specific sub-activities of any business activity, if any.

(5) An investor must meet the applicable requirements for categories of investors in order to invest in the designated economic sectors or business activities.

(6) The expansion of an existing investment as defined in this Act is treated as an investment that is subject to this Part.

(7) In order to value the expansion of an existing investment for the purposes of determining the application of this Act, only the costs of the additional investment proposed will be considered: provided that the expansion proposed is not an attempt to circumvent subsection (8).

- (8) If an investor or investment -
 - (a) has made more than one investment; or
 - (b) proposes to make more than one investment,

that is below any threshold set by the Minister as contemplated in subsection (4)(b), but the total relevant quantities for such investments would be over the threshold, such investments must be treated in a cumulated fashion as a single investment for the purposes of this Act.

Saving in respect of existing investments

13. (1) An investor who has lawfully invested in an economic sector or business activity before the sector or activity has been designated under section 12 is entitled to maintain his or her investment after the effective date of the designation of the sector or activity despite such designation.

(2) Any change in ownership or control of the maintained investments contemplated in subsection (1) is subject to the applicable requirements of Part 5.

Economic sectors and business activities not designated

14. An economic sector or business activity that has not been designated by regulation made pursuant to section 12 is open for investment and ownership participation by any investor in any legal form permitted by the applicable law.

PART 5

APPROVAL OF INVESTMENTS

Application for approval of investments and change of control

15. (1) An investor may not invest in a category of economic sectors or business activities for which the investment is designated as being subject to the approval of the Minister in accordance with section 12(2)(g) unless that investor had obtained the approval of the Minister.

(2) An investor who intends to make an investment in Namibia as contemplated in subsection (1) must make an application for approval of the investment to the Minister in the prescribed manner.

(3) A potential investor may not change control of an existing investment in Namibia in a sector prescribed by regulation pursuant to section 12(2)(g), including any licence, permit, authorisation or concession in Namibia, through -

- (a) the constitution, maintenance, merger with or acquisition of an enterprise inside or outside Namibia which has an effect in Namibia; or
- (b) the acquisition, directly or indirectly, of any license, permit, authorisation or concession inside Namibia, whether acquired through a transaction inside or outside Namibia,

unless such investor and the existing investment have obtained the approval of the Minister prior to any such change taking place.

(4) An investor who intends to change of control of an existing investment in Namibia as contemplated in subsection (3) must make an application for approval of the change to the Minister in the prescribed manner.

(5) In addition to any applicable requirements of the Competition Act, an investor or existing investment contemplated in subsection (3) must make the application contemplated in subsection (4) at least 60 business days before the date of intended change, or any earlier date as the Minister on application may permit in particular circumstances.

Consideration of application and grant or approval

16. (1) On receipt of an application made under section 15(2) or (4), the Minister -

- (a) must consider the application together with any additional information supplied under section 19(2) within the time periods set out in that section;
- (b) in the case of an application under section 15(4), must seek advice from the Namibian Competition Commission as contemplated in section 16(1)(d) of the Competition Act.
- (c) may, subject to section 18, approve or disapprove the application for approval or change of control of an investment, and in the case of an approval, with or without conditions and must –
 - (i) in writing provide the applicant concerned with the Minister’s decision approving or disapproving of the proposal; or
 - (ii) in the case of a disapproval of the application, in writing provide the applicant with the reasons for the disapproval; and

- (d) must subsequently publish the decision of an approval in the *Gazette*.
- (2) When -
- (a) the requirements of any other law have been complied with;
 - (b) an approval of an investment under subsection (1)(c) has been received by the investor; and
 - (c) the investor has notified the Minister of the acceptance of the approval of the investment,

the Minister must issue a certificate of approval of investment that allows the investor to register with the Agency and commence with the investment.

(3) If the Minister has approved a change of control the approval will only take effect when –

- (a) the investor has -
 - (i) accepted in writing the approval of such change of control, including any conditions set out by the Minister;
 - (ii) accepted in writing all the obligations, conditions and responsibilities of the prior investor; and
 - (iii) complied with all other applicable laws; and
- (b) the relevant certificate of investment has been amended to reflect the, if necessary, and the Agency has made the necessary changes in the register referred to in section 21.

