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ECONOMIC POLICY RESEARCH ASSOCIATION

# THE PERMISSION-BASED ECONOMY: WHY NAMIBIA'S INVESTMENT BILL FAILS FOREIGN AND LOCAL INVESTORS

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"*The more the state 'plans', the more difficult planning becomes for the individual. Economic control is not merely control of a sector of human life which can be separated from the rest; it is the control of the means for all our ends. And whoever has sole control of the means must also determine which ends are to be served, which values are to be rated higher and which lower, in short, what men should believe and strive for*." - Friedrich Hayek, The Road to Serfdom (1944)

"*Extra legal restrictions are the walls that keep capital outside the country.*" - Hernando De Soto

This document was prepared by several experts in Law (including International Trade Law), Economics, Business Management, Corporate Governance, Risk Management, Financial Management, Public Governance and Futures Studies.

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## 1. EXECUTIVE SUMMARY

This report concludes, in clear and unambiguous terms, that Namibia's proposed Investment Bill does not promote investment. On the contrary, it represents a fundamental shift away from a rules-based, market-oriented economic framework toward a permission-based, command-and-control investment regime administered through extensive ministerial discretion. If enacted substantially in its current form, the Investment Bill will materially deter both foreign and domestic investment, suppress private-sector activity, and exacerbate Namibia's already severe unemployment, fiscal, and competitiveness challenges.

At its core, the Investment Bill replaces legal certainty with political discretion. It empowers a single Minister, often with authority exceeding that of Cabinet, to decide who may invest, in which sectors, under what conditions, for how long, and whether an investment may be expanded, transferred, or sold. These decisions are not governed by objective, exhaustively defined statutory criteria, but by vague and elastic concepts such as "national interest," "public interest," "net benefit to Namibia," and a wide range of ideological policy objectives. Such an approach is fundamentally incompatible with international best practice in investment law and policy.

The Bill does not merely regulate foreign capital. It expressly applies to Namibian investors and existing domestic businesses, subjecting them to prior approvals, continuous monitoring, intrusive information demands, criminal sanctions, and even ministerial orders to cease operations. In effect, Namibians are rendered conditional participants in their own economy. No serious investment jurisdiction treats domestic private enterprise as a privilege granted at the discretion of the executive. This feature alone places the Bill far outside the norms of market-based economic governance.

Measured against global benchmarks, including long-established World Bank Group principles on foreign direct investment (FDI), the Investment Bill fails on every critical dimension. Open admission is replaced by discretionary screening; sector access becomes a political decision rather than a legal entitlement; investment incentives are converted into negotiable privileges; dispute resolution is internalised and politicised; and protections against expropriation and capital transfer are weakened through vague exceptions and broad executive powers. Rather than reducing risk and uncertainty, the Bill institutionalises them.

The economic implications are severe. Namibia is a small, capital-constrained economy with shallow domestic capital markets, a narrow tax base, and one of the highest unemployment rates in the world. Sustained growth, diversification, job creation, and fiscal stability are structurally impossible without substantial, predictable private investment, particularly FDI. At a time when global FDI flows are declining and competition for capital is intensifying, Namibia cannot afford an investment regime that raises barriers, increases discretion, and signals hostility to private capital. The Investment Bill does precisely that.

The Bill also creates fertile conditions for rent-seeking, corruption, and elite capture. Broad approval powers, performance agreements negotiated on a case-by-case basis, open-ended information-gathering authority, and the criminalisation of ordinary commercial conduct invite abuse of power and selective enforcement. Investors will rationally price these risks into their decisions, and many will simply choose alternative jurisdictions with clearer rules and stronger protections.

In substance, the Investment Bill amounts to centralised administrative allocation of capital: a defining characteristic of a command economy, regardless of whether formal ownership remains private. History and comparative experience demonstrate that such systems suppress investment, reduce economic dynamism, and entrench poverty rather than alleviate it.

The central conclusion of this report is therefore unavoidable: the Investment Bill, as currently drafted, will not attract investment, create jobs, or strengthen Namibia's economic sovereignty. It will do the opposite. Unless fundamentally reworked to restore legal certainty, sharply limit ministerial discretion, protect both foreign and domestic investors, and align with international best practice, the Bill risks inflicting long-term damage on Namibia's economy and development prospects.

## 2. INTRODUCTION: WHEN LAWS BECOME INVISIBLE WALLS TO CAPITAL

This report examines why Namibia's latest Investment Bill replaces legal certainty with discretion and risks turning invisible regulatory barriers into permanent walls against capital.

By way of brief recap: the original Namibia Investment Promotion Act was promulgated in 2016 but never enacted. It was subsequently revised, delayed, and ultimately replaced by a new Investment Promotion and Facilitation Bill that was tabled in 2021. That Bill was met with widespread criticism and swiftly withdrawn. EPRA provided an extensive report on that 2021 Bill.[1]

In its report on the 2021 Investment Bill, EPRA concluded that the draft legislation was materially worse than the already flawed 2016 Act, and that the intervening five years had clearly not been spent productively and yielded little improvement. Regrettably, the current 2025 iteration confirms that the subsequent four years have been no more productive. If anything, the 2025 Investment Bill (hereinafter referred to as "the Investment Bill" or simply "the Bill") is now even worse than it was before.

In January 2022, EPRA submitted an extensive, evidence-based critique of the 2021 Investment Bill. Yet, at no point since has there been any meaningful engagement by the government with the substance of those concerns. In fact, even attempting to obtain clarity on rumoured amendments to the 2021 Investment Bill was a frustrating exercise. In 2023, when EPRA requested clarification, it was at various times accused of "involving itself in politics", labelled a "lobby group", questions as to its "true motives", and asked to reveal its members and directors.

While stakeholder engagement is not an entitlement, the absence of meaningful engagement with crucial stakeholders (most notably investors, private sector and investment experts) raises serious questions about whether consultation is intended as a genuine policy-shaping exercise or merely as regulatory window dressing. Tick-box exercises involving country-wide townhalls do not constitute meaningful engagement on a very technical bill aimed at regulating (and policing) domestic and foreign investments. If the government is indeed persuaded of the correctness of its position, it should be prepared to defend that stance in open dialogue with civil society. Ignoring well-founded criticism is not a sign of policy strength - it is a failure of the governance process.

We provide some summarising quotes from our report on the 2021 Investment Bill:

"*…the Minister thus decides who may invest, where, when, how, for how long and under what conditions. The scope of the bill thus effectively includes all current and future Namibian businesses… Once an investment (read business) approved by the Minister commences, such investment (read business) is then also continuously subject to policing by the Minister… The Minister may potentially obtain complete control over every private sector business.*"

[1] Available at https://www.epra.cc/wp-content/uploads/2022/01/EPRA-report-on-2021-INVESTMENT-BILL-FINAL.pdf

"*EPRA observed that, under the 2021 Bill, the Minister could effectively control who participates in the private sector, amounting to a de facto 'hi-jacking' of private economic activity away from market forces and into discretionary political control.*"
"*The Bill fundamentally transforms Namibia from a rules-based, market-oriented economy into a permission-based system in which private investment exists only at the discretion of the State*."

"*Instead of facilitating investment, the Bill centralises control over economic activity, substituting legal certainty with administrative discretion and exposing the entire private sector to continuous political oversight*."

Despite repeated revision and public criticism, the central indictment of the 2021 Investment Bill applies fully to its 2025 iteration, as explained in detail in this report.