(4) If an applicant intends to make changes to a proposed investment or a proposed change of control that -

- (a) do not materially alter the nature, size, location or scale of the proposed investment or proposed change of control; or
- (b) do materially alter the nature, size, location or scale of a proposed investment or a proposed change of control,

the investor must in writing notify the Minister of all the proposed changes.

Provisional approval of investments

17. (1) The Minister may grant a provisional approval for a specified period of time in relation to a proposed investment for which an approval under this Act is required if -

- (a) the investor has requested a provisional approval in writing;
- (b) the Minister has had an opportunity to fully consider the circumstances; and
- (c) it will facilitate the ability of an investor to obtain other approvals, permits licenses, authorisations or concessions under other legislation, which are necessary for the final approval of the proposed investment.

(2) The granting of a provisional approval of investment under subsection (1) does not imply or in any other manner guarantee the granting of a final approval of the investment by the Minister in accordance with this Act.

Criteria for approval of investments

18. In considering an application for approval of a proposed investment and in addition to any other provision of this Act, the Minister must consider the overall net benefit to Namibia, taking into account, as may be relevant to a specific investment proposal -

- (a) the contribution of the investment to the national development, economic growth, public policy and national security objectives of Namibia;
- (b) the contribution of the investment to the advancement of persons who have been socially, economically or educationally disadvantaged by past discriminatory laws and practices;
- (c) the contribution of the investment to the implementation of programmes and policies aimed at redressing social and economic imbalances in Namibia, including gender-based imbalances;
- (d) the contribution of the investment towards increasing employment creation in Namibia;
- (e) the contribution of the investment to the advancement of small and medium enterprises in Namibia;
- (f) the contribution of the investment to the advancement of the development of a geographical area of a low social and economic development;
- (g) the contribution of the investment to the transfer of technological and managerial skills, knowledge and innovation;
- (h) the contribution of the investment to value addition to the natural resources and manufacturing sector of Namibia;
- (i) the extent to which the investment will procure goods and services from the small and medium enterprises sector and Namibian suppliers in general;
- (j) the impact on the environment and contribution to environmental benefits;
- (k) the record of the proposed investor in terms of compliance with applicable laws and relationships with communities in other states, if the investor has made investments in other states;

- (l) if the investor is an enterprise of another state which is similar to a public entity, the -
 - (i) degree of independence of the investor from the government, and whether the enterprise operates on a transparent commercial basis;
 - (ii) degree to which it operates in a free market context; and
 - (iii) risks to national security of the proposed investment; and
- (m) any other factor which the Minister may prescribe.

Approval of investments and time periods relating to approval

19. (1) The Minister must, subject to subsections (2) to (6), make any decision contemplated in this Act within 90 business days after receipt of the application for approval or change of control of an investment.

(2) If after receipt of an application under this Act the Minister requires additional information in order to consider the application, the Minister may, within 60 business days after the date of receipt of the application, in writing request for such information from the applicant, in which case the time for making the decision as contemplated in subsection (1) runs from the date of receipt of the additional information.

(3) Subject to subsection (4), if the Minister is of the opinion that the period referred to in subsection (1) or (2) ought to be extended –

- (a) to ensure a fully informed decision; or
- (b) due to the complexity of the issues involved,

the Minister may extend by notice in writing to the applicant, before expiry of that period, the period concerned by a further period, not exceeding 90 business days, specified in the notice.

(4) Despite subsection (3), if the Minister is of the opinion, based on extraordinary circumstances, that a decision cannot be reached within the extended period contemplated in that subsection, the Minister may extend by notice in writing to the applicant, before expiry of that period, as an exceptional measure the period concerned by a maximum of 30 business days, but no further extensions are permitted.

(5) If, at the end of a decision-making period contemplated in -

- (a) subsection (1), (2) or (3) the Minister has not yet made decided and the period concerned has not been extended; or
- (b) subsection (4) the Minister has not yet made a decided,

it is deemed that the Minister has given approval in respect of the application concerned.