Most investment barriers are not physical borders or walls, but rather laws and regulatory systems that operate outside clear, predictable parameters, keeping capital out. This can include extra licensing requirements, unofficial rules, and arbitrary ministerial discretion. They function like invisible walls and raise the cost and risk of doing business. It keeps rational investors away, rather than attracting them. A good example is Zimbabwe, which according to various reports recently enacted new rules (December 2025) requiring foreign-owned businesses in specific sectors (salons, retail, transport, etc.) to sell 75% of their shares to Zimbabweans within three years (by 2028), with annual divestment of 25%. If they fail to do so, they must shut down or leave the country.[2]

This is a classic example of what not to do.

The Ministry of International Relations and Trade (the **"Ministry"**) has recently invited nationwide consultations on the Investment Bill. This is the third major attempt, over nearly a decade, to craft a modern investment framework for Namibia. So far, without success. Instead of promoting much-needed investment, we are left with a bill that will, in EPRA's opinion, act as a brake on investment (both domestic and foreign).

[2] - https://www.facebook.com/dw.africa/posts/zimbabwe-has-introduced-new-rules-that-force-foreign-owned-businesses-in-certain/1263195912510965/

Most laws mature with successive refinement. The Investment Bill is an exception. Instead of converging towards clarity, certainty, and competitiveness, it has regressed. This version of the Investment Bill is only the latest in a long series of disappointing revisions to what was supposed to be a (much-needed) streamlined, incentive-driven, and globally competitive investment framework for Namibia.

Against this background, this report (the second comprehensive report on the supposed "new and improved" investment bill in Namibia) is prepared with a degree of institutional fatigue and frustration. Nevertheless, the stakes are too high for disengagement. The Investment Bill will shape Namibia's investment climate, capital formation, job creation, and long-term competitiveness for many years to come. It therefore demands rigorous scrutiny and candid assessment.

## 3. THE STRUCTURAL IMPORTANCE OF FOREIGN DIRECT INVESTMENT

Namibia is currently ranked 68$^{th}$ (out of 69 countries) in the IMD World Competitiveness Ranking Index.[3] This is a dismal indictment of government policy. This is not the result of an isolated policy misstep, but a sustained policy failure spanning more than a decade

For a small, capital-constrained economy like Namibia, sustained growth, job creation and fiscal stability are structurally impossible without substantial and predictable foreign direct investment.

It is no secret that Namibia badly needs investment, especially Foreign Direct Investment (FDI) to develop and to grow its economy. Putting it differently: Namibia's reliance on FDI is not a "nice to have" or optional consideration; it is a structural necessity. The country's economic size, capital constraints, fiscal pressures, and development ambitions make sustained growth without substantial external investment extremely difficult. With a population of approximately 3 million people and a correspondingly small domestic consumer base, Namibia faces a hard ceiling on the scale of locally driven demand, savings, and industrial investment. Domestic capital markets are shallow, and long-term project finance remains limited. As a result, FDI plays a pivotal role in unlocking projects (and generating jobs) that are simply beyond the reach of local funding alone.

[3] https://www.imd.org/centers/wcc/world-competitiveness-center/rankings/world-competitiveness-ranking/rankings/wcr-rankings/#_tab_List

The structure of Namibia's economy further deepens this dependency. Economic activity remains heavily concentrated in extractive industries such as mining, alongside primary agriculture, fishing, and public-sector expenditure. While these sectors generate important foreign exchange earnings, they are highly exposed to global commodity price cycles and offer limited scope for broad-based job creation or downstream value addition. FDI is therefore indispensable for diversification into higher-value activities such as mineral processing, manufacturing, renewable energy, logistics, advanced agriculture, data infrastructure, and green hydrogen. Without such diversification, Namibia remains locked into a low-value, commodity-export model that is inherently volatile and growth constrained.

Fiscal realities reinforce this dependence. Government finances are under persistent strain due to a large public-sector wage bill, rising debt-servicing costs, and declining reliability of SACU transfers. At the same time, the tax base remains narrow because the private sector is already heavily taxed and constrained by a plethora of "anti-growth" legislation. As a result, it remains too small to absorb Namibia's growing labour force or to generate sufficient revenues. FDI directly strengthens fiscal sustainability by expanding the tax base without raising tax rates, reducing the need for debt-financed expenditure, and creating formal employment that lowers long-term pressure on social grants and welfare systems. In the absence of significant private-sector expansion driven by investment, the state is forced into an increasingly unsustainable cycle of borrowing, taxation, and expenditure compression.

Unemployment, particularly among the youth, represents one of Namibia's most serious long-term risks. Structural joblessness, skills mismatches, and limited industrial absorption capacity have created conditions where large segments of the workforce are excluded from meaningful economic participation. Small-scale domestic enterprises alone cannot absorb this labour surplus. FDI, by contrast, enables the establishment of entirely new industries and large-scale projects with the capacity to create both direct and indirect employment across construction, services, logistics, manufacturing, and technology sectors. Without FDI-driven job creation, unemployment becomes entrenched, social tensions intensify, and political instability risks increase.

Beyond capital and jobs, Namibia also faces a significant technology constraint. Modern economic development increasingly depends on access to advanced technologies, managerial systems, digital infrastructure, and sophisticated maintenance ecosystems. Local capital markets cannot independently finance capital-intensive projects such as large renewable energy systems, hydrogen infrastructure, smart mining operations, port automation, advanced agricultural systems, or telecommunications and data networks. FDI fills this gap by transferring technology, skills, management expertise, and access to international research, supply chains, and innovation ecosystems. Without this technological infusion, Namibia risks becoming a perpetual technology taker rather than a competitive technology user or builder.

Namibia's long-term growth strategy is, by necessity, export oriented. The domestic market is simply too small to sustain industrialisation on its own. Export-led growth depends on access to international buyers, global logistics networks, foreign financing, and international risk appetite - precisely the channels that FDI provides. Through FDI, Namibia becomes integrated into global energy markets, mineral value chains, agri-export systems, manufacturing platforms, and digital services networks. Without these connections, Namibia remains a marginal price taker with limited influence over where it sits in global value chains.

It is also unrealistic to expect domestic investors alone to finance national development at the scale required. Local investors face high interest rates, limited access to long-term capital, policy uncertainty, and relatively small profit pools. Mega-scale infrastructure such as ports, refineries, transmission grids, hydrogen corridors, and large logistics platforms cannot be built using pension funds, bank loans, or SME finance alone. FDI is therefore not supplementary to development; it is foundational.

FDI also serves as a crucial international confidence signal. Sustained investment inflows reflect legal certainty, policy stability, regulatory credibility, and protection of property and contract rights. When FDI weakens, the consequences extend far beyond individual projects: borrowing costs rise, exchange rate pressure intensifies, domestic capital seeks safer jurisdictions, and national risk premiums increase. Investor confidence takes years to build but can be destroyed rapidly through policy uncertainty, excessive political discretion, or regulatory unpredictability.

The strategic risks of restricting or discouraging FDI are therefore severe. In such a scenario, Namibia would face prolonged low growth, rising public debt, worsening unemployment, deteriorating infrastructure, accelerating skills emigration, and growing social and political strain. Redistribution without growth becomes the default policy outcome - an approach that is economically unsustainable and ultimately socially destabilising.

Critically, the policy choice Namibia faces is not between foreign and local investment. Successful countries integrate both. They welcome FDI while enforcing fair regulation, tax compliance, competition policy, and local value-chain participation. They use foreign capital to expand productive capacity while simultaneously strengthening domestic enterprise development. By contrast, countries that politicise investment, centralise approvals excessively, weaponise ministerial discretion, or blur national interest with state control tend to suppress both foreign and domestic investment simultaneously.

We pause to note that the Investment Bill also applies to domestic investment, and thus also places substantial restrictions on domestic investors.