(6) Despite subsection (5), if a performance agreement is requested as contemplated in section 8, the Minister and the investor must make best efforts to enter into such an agreement in the timeframes set out subsections (1) to (4), and subsection (5) does not apply in these circumstances.

(7) An -

- (a) approval of an investment proposal by the Minister under this Act only constitutes an approval to proceed with an investment if all other approvals, permits or authorisations of any type under any other applicable law have been lawfully granted to the investor; and
- (b) investor or investment may not commence with the establishment or operation of an investment until all the approvals, permits or authorisations of any type referred to in paragraph (a) are granted.

(8) The Minister may, after the applicant has been afforded the opportunity to be heard, suspend any decision-making period if there are changes to the investment proposal that do not materially alter the nature, size, location or scale of the proposal, and if the decision-making period is so suspended, it will continue to run on the date that all information pertaining to the changes is received by the Minister.

(9) The Minister may, after the applicant has been afforded the opportunity to be heard, suspend or annul a decision-making period if there are changes to a proposal which materially alter the nature, size, location or scale of the proposal.

(10) If the decision-making period under subsection (9) –

(a) is suspended, it will continue to run on the date that all information pertaining to the changes is received by the Minister;

(b) is annulled, the applicant may resubmit the application as a new proposal.

(11) If a document submitted in respect of an investment contains false or misleading information the Minister may, after the applicant has been afforded an opportunity to be heard, suspend or annul the decision-making process, and -

(a) if suspended, the decision-making period recommences when the corrected information is received;

(b) if annulled, the applicant may resubmit the application as a new proposal.

(12) If a new proposal is submitted under subsection (10)(b) or (11)(b), the time period for a decision recommences on the date of submission of the new proposal.

Exception to requirements for approval for change of control

20. (1) If a finance contract, mortgage or similar instrument permits the provider of finance to take possession of the financed investment -

- (a) in the event of a default by the debtor; or
- (b) in the event of the bankruptcy or insolvency of the investment in accordance with the Insolvency Act, 1936 (Act No. 24 of 1936),

the transfer of ownership for this purpose is not subject to approval under this Act.

(2) Despite subsection (1) the transfer of ownership to any third party by a provider of finance concerned is subject to this Act.

(3) Despite subsection (1), if the provider of finance seeks to operate the investment, other than for essential maintenance and temporary operation, until a buyer is determined or the investment is dissolved in an orderly manner, the provisions relating to the transfer of ownership apply with the necessary changes.

PART 6

RIGHTS AND OBLIGATIONS OF INVESTORS

Compliance with applicable laws and registration of investors

21. (1) Investors and their investment must in the carrying out of their activities at all times comply with this Act and all other applicable laws of Namibia.

(2) An investor whose investment has been approved under section 16 must register itself and the investment with the Agency in the prescribed manner.

(3) Despite anything to the contrary in this Act, the obligation to register in terms of subsection (2) applies to existing investors and investments, subject to subsection (4).

(4) Every investor and every investment existing at the commencement of this Act which is required to be registered under subsection (1) must register itself and the investment as contemplated in subsection (2), within 12 months from the date of commencement of this Act or such longer period of time that the Minister may on application to him or her allow, but which period may not in total exceed 18 months.

Treatment of foreign investors and their investments

22. (1) With respect to the management, operation and disposition of investments within Namibia the State must, subject to this Act, accord to foreign investors and their investments treatment that is not less favourable than the treatment it accords in like circumstances to Namibian investors and their investments.

(2) In the assessment of the “like circumstances” contemplated in subsection (1) the State must consider -

- (a) the effects on third parties and the community in proximity to the investment location;
- (b) the effects on the environment, including the cumulative effects of all investments on the environment;
- (c) the sector of investment;
- (d) the linkages to other sectors;
- (e) the aim of the measure concerned; and
- (f) the regulatory process generally applied in relation to the measure concerned.