In practical terms, Namibia needs FDI because it does not have sufficient domestic capital to finance development at scale; it cannot industrialise using local resources alone; it cannot resolve structural unemployment without new industries; it cannot achieve technological upgrading without foreign expertise; and it cannot achieve sustainable fiscal consolidation without private-sector expansion. Properly regulated FDI does not undermine sovereignty. On the contrary, sustained economic stagnation is the real long-term threat to economic sovereignty, social stability, and national development.

## 4. WHAT SERIOUS INVESTMENT LAWS LOOK LIKE – AND WHY THIS IS NOT ONE

Measured against international FDI benchmarks, the Investment Bill departs sharply from rules-based openness and instead institutionalises screening, discretion and policy uncertainty.

The Investment Bill, in its current form, is not an investment promotion law as any serious investor would understand it. Quite the opposite: It is a state control and screening law, a sector reservation law, a ministerial discretion law, a law whereby investors must beg for permission to invest and stand to be criminally liable at the behest of a Minister. The Investment Bill does not promote investment; it polices it. None of this is beneficial to Namibia. This approach is fundamentally inimical to Namibia's economic interests.

The Investment Bill violates at least 6 core principles of global FDI best practice because:

- Clear and transparent investment rules are replaced by political discretion.

- An already relatively repressed economy[4] now becomes a permission-based economy.
- Foreign and local investors are subject to essentially the same restrictions.
- Sector access is converted into political decisions.
- Change-of-control is effectively nationalised through approvals.
- Dispute resolution is downgraded from international arbitration to internal committees.

We must add to the above that in many instances the Minister's powers supersede that of Cabinet.

If the Investment Bill passes substantially as drafted, Namibia will lose its limited competitive edge against its competitors for non-resource FDI. It will also, bizarrely, subject Namibians to investment restrictions in their own country. There are several constitutional issues with the Bill, some of which we mention herein (but not in the form of a formal legal opinion). Before we zoom in on the most glaring deficiencies of the Investment Bill, it may be helpful to first briefly zoom out and look at the World Bank Group's global best practice approach to attracting FDI.

### 4.1. The World Bank Group

The World Bank Group's June 2025 Global Economic Prospects Report makes for grim reading.[5] It is worth quoting the executive summary of the Global Economic Prospects Report in full (with own emphasis):

"*After a succession of adverse shocks in recent years, the global economy is facing another substantial headwind, with increased trade tension and heightened policy uncertainty. This is contributing to a deterioration in prospects across most of the world's economies. For emerging market and developing economies (EMDEs), the ability to narrow per capita income gaps with richer countries, boost job creation, and reduce extreme poverty remains insufficient.*

*Downside risks to the outlook predominate, including an escalation of trade barriers, persistent policy uncertainty, rising geo-political tensions, and an increased incidence of extreme climate events. Conversely, policy uncertainty and trade tensions may ease if major economies succeed in reaching lasting agreements that address ongoing trade disputes. The challenging global context faced by EMDEs is compounded by the fact that <u>foreign direct investment inflows into</u>*

[4] Namibia ranks 94 on the Index of Economic Freedom, labelled as "Mostly Unfree" - https://www.heritage.org/index/pages/country-pages/namibia
[5] The full report can be downloaded at https://www.worldbank.org/en/publication/global-economic-prospects

*these economies have fallen to less than half of their peak level in 2008 and are likely to remain subdued. Global cooperation is needed to restore a more stable and transparent global trade environment and scale up support for vulnerable countries grappling with conflict, debt burdens, and climate change.*

*Across EMDEs, domestic policy action is also critical to contain inflation risks, strengthen fiscal resilience through improved revenue mobilisation, and reprioritise spending. To unlock job creation and long-term growth, structural reforms must focus on raising institutional quality, attracting private investment, and strengthening human capital and labor markets. In particular, countries in fragile and conflict situations (FCS) face daunting development challenges that will require tailored domestic policy reforms, underpinned by well-coordinated multilateral support.*

*Global Outlook.*

*Global growth is slowing due to a substantial rise in trade barriers and the pervasive effects of an uncertain global policy environment. Growth is expected to weaken to 2.3 percent in 2025, with deceleration in most economies relative to last year. This would mark the slowest rate of global growth since 2008, aside from outright global recessions. In 2026-27, a tepid recovery is expected, leaving global output materially below January projections. Progress by emerging market and developing economies (EMDEs) in closing per capita income gaps with advanced economies and reducing extreme poverty is anticipated to remain insufficient. The outlook largely hinges on the evolution of trade policy globally. Growth could turn out to be lower if trade restrictions escalate or if policy uncertainty persists, which could also result in a build-up of financial stress. Other downside risks include weaker-than-expected growth in major economies with adverse global spillovers, worsening conflicts, and extreme weather events. On the upside, uncertainty and trade barriers could diminish if major economies reach lasting agreements that address trade tensions. The ongoing global headwinds underscore the need for determined multilateral policy efforts to foster a more predictable and transparent environment for resolving trade tensions, some of which stem from macroeconomic imbalances. Global policy efforts are also needed to confront the deteriorating circumstances of vulnerable EMDEs amid prevalent conflict and debt distress, while addressing long-standing challenges, including the effects of climate change. National policy makers need to contain risks related to inflation as well as strengthen their fiscal positions by raising additional domestic revenues and re- prioritising spending. To facilitate job creation and boost long-term growth prospects in EMDEs, reforms*

*<u>are essential to enhance institutional quality, stimulate private investment growth, develop human capital, and improve labor market functioning.</u>*

*Regional Prospects.*

*All EMDE regions face a challenging outlook amid the rise in trade tensions and heightened global uncertainty. In 2025, growth is projected to slow in East Asia and Pacific as well as in Europe and Central Asia—both regions that are highly reliant on global trade—and, to a lesser extent, in South Asia. In Latin America and the Caribbean, growth is projected to be the lowest among EMDE regions over the forecast horizon, as activity is held back by high trade barriers and long-standing structural weaknesses. In regions with a large number of commodity exporters, including in the Middle East and North Africa and <u>Sub-Saharan Africa, growth is anticipated to face drags from the weakening outlook for external commodity demand</u>. Against the backdrop of a deteriorating global environment, growth forecasts for 2025 have been downgraded in all EMDE regions relative to January projections.*"

### 4.2. Sub-Saharan Africa (SSA)

In the SSA region, the World Bank Group states that growth is forecast to "*edge up from 3.5 percent in 2024 to 3.7 percent this year and then average 4.2 percent in 2026-27. Growth this year and next is anticipated to be weaker than previously expected, owing to the deterioration in the external environment and domestic headwinds. Elevated government debt, still-high interest rates, and rising debt-servicing costs have narrowed fiscal space, prompting fiscal consolidation efforts in many countries, especially as financing needs remain high as international development assistance is cut back. Per capita income gains will remain inadequate to make significant progress in reducing extreme poverty in the region, which is home to most of the world's poor. Progress in these areas is likely to be impeded by the looming jobs challenge, which is expected to be the most acute in SSA relative to other regions, as the pace of job creation struggles to match the rapid expansion of working-age populations. Risks to the outlook remain tilted to the downside. The more significant risks are the possibility of weaker external demand in response to heightened trade policy tensions and a sharper-than-expected slowdown in China. Increased regional political instability poses an important risk to the growth outlook. Rising sovereign spreads and the possibility of higher-for-longer global interest rates, along with further reductions in donor support, risk pushing even more SSA economies into government debt* *distress. Intensification of ongoing droughts and greater frequency and intensity of other adverse weather events represent persistent risks to the SSA outlook*."

### 4.3. Namibia

According to the World Bank Group, Namibia's real GDP growth (at market prices) was 5.4 percent in 2022 and declined to 4.4 percent in 2023. It is projected to further decline to 3.7 percent in 2024 and 2.9 percent in 2025. The next two years don't look much better for Namibia, with anemic growth forecast at 3.4 percent for 2026 and 3.5 percent for 2027. Namibia is in desperate need of investment, which makes the latest (anti-investment) provisions in the Investment Bill even more perplexing.

### 4.4. What about FDI?

FDI is a key driver of economic growth, but FDI flows globally are declining. In other words, just when Namibia needs it most, the pot of available FDI funds is becoming smaller, and more countries are competing for what little remains. The Investment Bill should be seen against this backdrop. We need to attract investment, not deter it, as the Investment Bill does.

In June 2025, Ayhan Kose, the World Bank Group's Deputy Chief Economist, unpacked the reality of declining global FDI flows.[6]

Kose correctly emphasised that FDI is very important when we think about economic development because it helps create jobs, facilitate private capital mobilisation, and helps reduce poverty.

### 4.5. Why is FDI declining?

According to Kose, there has been a dramatic sea change in FDI flows this century. FDI is declining globally, not increasing. He goes on to say that:

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[6] The full interview can be downloaded at https://www.worldbank.org/en/news/video/2025/06/27/global-economic-prospects-foreign-direct-investment-fragile-conflict-settings-expert-answers#:~:text=June%2027%2C%202025-,Boosting%20Foreign%20Direct%20Investment%20and%20Supporting%20Countries%20in%20Fragile,Settings%20%7C%20World%20Bank%20Expert%20Answers&text=Global%20growth%20is%20projected%20to,these%20challenges%20and%20paths%20forward.

"*In the 2000s, we saw sharp increase in FDI to developing economies. In fact, at some point, FDI to GDP ratio reached around 5 percent in mid-2000s, basically. Since then, we have seen a steady decline. In fact, in 2023, when we have the latest good data available, we had the lowest level of FDI flows to developing economies since 2005. When you think about the share of FDI relative to GDP, that number has been hovering around 2 percent. Now, why did we end up with this outcome? At the global level, we have seen unprecedented geopolitical tensions, unprecedented policy uncertainty, and in the 2000s, we had basically broad-based embrace of globalisation, integration, opening up financial markets. That has changed. We have basically more fragmentation, more countries are introducing trade restrictions, and that makes a big difference when you think about cross-border investment flows. And when you look at country-specific reasons, in the 2000s, we had this incredible appetite to basically push new reforms, structural reforms, financial sector reforms, liberalisation, labor market reforms. That appetite has waned. With that, the type of improvements we saw in business climates, the pace of those improvements has slowed as well.*"

**4.6. Given the above, how should developing countries like Namibia respond?**

According to Kose, the good news is that we had a period of very strong FDI flows from which developing countries can take their cues. He says that (own emphasis):

"*We have a kind of a playbook here. What that playbook implies, one, countries have to do certain things to attract FDI; two, they need to do certain things to maximise the benefits of FDI; and three, at the global level, we have to have certain interventions to basically see more FDI going to developing economies. Now, obviously, there is no one-size-fits-all policy, but at the end of the day, at the country level, <u>we need to see reforms to improve business climates</u>. We need to see, basically, human capital improvements, increasing the schooling years, including increasing the quality of education. And labor market reforms are critical, making these countries more business-friendly and, of course, pushing more trade integration and having investment treaties between countries. At the global level as well, we need to find ways to cooperate, rather than fragment the investment flows. As you know, at the World Bank is the largest development bank. We have a wide range of instruments we provide, especially in the context of de-risking, providing insurance against, basically, the political risk. And of course, at the private sector level, our private sector IFC are working extremely hard to basically facilitate FDI into these economies.*"

We pause to note that EPRA has in the past reported on the disastrous impact of several labour laws and regulations in Namibia.[7] These reports were provided to policymakers. Nothing changed, and unemployment increased drastically over the past decade. If government pursue laws such as the Investment Bill, unemployment will undoubtedly worsen.

### 4.7. World Bank Group Guidelines on the Treatment of FDI

In 1992, the World Bank Group published its guidance on Foreign Direct Investment (FDI) treatment (the **"1992 Guidelines"**). It emphasised a liberal, open admission policy, promoting transparency, predictability, and non-discrimination, moving away from restrictive performance requirements, and ensuring fair investor treatment while respecting host country regulatory rights. The 1992 Guidelines are not binding, but they remain a good benchmark for any country that wants to create a conducive environment to attract FDI. Namibia would do well to pay more attention to these basic principles, rather than getting stuck in revisionist and regressive policies, such as the restrictive Investment Bill, and many others.

### 4.8. Key Principles from the 1992 Guidelines

**Open Admission:** Encourage capital, technology, and skills by facilitating admission, avoiding cumbersome procedures, and reducing unnecessary conditions.

**National Treatment:** Treat foreign investors no less favorably than domestic investors (within agreed scope).

**Fair & Equitable Treatment (FET):** Ensure fair and consistent treatment, including due process and non-arbitrariness.

**Protection from Expropriation:** Protect against expropriation without prompt, adequate, and effective compensation.

**Free Transfer of Funds:** Allow free transfer of investment-related funds, including profits and capital.

[7] These reports can be obtained at www.epra.cc/downloads. See especially the input provided to the Wage Commission, the report on Affirmative Action, as well as the report on the regulations to the Affirmative Action Act and Employment Services Act.

**Performance Requirements:** Discourage counterproductive requirements (like local content or export quotas) in favor of open admission and post-establishment incentives.

The 1992 Guidelines are arguably still the “gold standard” when it comes to attracting FDI but there has been a shift in recent years. If we “stress-test” the Investment Bill against the 1992 Guidelines, we see a shift from liberal, rules-based openness towards a more restrictive, permission-based, discretionary, policed regime. That is exactly the kind of move that most FDI benchmarking frameworks flag as negative for investor confidence, especially in small, peripheral markets that need to over-compensate for their lack of size with more predictability and openness. Namibia is a classic example of this. Sadly, we are going in the wrong direction. Namibia’s ongoing economic malaise and mass unemployment stand as stark evidence of the consequences.

### 4.9. The Problem with Investment Incentives

The World Bank Group’s Investment Policy and Promotion Circular 54017 consolidated the policy implications of the latest research by the World Bank Group’s Investment Climate Advisory Services on the efficacy of investment incentives.[8]

In terms of tax incentives specifically, the circular made it clear that “*tax incentives are far less effective in weaker investment climates than in stronger ones. Moreover, tax incentives should not be used in an effort to compensate for a weak investment climate*.”

Best practices in administering incentives require that governments administer them and curb their misuse. If they fail to do so, they can impose additional costs on businesses and create opportunities for rent-seeking. Incentives should ideally be granted automatically and not be subject to some opaque review or approval process (as is the case with the Investment Bill). To quote the World Bank Group: (own emphasis)

“*Eligibility for incentives provided by law should be <u>based on clear criteria, not granted through special permission or certification by investment promotion agencies, ministries of trade, or other government agencies</u>. This approach ensures prompt decision-making and quick turnaround times for investors—essential to attracting and retaining investment.*”

[8] It can be downloaded at https://openknowledge.worldbank.org/server/api/core/bitstreams/869f8c1e-3760-5ef7-b090-e41dae762087/content

The Investment Bill does exactly what the World Bank warned against. Ignoring those warnings may be politically appealing, but the economic costs are borne by the country and its citizens, not its institutions or its politicians (who are often shielded from the effects of their own bad policies).