(3) The treatment of foreign investors and their investments contemplated in subsection (1) does not apply in relation to any concessions, advantages, exemptions or other measures in favour of any investor or any investment in Namibia that may result from the existence or implementation of -

- (a) any bilateral treaty relating to investment or free trade between Namibia and another state;

- (a) any multilateral or regional agreement relating to investment, free trade or economic integration to which Namibia is a party; or
- (c) State procurement tied to development assistance funds or loans.

(4) Nothing in this Part may be construed to prevent Namibia from adopting or maintaining a measure that prescribes special formalities in connection with the investments of foreign investors, but the measures may not materially impair the rights granted by other provisions of this Act.

Expropriation

23. (1) In case of an expropriation of land or property affecting any investment such expropriation must be done in conformity with Article 16 of the Namibian Constitution, this Act and any applicable law.

(2) The State may take a measure of expropriation affecting land, property, a property right or any other right of an investor, if the measure -

- (a) is taken in the public interest;
- (b) is taken in accordance with applicable legal requirements and procedures; and
- (c) is accompanied by the payment of just compensation.

Payment of compensation

24. (1) The just compensation contemplated in section 23(2)(c) must be paid, once it is assessed in accordance with subsection (2), promptly in a freely convertible currency.

(2) Subject to any other law to the contrary, the just compensation referred to in subsection (1) must be assessed in relation to the fair market value of the expropriated investment immediately before the expropriation took place, but in appropriate circumstances

the just compensation may be based on an equitable balance between the public interest and the interest of those affected having regard to all relevant circumstances, including the -

- (a) fair market value;
 - (b) profit of the investment up to date of the expropriation;
 - (c) capital costs of the investment;
 - (d) current and past use of the property;
 - (e) the history of acquisition of the property;
 - (f) purpose of the expropriation; and
 - (g) duration of the investment.
- (3) The amount of compensation -
- (a) must be assessed after consultation with any other relevant Minister responsible for the sector of the enterprise or property in question and following a just compensation evaluation by an independent expert or a panel of experts;
 - (b) determined by the Minister must be approved by the Cabinet.
- (4) The assessment of fair market value may not reflect any change in value occurring because the intended expropriation had become known earlier.
- (5) Compensation must include simple interest at the rate as defined in section 1 and commences on the date the act of expropriation occurs and ends on the date the whole compensation amount is paid.

Review concerning expropriation and compensation

25. If an investor or investment affected by an expropriation takes the expropriation and the amount of the just compensation in respect of the expropriated investment on review to the High Court, that court must have regard to the principles set out in section 24.

Foreign personnel

26. (1) Despite subsection (3), the Minister responsible for immigration, on the recommendation of the Minister and after consultation with any relevant Minister as the circumstances require, may in writing authorise an investor to employ natural persons who are not Namibians to perform in Namibia -

- (a) scarce key professional and managerial functions; or
- (b) specialised services, scarce skills or specialities,

required for the operation of the investment.

(2) The authorisation granted under subsection (1) is subject to this Act, to other laws relating to labour and immigration control and to any applicable agreement entered into with the Minister.

- (3) An investor must -
 - (a) employ and make use of available skills in the Namibian labour market;
 - (b) invest in human capacity development in the Namibian labour market; and
 - (c) ensure the transfer of skills to Namibians,

so as to enhance the sustainability of the investment and its linkages within the Namibian economy and achieving the developmental objectives of Namibia.

(4) The foreign personnel referred to in subsection (1) excludes the investor and shareholder, his or her spouse and dependent children and parents of the investor, who, if non-

Namibian, are deemed to have been granted, subject to section 27 and to other immigration control requirements, the right to enter and work in Namibia at the point of admission once final approval of the investment has been granted.

Facilitation of visas and permits of investors, dependents and foreign personnel

27. (1) The Minister, through the Agency, must engage the Minister responsible for immigration to facilitate the issuing of visas and residence permits to investors, their spouses and dependent children and parents of the investors and foreign personnel.

(2) The Minister, after consultation with the Minister responsible for immigration, the Minister responsible for labour and the Minister responsible for tertiary education, may give approval to the engagement of foreign personnel in a written agreement with the investor, to be included in the performance agreement of the investment if appropriate, in respect of the positions available for -

- (a) a long-term engagement of foreign personnel; or
- (b) a temporary engagement of foreign personnel for a prescribed period.

(3) The Minister, after consultation with the Minister responsible for immigration, the Minister responsible for labour and the Minister responsible for tertiary education, may prescribe positions, even in the absence of the performance agreement contemplated in subsection (2), as temporary in respect of foreign personnel in respect of various investments to which section 28 applies.

Capacity development and transfer of skills

28. (1) If -

- (a) the Minister and investor have agreed on positions that may be filled on a temporary basis by foreign personnel by reason of lack of appropriate skills in the Namibian market; or

- (b) the Minister has designated positions as temporary in respect of foreign personnel under section 27,

an investor must ensure that Namibians are trained to acquire relevant skills to assume those positions within the designated period or a period agreed upon between the Minister and the investor.

(2) An investor must train Namibians to fill the positions occupied by foreign personnel on the basis of one apprenticeship for each position held by a foreign person, unless otherwise agreed and specified in the performance agreement contemplated in section 27(2).

Transfer of funds

29. (1) Subject to subsection (4) and the applicable laws of Namibia a foreign investor may transfer funds relating to his or her or its investment into and out of Namibia.

- (2) The funds referred to in subsection (1) include -
 - (a) the initial capital and additional amounts to maintain or increase the investment including, among other things, funds relating to equipment, stocks, supplies and other necessary operational elements;
 - (b) the profits, dividends, royalties and income yielded by an investment;
 - (c) the funds in repayment of loans and interests of loans related to an investment;
 - (d) just compensation paid under this Act;
 - (e) proceeds from the total or partial sale or liquidation of an investment;
 - (f) earnings and other remuneration of personnel engaged from abroad in connection with an investment; and

- (g) payments arising out of the settlement of a dispute between the investor and another party in Namibia.

(3) The transfer of funds under this Act must be made without undue delay in a freely convertible currency at the market value of exchange applicable on the date of transfer, subject to the exchange control regulations made under the Currency and Exchanges Act, 1933 (Act No. 9 of 1933).

(4) Despite subsection (1), the State may delay or prevent a transfer of funds or other assets through a fair, non-discriminatory and good faith application of measures -

- (a) to protect the rights of the creditors in the event of actual or anticipated bankruptcy;
- (b) to ensure the compliance with judgments concerning offences;
- (c) to ensure the compliance with tax obligations;
- (d) to comply with lawful administrative decisions and facilitate the execution of judgments;
- (e) in response to serious or exceptional balance of payments or external financial difficulties, or the anticipated financial risk experienced in Namibia; or
- (f) in exceptional circumstances, to prevent movements of capital that cause or threaten to cause serious difficulties for macro-economic management, including monetary or exchange rate policies in Namibia.

PART 7

DISPUTE SETTLEMENT

Resolution of disputes

30. (1) An investor or investment may notify the Minister of a dispute arising between the investor or the investment and the State after admission or after establishment of the investment.

(2) The Minister, on request of the investor or investment and if appropriate, may assist in the resolution of the dispute, including by designating a mediator or mediation panel to mediate any dispute contemplated in subsection (1).

(3) An investor or investment may choose to directly approach the courts of Namibia for remedy instead of using the mediation procedures referred to in subsection (2).

(4) Nothing in this Act impedes the courts from seeking to pursue alternative forms of dispute settlement employed by the courts to encourage the resolution of disputes.

(5) Even though the courts in Namibia have jurisdiction over disputes relating to this Act, the Minister and an investor or investment, as required by the circumstances of the alleged breach of rights or obligations, may agree by written agreement to –

- (a) arbitration in accordance with the Arbitration Act, 1965 (Act No. 42 of 1965); or
- (b) international arbitration as may be specified in the agreement or as may be prescribed.

(6) Nothing contained in this Act has any impact on an agreement between a public entity and an investor or investment to refer a dispute to arbitration that has been agreed or may be agreed pursuant to other legislation permitting such arbitration.