The lessons for Namibia are as follows:

Whatever investment incentives a government decides to offer and however it structures them, it should make every effort to ensure that they are:

- Affordable - forgone income should not severely undermine government revenue streams.

- Based on evidence - targets for incentives should be based on research that confirms they will benefit the country in ways that would not have been possible if there were no incentives.

- Simple - incentive administration should permit easy accessibility and eligibility determination.

- Reviewed periodically – investment incentives should be reviewed regularly to determine their relevance and economic benefits relative to their budgetary and other costs, including long-term impacts on resource allocation.

EPRA previously reported extensively on the negative consequences of economic policies based on race, redistribution of wealth, and preferential treatment. In a nutshell, they create rent-seeking, deter investment, and the economy and all citizens suffer, but it disproportionately affects the poor (who always bear the brunt of bad but populist policy decisions).

The World Bank Group concludes that "*providing incentives can create risks for the investment climate and fiscal compliance. It also encourages lobbying and rent-seeking. Over the long run, making the costs and benefits of tax incentives more transparent helps frame future policy. Many countries have found that the best investment incentive is providing a level playing field to all businesses through a broadly based, low, uniform tax rate and a good investment climate*."

### 4.10. Where the Investment Bill Clashes with the 1992 Guidelines' Logic

Several features push Namibia away from the 1992 Guidelines' "best practice" model:

**From open entry to discretionary screening:** The 1992 Guidelines favour a clear negative list: most sectors open by default, with a limited list of prohibited/strategic sectors, plus transparent publication of that list. The Investment Bill model instead relies on broad ministerial discretion: foreign (and local) investors need prior approval in many cases; the Minister can decide whether investments "align with national objectives," and can later cancel approvals. That moves Namibia towards a case-by-case licensing regime, which the 1992 Guidelines explicitly warn can become cumbersome and counterproductive.

**Reserved sectors and "national interest" tests:** The 1992 Guidelines allow some sectors reserved to nationals, but only on clearly defined national security or specific development grounds. If Namibia designates widely reserved or "Namibian-only" sectors or uses a vague "national interest" yardstick, that starts to look broader and fuzzier than the 1992 Guidelines' narrow exceptions – and more like classic protectionism. Protectionism logically leads to reduced economic activity, and fewer jobs.

**Performance conditions and policy bargaining:** Performance agreements, localisation demands, or empowerment conditions attached ad-hoc to approvals can morph into the sort of performance requirements the 1992 Guidelines call "often counterproductive". From an investor perspective, this also introduces negotiated uncertainty: everything depends on what a given minister or official wants to extract at approval time. The Investment Bill grants discretion so expansive that it is effectively unbounded by the legislation itself

**Transfers of funds and FX controls:** The 1992 Guidelines say free transfer is the rule; temporary restrictions are an exception for serious FX crises, with strict time limits and interest on delayed transfers. The Investment Bill lists a broad menu of reasons to delay or block transfers (not just FX/BoP emergencies, but a range of regulatory grounds). To investors, this looks like open-ended policy space to trap capital, which is exactly what the 1992 Guidelines try to reduce.

**Contract stability and regulatory risk:** Under the 1992 Guidelines, if the state unilaterally terminates or alters a contract in its sovereign capacity, it should pay compensation on the same basis as expropriation. Provisions allowing a minister to revoke approvals, suspend operations or alter conditions without a clear, compensatory framework look like regulatory expropriation risk.

**Dispute settlement:** The 1992 Guidelines see independent international arbitration, especially ICSID, as a positive and widely accepted way to depoliticise disputes. The Investment Bill however centralises disputes first within the Agency, and then in Namibian courts (with limited access), with arbitration available only on terms agreed with the minister and under domestic law, which is the opposite direction.

### 4.11. What this Means for Namibia

The 1992 Guidelines offer a clean, internationally recognised checklist. For Namibia specifically, an attractive investment law should:

- Codify an open-admission regime with a short, clearly defined negative list (national security, a handful of genuinely strategic sectors) and transparent publication of all reservations and procedures.
- Limit ministerial discretion by using objective criteria for approvals, tight timelines, and strong duties to give written reasons and allow appeal.
- Guarantee robust non-discrimination, FET, full protection and security, and free transfer of funds, with emergency carve-outs drafted narrowly and time-limited.
- Adopt clear, guideline-style rules on expropriation and contract changes, including valuation standards and prompt, effective compensation.
- Clearly define "just compensation" for expropriation and ensure this remains competitive on global standards. In most free-market economies compensation for expropriation is based on market value PLUS (i.e. market value with additional compensation for inconvenience, relocation expenses, etc.). The Investment Bill does the opposite, conferring wide discretion to reduce compensation in a manner that is constitutionally suspect and largely unconstrained by objective standards.
- Offer investors a choice of neutral dispute settlement, including access to international arbitration consistent with Namibia's BITs and ICSID membership.
- Focus on stability and transparency, not negotiating power: predictable tax and regulatory regimes usually attract more high-quality FDI than a "door-by-door bargaining" model.

We will now turn to the Investment Bill and critically analyse the most important sections. We will also provide a scorecard to measure how it stacks up against global best practice. The crucial question is: Does the Investment Bill encourage investment? Sadly, the answer is a resounding "NO"!

## 5. INSIDE THE BILL: POLITICAL DISCRETION, CONTROL AND UNCERTAINTY

A clause-by-clause analysis reveals how the Investment Bill centralises control, politicises market access, and systematically erodes the protections that serious investors require.

**Part 1**

### 5.1. Definition of "Investor" and "Investment"

The Investment Bill defines an "investor" and "investment" as both foreign and Namibian investors and investments (unless it expressly refers to foreign or Namibian investors). It therefore also takes aim at Namibian investors. The bulk of the regulation of investors and investments contained in the Bill thus applies to domestic investors as well. This substantially reduces the freedom of Namibians to start a business, expand a business, sell a business and decide on how the business should optimally be managed. Doing business in future will be at behest of a Minister, with conditions as set by the Minister (who may invest, where they may invest, and how their investments must be managed). Approval of investment may be withdrawn. A business may by notice be ordered to cease operations, failing which its owners can be criminally liable. More on these draconian powers and the move away from almost all principles of a free market economy hereunder.

It is noteworthy that "investment" does not include services or provision of goods to any branch of government procured through tender, contract including public-private partnership agreements or any other means (Section 2). To put it bluntly, entrepreneurs (local and foreign) will not be subjected to the restrictive provisions of the Bill. Most importantly, where other private enterprises will have to make full disclosure of their proprietary rights and assets, investments and activities to the Minister, those dealing with government only will not be required to make such disclosure. They will also not be policed by the Minister.

Enterprises who deal only with government are therefore distinctly advantaged, and they benefit from their personal information being privileged which privilege the average enterprise no longer enjoys. To give an example, a Chinese company that only constructs roads and buildings for government will not be required to comply with the Bill. Local engineers and construction companies will have to comply if they have any clients other than government. The fact that they have other clients means they are enterprises and are making investments as per this, and the definitions discussed below.

This places local enterprises at a distinct disadvantage in providing capital project services to government, both in increased regulatory requirements, but also in having to share proprietary information with government (with a promise of secrecy, which means nothing in practice), which the foreign contractor does not have to share. This opens the door for corruption.

In fact, the Minister's omnipotence throughout this Bill, with no checks and balances and no accountability provisions, opens the door for grand corruption.