PART 8

GENERAL PROVISIONS

National security

31. Despite any other provision of this Act to the contrary and subject to consultation with the Head of the Namibian Intelligence Service referred to in Article 120A of

the Namibian Constitution, the Minister may further prescribe and regulate investments in a manner necessary to maintain -

- (a) national security and international peace; and
- (b) any obligations arising from the obligations of Namibia as a member of the United Nations Organisation concerning international peace and security.

Offences penalties

32. (1) An investor or investment commits an offence, if the investor or investment -

- (a) undertakes, establishes or operates an investment in a manner contrary to section 15(1) or (3);
- (b) invests in a sector in which the investment is not permitted pursuant to any designations made as contemplated in section 12;
- (c) changes the nature of the investment in a manner that makes it materially different from the approved investment;
- (d) fails to comply with the requirement to cumulate investments into a singular investment for the purposes of this Act as required under section 12(8); or
- (e) is, despite any other law to the contrary, in material breach of any conditions agreed with the Minister in relation to the establishment or operation of the investment;
- (f) contrary to section 15 -
 - (i) changes the ownership or control of his or her investment; or

- (ii) transfers any licence, permit, authorisation or concession owned by the investor or investment,

to any other person.

(2) An investor or investment commits an offence if the investor or investment submits information which the investor or investment -

- (a) knows to be false, misleading or fraudulent; or
- (b) does not believe to be true,

in relation to any matter required by or under this Act;

(3) In addition to any action taken pursuant to section 34, a person convicted of an offence under subsection (1) or (2) is liable to a fine not exceeding N\$2 000 000 or to imprisonment for a term not exceeding 10 years or to both such fine and such imprisonment.

Opportunity to comply with law

33. (1) If the Minister or an inspector has reason to believe that an investor or investment has committed an offence as contemplated in section 32 the Minister or inspector may, where appropriate -

- (a) notify the investor or investment of the reasons for such belief that an offence has been committed; and
- (b) provide the investor or investment an opportunity to implement corrective measures to ensure compliance.

(2) If an investor or investment has agreed to implement corrective measures as contemplated in subsection (1) the investor or investment must implement the corrective measures concerned within a period agreed upon with the Minister or inspector.

(3) If the Minister is of the opinion that an effort has been made in good faith to ensure compliance within the period referred to in subsection (2) the Minister may delay any further enforcement of any action contemplated in section 34.

Action to be taken against investor or investment for offences

34. (1) If the Minister is of the opinion that an investor or investment has committed an offence contemplated in section 32, the Minister may, subject to subsection (2) and with due regard of any penalty that may be imposed under that section, in writing order the

-

- (a) suspension, withdrawal or cancellation of the approval of the investment issued under this Act;
- (b) suspension, withdrawal or cancellation, or, where appropriate, recommend to the relevant Minister or other functionary the suspension, withdrawal or cancellation of any licence, permit, authorisation or concession, issued under any other law; or
- (c) investor or investment to cease operations until the suspension, withdrawal or cancellation is lifted or until the offence is remedied.

(2) If the Minister intends to make an order under subsection (1) the Minister must

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- (a) give notice in writing of the intended action to the investor or investment concerned and to any other person who in the opinion of the Minister is likely to have an interest in the matter; and
- (b) call upon the investor, investment or person concerned to submit to the Minister, within 30 business days after receipt of the notice, in writing any representation which they may wish to make regarding the intended action.

(3) Apart from any suspension, withdrawal or cancellation of approval under this section the Minister may apply to the High Court by way of a notice of motion for an order that

the investor or investment pay an administrative fine as a result of the commission of the offence.

(4) The Minister must in his or her application contemplated in subsection (3) submit all evidence to the High Court which supports the order contemplated in that subsection.

(5) If the High Court is of the opinion that an investor or investment has committed an offence contemplated in section 32, the court may impose an administrative fine that does not exceed the full value of the economic benefits that have accrued to the investor or investment as a result of the commission of the offence.

(6) When imposing an administrative fine as contemplated in subsection (5) the rules of the High Court apply and the court may issue any further directive in respect of the application and the administrative fine so imposed with reference to the objectives of this Act.