**Why is this a problem?**

This makes many sector restrictions, approvals, monitoring, sanctions and change-of-control rules apply to Namibians as well. No serious investment jurisdiction does this. It regulates private domestic business as if it were foreign capital. Corruption will flourish. Economic activity will reduce, jobs will be lost, capital will flee the country. Even a communist country like Vietnam for instance, which is ranked 61 on the Index of Economic Freedom, where Namibia is ranked 94, becomes a far more attractive investment destination than Namibia.

**What is the Solution?**

By way of example of what investor friendliness entails, we refer to Singapore, which ranked number one on the Index of Economic Freedom. Investors do not need prior government permission to invest in Singapore. Foreign and local investors may freely establish businesses. No licence or ministerial approval is required simply to invest. Investment is treated as a private commercial decision, not a privilege granted by the State. Some restrictions exist in "sensitive sectors", but even these rules are clearly defined in law, decisions are rule-based and not discretionary and there is no criminalisation of ordinary investment activity.

Unlike the Namibian Investment Bill, Singapore does not require prior political screening of investors, ministerial veto over ordinary investments, or broad "public interest" discretion without criteria.

The Minister's omnipotence needs to be removed. The scope of the Investment Bill needs drastic change. It should only apply to foreign "investors" and "investments". There should also be a provision that nothing in the Investment Bill may be interpreted to impose ownership, approval, designation, sectoral limitation, or monitoring obligations on Namibian investors, except where expressly provided in other legislation. The Bill must actually promote foreign investment (not only limit it as is currently the case), and any limitations on foreign investment must be clear, specific, rule-based, and limited to objectively acceptable strategic national interests, such as national defence. Prohibiting or limiting foreign investment simply because government has commercial interests in government-owned commercial enterprises is not good for economic growth or socio-economic progress.

It may be regarded as a politically incorrect statement by some, but government is notoriously inefficient in creating financially sustainable enterprises. The numerous, massive government bailouts to commercial public enterprises over many decades are evidence of this. Ultimately, government competes with private enterprises (taxpayers), using taxpayer funds. Private sector investment is curtailed, economic activity is reduced, jobs are lost, and tax revenue is reduced.

**5.2. Definition of "enterprise", "business activity" and "undertaking"**

The definition of "enterprise" includes *any* organised business undertaking, established *inside or outside Namibia. "Business activity"* includes *any* activity conducted in Namibia that involves the commitment of capital with the expectation of gain or profit. "Undertaking" will include any business carried on for gain or profit (by an individual or body corporate) in the supply of goods and services. From the above it is clear that every private sector enterprise (even sole proprietors and partnerships) doing business in Namibia (whether local or foreign owned) will fall within the scope of this Bill.

**5.3. Definition of "this Act"**

The definition of "this Act" (the Investment Bill) includes directives and guidelines issued under the Act. Thus, directives and guidelines (issued by the Minister) are elevated to the status of statute passed by Parliament. This illustrates the omnipotent powers the Minister will have, and uncertainty that is created in the process.

### 5.4. The Application of the Act

Section 3 (1) reads as follows:

"*This Act applies to all economic sectors and business activities within Namibia for –*
*(a) investors who want to access incentives, and use the facilitation services of the Agency;*
*(c) investors who have invested or want to invest in designated economic sectors, or business activities pursuant to section 30(2) (c) and (d).*"

Be that as it may, section 3(1) materially diverges from global best practice by blurring the boundary between investment facilitation and investment control, enabling retroactive sectoral regime shifts through executive designation, and undermining legal certainty for both existing and prospective investors. This design materially weakens Namibia's investment predictability profile and elevates long-term regulatory risk across the economy.

On its face, it purports to apply the Investment Bill across all economic sectors and business activities, but only in relation to two categories of investors:

- Investors (both Namibian and foreign) who seek to access incentives or facilitation services from the Namibia Investment Promotion and Facilitation Agency ("**NIPA"**); and
- Investors (both Namibian and foreign) operating in or seeking to enter designated economic sectors or activities as determined under section 30(2)(c) and (d).

The clause does not create a purely voluntary investment facilitation regime, but rather establishes a hybrid system where:

- Some investors fall under the Investment Bill by choice (those seeking incentives or facilitation); and
- Others fall under the Investment Bill by compulsion (those investing in "designated" sectors).

It must be added that all investors that fall within the scope of the Act must deal with NIPA. While section 38 (dealing with registration with NIPA) appears, at first glance, optional, it becomes mandatory in substance:

- Registration is required once approval is granted (s 38(1))
- No investor or investment may access incentives, PPPs, joint ventures, procurement, licences, permits or natural resources unless registered. The Agency:

We pause to caution that NIPA has the power to monitor investors and investments (Section 40(1)), to demand information (Section 40(2)), and to enter premises (without any judicial oversight).

Under international best practice, investment laws typically adopt one of two clean models:

- A pure facilitation model which only applies to investors who voluntarily seek incentives or facilitation - no investor is forced into discretionary approval simply by operating in a sector; or
- A narrow national security screening model where mandatory screening is limited to clearly defined, sensitive sectors (e.g. defence, critical infrastructure, dual-use technology). In this model, sector restrictions are exhaustively listed in the primary statute or subject to strict, objective criteria and parliamentary oversight.

The Investment Bill does not follow best practice. In fact, it directly clashes with best practice, which strongly avoids economy-wide discretionary "designation" powers and blended regimes where ordinary commercial investment is quietly converted into a controlled activity at the discretion of the Minister.

Arguably, the most serious deviation from global best practice is the compulsory application of the Investment Bill via "Designated Economic Sectors". This means that the government (in fact, the Minister alone, with omnipotent powers even superseding that of Cabinet – see Section 31(10)) may expand the reach of the Investment Bill by unilaterally designating sectors where investment (both local and foreign) requires ministerial "approval". The net effect is that entire industries can be shifted overnight from open commercial space into discretionary state-controlled space. Under best practice sector restrictions are exceptional, not routine. They are narrowly defined (normally based on national security, not industrial policy convenience). They are also subject to legislative oversight, not only executive notice. One cannot fathom why the legislator would want to give a single minister such unconstrained powers, which may very well result in devastating consequences for our country.

The Investment Bill conflates facilitation and control. There is very little facilitation, and none for which the law and appropriate platforms and channels do not already exist. The Bill is about control. Best practice draws a clear legal distinction between investment promotion/facilitation; and investment control/screening. Section 3(1) collapses both into one statute and one application clause. As a result, a bill marketed as an "investment promotion" instrument simultaneously, and predominantly, creates an economy-wide control mechanism for the government. This is structurally inconsistent with any reasonable investor protection benchmarks.

The sad reality is that the Investment Bill creates unpredictable regulatory reach: No investor (Namibian or foreign) can be certain today whether their sector will be a "designated economic sector" tomorrow. How can any investor plan long-term in such an environment?

The same goes for designation of "business activities". Any business activity can overnight be designated at the behest of the Minister alone (see again Section 31(10). As an example of the absurdity of these provisions, a Minister may, in his sole discretion, even if Cabinet does not agree, designate all information and telecommunications services.

If the business activity is designated as "strategic" no new investment or change of ownership may be made without approval. The business cannot freely expand, restructure, sell, or attract capital. The business must also get approval to continue its operations within 3 years, failing which it must cease operations. Failure to cease operations is a criminal offence.

Current investors (both local and foreign) have a lot to fear. Potential investors are likely to view this as an unacceptable risk, especially if they intend to spend hundreds of millions, even billions to invest in a country where one minister can destroy their investment in a heartbeat. We deal with expropriation further down - in that regard the Bill again moves away from global best practice, and mechanisms are devised not to properly compensate investors (both local and foreign).