(7) If the High Court imposes an administrative fine under subsection (3) the fine is -

- (a) payable to the Ministry for the benefit of the State Revenue Fund;
- (b) regarded as a debt due to the State; and
- (c) recoverable in a court of law in the case of non-payment.

(8) If the offence concerned is also an offence under any other law, the fine imposed under subsection (5) is in addition to such other applicable penalties in such other law.

Appeal to High Court

35. (1) An investor or investment may appeal to the High Court against any suspension, withdrawal or cancellation contemplated in section 34 on the grounds that -

- (a) no offence has been committed;

- (b) the offence so committed has no material impact on the issuance of the approval of the investment contemplated in this Act; and
- (c) the intended suspension, withdrawal or cancellation is manifestly excessive given the nature of the offence.

(2) A notice of appeal relating to an appeal in terms of subsection (1) must be lodged, in the prescribed manner, with the registrar of the High Court within a period of 30 days after the date upon which the suspension, withdrawal or cancellation appealed against was ordered.

(3) The High Court may allow, on good cause shown, an appeal to be lodged after the expiry of the period of 30 days specified in subsection (2).

(4) An appeal under this section must be conducted in accordance with rules of the High Court regulating civil proceedings in an appeal from a decision of a magistrates' court to that court.

(5) The High Court may -

- (a) request the Minister in writing to furnish it with such documents or particulars as it may require;
- (b) refer the matter to the Minister for further consideration;
- (c) allow or dismiss an appeal lodged in terms of this section;
- (d) make an order reversing or amending the suspension, withdrawal or cancellation appealed against, if it is of the opinion that the Minister has not acted in accordance with this Act;
- (e) make an order relating to the payment of costs; or

- (f) make such other order as it may consider appropriate.

Regulations

- 36.** (1) The Minister may make regulations relating to -
- (a) the form of any application, notice and other document required for the purposes of this Act and the manner for making such application;
 - (b) the organisation and operations and proceedings of a body that may be established under this Act to perform any functions in terms of this Act or as may be delegated to it;
 - (c) any fees to be paid for services provided under this Act;
 - (d) the facilitation of Namibian investment in priority economic sectors;
 - (e) the requirements that must be met by Namibian and foreign investors, which may differ, that seek approval of investment in designated sectors pursuant to sections 15 and 16;
 - (f) the provision of incentives and support mechanisms to investors;
 - (g) the qualifications and additional functions of inspectors;
 - (h) any matter which in terms of this Act is required or permitted to be prescribed;
and
 - (i) generally any matter in respect of which the Minister considers it necessary or expedient to prescribe in order to achieve the objectives of this Act, but not inconsistent with this Act.

(2) A regulation made under this section may prescribe penalties not exceeding a fine of N\$100 000 or imprisonment for a period not exceeding 12 months or both such fine and such imprisonment for any contravention of or failure to comply with such regulation.

Repeal of laws

37. The Foreign Investment Act, 1990 (Act No. 27 of 1990), the Foreign Investment Amendment Act, 1993 (Act No. 24 of 1993) and the Namibia Investment Promotion Act, 2016 (Act No. 9 of 2016) are repealed.

Savings and transitional provisions

38. (1) Despite the repeal of the Foreign Investment Act, 1990, any certificate of investment status, investment contract or permit executed thereunder and in force at the date of commencement of this Act continues to be in force as if it has been made under a corresponding provision of this Act and may not be prejudiced or limited or otherwise negatively affected by this Act.

(2) A certificate of investment status, an investment contract or permit contemplated in subsection (1) ceases to be of effect upon its expiry, unless the Minister and the investor agree to its renewal on terms consistent with this Act.

(3) Anything done under a provision of the repealed Foreign Investment Act, 1990, that could have been done under this Act is deemed to have been done under the corresponding provision of this Act.

Short title and commencement

39. (1) This Act is called the Investment Promotion and Facilitation Act, 2021; and commences on a date determined by the Minister by notice in the *Gazette*.

(2) The Minister may determine different dates under subsection (1) in respect of different sections of this Act.