### 5.5. Objectives of the Act

From the onset we must state that the objective under Section 4(1)(c) is extremely unlikely to be achieved. The Bill simply does not create anything (which does not already exist) to promote sustainable development and growth and attract domestic and foreign investment. Quite the opposite. It only puts in place a regulatory regime over private sector which will no doubt send investors running for the hills.

Section 4 (k) allows for the designation of certain sectors of the economy to be reserved for certain investors (Namibian and foreign) and investments (Namibian and foreign)

**Why is this a Problem?**

It institutionalises economic closure as a primary government policy objective, instead of openness. As discussed above, Namibia is already regarded as an extremely uncompetitive country, with a very poor ranking on economic openness. This Bill drastically closes the economy even more. Nothing good can come from this.

**What is the Solution?**

The solution is to provide for narrowly defined national security screening of foreign investments only, based on objective, transparent and proportionate criteria. Remove the powers (of a Minister, and generally of government) to decide on who may invest, in which sector or business activity they may invest, where they may invest, if an investment may be expanded, and if and when and to whom an investment may be sold (other than for narrowly defined, objective, and transparent criteria).

**Part 2**

### 5.6. Administration of the Act

Sections 5 and 6 give extremely wide powers to the Minister.

As an example, the Minister is responsible for the administration of the Investment Bill and is empowered to “formulate policies and to make or issue regulations and other related subordinate measures to give effect to" the Investment Bill (Section 5 (1)). The Minister (not Cabinet or Parliament) may "formulate policies", which policies (as per the definition of "this Act"), then becomes tantamount to statutory law. These powers must be read with the numerous vague and seemingly unlimited criteria and objectives and similar phrases used in the Bill, for example "national development objectives", "enhance economic transformation and inclusivity", "encourage wealth creation", "diversification", "national interests", "public interest", "socioeconomic inclusion", "gender equality and youth empowerment", "innovation capability", and "net benefit to Namibia". There is essentially no limitation on the policies the Minister can make. There is no objective standard against which a refusal can be tested. Also, any future ministerial policy can be justified as advancing one of the Bill's objectives, even if it undermines others. The Minister may thus elect to prioritise "economic transformation" above economic growth and increased investment. The uncertainty that these unlimited powers of the Minister create for investors is profound.

In terms of section 6, the Minister has the power to:

- Set investment policies - section 6 (1) (a);
- introduce incentives and identify classes of investors (both Namibian and foreign) who are entitled to incentives – section 6 (1) (b);
- enter into performance agreements of strategic investments – section 6 (1) (d);[9]
- designate sectors that are reserved for certain categories of investors (both Namibian and foreign) – section 6 (1) (f); and
- issue directives, propose reforms, and coordinate approvals.

**Why is this a Problem?**

The net effect of the Investment Bill is that it essentially centralises executive control of capital allocation under one Ministry, and that Minister has virtually unlimited powers in relation to any investments (by Namibians and foreigners). In contrast, attractive FDI jurisdictions tend to separate policy (which is set by Parliament), screening (which is done by independent regulators) and incentives (which are done by the treasury). In the Investment Bill the Minister, even though he/she has to "consult" with the Agency and across ministries, will ultimately be responsible for

[9] As discussed above, these agreements become tantamount to statutory law, and any breach becomes a criminal offence.

deciding who gets to invest what, where, and under what conditions in Namibia. In effect, this creates an all-powerful "super Minister", and all current and future investments may only proceed at this Minister's behest.[10]

As per Section 6(1)(b) and 6(1)(f) the Minister may identify "classes" of investors that qualify for "incentives" and "categories" of investors who may enjoy exclusive access to certain economic sectors and business activities. There is no limitation on what may constitute a "class" or "category" of investors. This opens the door for nepotism, abuse and discrimination. Classes and categories can for example be based on race, ethnicity, tribe, age, creed, religion, gender, etc. It can also be based on foreign nationality, i.e. Asian, African, European, etc.

As an illustration of the absurdity of these powers as the Bill currently stands (ignoring the glaring unconstitutionality for now), the Minister may prohibit white and Baster Namibians from owning and operating any business related to public transport, or prohibiting any Namibian not registered as a voter in the Omusati Region from owning and operating a hair and beauty salon, or prohibit any second and third generation Namibian from participating in the oil and gas industry, or prohibit any duly qualified legal practitioner over the age of 40 to practice law. We recognise the ridiculousness of these examples, but provide them nonetheless to illustrate the ludicrousness of the Minister's powers in this Bill. [11]

**What is the Solution?**

Clause 6 (1), especially read with Section 30(1), is not ideal. If it has to stay in place, then it should, at the very least, be amended to provide that the Minister may:

(a) implement investment policy as adopted by Parliament;
(b) administer incentives as enacted in legislation approved by Parliament;
(c) not designate or reserve any economic sector except where such reservation is expressly enacted in primary legislation passed by Parliament;
(d) not issue binding directives (or any similar document, policy, condition, etc.) affecting investor rights, ownership or control.

[10] Keep in mind that the Minister alone may amend any thresholds and introduce new sectoral and "business activity" restrictions. So for instance the Minister can overnight reduce the threshold for construction activities or hotels (Schedule 1 Part 1) from N$200 million to N$100,000, effectively taking control of ALL such investments in Namibia.
[11] See also Section 30(1).

### 5.7. Performance Agreements

Section 7 provides that the Minister may "*on behalf of the State and after consultation with the Agency, enter into a performance agreement with any investor seeking approval, for an investment designated under section 30(2)(d) to agree on matters related to the contribution of the investment to the development objectives of Namibia*."

Section 30 (2) (d) are those categories of designated economic sectors or business activities designated as strategic economic sectors or business activities which require the approval of the Minister in terms of section 33(1)(a).

**Why is this a Problem?**

It replaces law with political contracts, encourages rent-seeking, and destroys equality of treatment. These agreements are regarded as statutory law, and breach thereof amounts to a criminal offence. The Minister may withdraw approval, even direct the business to "cease operations" with immediate effect.[12] In the latter instance, an investor's business will remain closed (or the investor will be criminally charged), until the investor can get a court order for the operations to proceed, or finalise alternative dispute resolution proceedings. In both instances the business is likely to remain closed for a considerable period of time, possibly years. This is not exactly an "investor-friendly" environment.

It is the State's responsibility to create a predictable and investor-friendly environment. Investment law should facilitate private capital deployment, not conscript investors into compensating for failures in the State's own policy execution or achievement of national objectives.

**What is the Solution?**

Section 7 should be repealed in its entirety. All investor rights and obligations must arise exclusively from statute and regulation of general application. No investor (Namibian or foreign) should be subjected to individualised obligations outside general law. Government must create

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[12] Section 56(1)(d).

an investor-friendly environment, not force investors to do right where government has failed in its "national objectives".

**Part 3**

### 5.8. The Namibia Investment Promotion Agency ("NIPA")

The acronym of this Agency is unfortunate, as it is the same as the acronym for the well-established Namibian Institute for Professional Accountants. This will cause confusion.

The Agency's powers (Section 9(2)) include obtaining any information or documents from investors and "other persons" as required by this Bill. The section itself does not list or limit the categories of information or documents. As per sections 33 to 35 such information and documents include:

Sections 33–35 the Agency may require:

- full investment proposals;
- ownership and control structures;
- source of funds;
- business plans;
- employment projections;
- sectoral alignment information;
- any information relevant to the criteria for approval (including "national objectives").

Because section 35 includes open-ended criteria, the information demand is correspondingly open-ended.

Where a performance agreement exists, the Agency may require:

- documents evidencing compliance;
- reports on developmental commitments;
- operational, employment, localisation or skills-transfer data.

Again, because performance agreements are not statutorily restricted, neither is the information demanded.

Section 40 expressly authorises monitoring of investments, which implies demands for:

- financial information;
- operational data;
- compliance reports;
- documents showing adherence to approval conditions and agreements.

Because the Minister may prescribe additional requirements by regulation, the Agency's information-gathering power automatically expands as regulations expand.

The Bill does not define "other person". This means the Agency may demand documents from, for example:

- shareholders or members;
- directors or officers;
- financiers or lenders;
- joint venture partners;
- suppliers or counterparties;
- consultants or advisors.

There is no express limitation tying "other persons" to:

- contractual privity,
- control,
- materiality,
- or confidentiality safeguards.

Section 9(2) does not include:

- a closed list of documents;
- relevance or proportionality tests;
- confidentiality thresholds;
- privilege protections (e.g. legal privilege);
- judicial pre-authorisation;
- remedies for overreach.

Section 9(2) of the Bill confers on the Agency an open-ended power to demand any information or documents from investors and even from undefined ‘other persons’, without specifying categories, relevance, proportionality, confidentiality safeguards, or judicial oversight. Such unbounded information-gathering powers are a classic enabler of abuse of public power: they invite fishing expeditions, selective enforcement, and informal coercion, and create fertile conditions for rent-seeking and corruption. In an investment regime, where commercial sensitivity and predictability are paramount, this degree of discretion is not merely undesirable—it is fundamentally incompatible with transparency, accountability, and the rule of law.

By vesting appointment, policy direction and effective control in the Minister, the Bill reduces NIPA to an instrument of (unlimited) executive power rather than an independent investment promotion body. To illustrate the Minister’s absolute control over the Agency: the Minister may remove a member of the board if, in the sole discretion of the Minister, the member is for whatever reason, not effectively and efficiently performing the functions of the Agency.

By design, the Bill replaces regulatory independence with political alignment, as the Agency’s board is appointed and controlled by an omnipotent Minister. The board is therefore likely to consist of political loyalists rather than independent experts genuinely committed to attracting investment to Namibia.

**Part 4**

### 5.9. Designation of Economic Sectors and Business Activities

Part 4 is arguably the core <u>anti-investment</u> provision in the Investment Bill. It states that the Minister may (after following prescribed procedures – but with the final say) designate certain economic sectors or certain business activities as exclusively:

- Reserved for the State;
- Reserved for Namibians;
- Reserved for certain categories of investors and investments;
- Requiring mandatory joint ventures with Namibian investors (with percentages set out in regulations which can be amended later at the whim of the Minister); and
- Strategic sectors requiring approval.

As per section 30(5) the Minister, in designating economic sectors and business activities, may also set out specific thresholds relating to the value of the investment, number of jobs created, specific "sub-activities", and the location of the investment(!).

Any expansion of an existing investment is treated as an investment that is subject to this Act (section 30(7)). This will gravely restrain the expansion of Namibia's current businesses that will become designated as per the proposed regulations to the Bill (and designated in future) and is regressive to say the least.

The saving clause for existing investments (i.e. businesses) (section 32) provides little comfort and is in any event misleading. Firstly, expansion of existing business falls squarely under this Bill. Secondly, any change of ownership falls under this Bill. Thirdly, and most importantly, as per section 65(4) an existing business must in any event apply for a certificate of approval of the investment within 36 months after the Bill becomes law. Section 32 does not spare existing businesses from this regime - it merely delays their reckoning, after which the full machinery of the Act applies.

**Why is this a Problem?**

Existing investors will be extremely fearful of this law, and rightly so. Their investments will now be exposed to substantial risk, with a Minister telling them very soon how their business must be managed, changed, and sold. Free sale is no longer an option. The freedom to expand is no longer free. The decisions to manage and operate the business optimally is no longer in the hands of business owners and experts, but prescribed by a Minister.

Section 30 makes investing in Namibia essentially an exercise in political discretion. It means that market access (for a much broader range than a narrow band of "security" or "national interest") essentially becomes discretionary (at the whim of the Minister) rather than a true and open free market system.

To add insult to injury, section 30 (8) makes expanding an existing investment also subject to the Investment Bill (in effect at the discretion of the Minister). In other words, once an investor (Namibian or foreign) has taken the leap of faith to invest his or her hard-earned cash in Namibia, the Minister will then decide whether expanding his or her investment is deemed worthy of his "approval". The same applies to the change of control provisions (which we will deal with later below).

**What is the Solution?**

Section 30 needs to be reworked completely. It should be replaced with a negative list model. In other words, all economic sectors in Namibia should be open to foreign (and local) investment unless expressly restricted by an Act of Parliament.

Even then, Parliament should only adopt a negative list of "reserved" sectors for very good reasons, for example, restricted solely on national security grounds. Any restriction should be narrowly defined, proportionate, published as primary legislation, and subject to judicial review.

Ideally, approval should only be required for foreign investments involving: (a) defence; (b) intelligence; (c) critical communications infrastructure; (d) energy transmission; and (e) national security technologies.

No approval should be required for (a) commercial acquisitions; (b) changes of control; or (c) offshore transactions with Namibian effect (unless national security is directly and objectively implicated).

Investors want certainty; they do not want to guess what will happen to their investment tomorrow. The powers of the Minister to have the final say must be removed. There must always be Parliamentary oversight in crucial decisions that will materially affect Namibia's investment environment. Certainty for investors must be paramount.

**Part 5**

**5.10. Approval of Investments in Strategic Economic Sectors and Business Activities**

Section 33 (1) requires any investor (Namibian or foreign) who wants to invest in a strategic economic sector to first obtain the Minister's approval. Any change in control (as per section 33 (3)) also requires the Minister's approval. In other words, any merger and acquisition transaction or license, permit, concession and authorisation transfer needs prior ministerial approval. This is in addition to the approvals required from the Competition Commission. Free transferability of investments faces more and more hurdles, now also political hurdles, making investment in Namibia increasingly unattractive. Nelson Mandela once said "poverty is man-made"; these are the types of government policies and controls that create more and more poverty. Unfortunately, Namibia has many other such policies, hence our deplorable rankings in economic openness and competitiveness.

**Why is this a Problem?**

No reasonable institutional investor will accept a state veto over exits.

**What is the Solution?**

The only approval considerations should be the financial solvency of the investor, the legality of the source of funding, competition law compliance (solely to avoid monopolies, and not for political reasons), and (genuine and objectively proven) national security risks.

### 5.11. Criteria for Approval of Investments in Strategic Economic Sectors or Business Activities

Section 34 allows the Minister to prescribe conditions before an investment may be made (or expanded). These conditions are politically motivated, and virtually unlimited, as discussed before. The Minister may impose (unlimited) "obligations, conditions and responsibilities" on investors. An investor has no option but to accept these or leave. In such a restrictive and uncertain environment, leaving becomes an easy choice, as the bulk of the countries in the world, and also in Africa, provide a far less restrictive investment environment. Some members of EPRA who operate businesses in Namibian and other African countries have in the past reported that doing business in Namibia is already far more difficult than many other African countries. This should be a major concern for government, but sadly, judging from the Investment Bill, it is not.

Section 35 has a "Net Benefit to Namibia" test baked into any proposed investment or change of control. This includes demographic redress, contribution to the advancement of previously disadvantaged persons, SME procurement, youth preferences, geographic redistribution, and any other Minister-added ideological factors.

Businesses are by their nature profit driven. Investors take financial and many other risks with the hope of making profit – probably more often than not, they fail. Only with the prospect of being profitable can a business create more jobs. Only after becoming profitable does a business pay taxes, and can expansion be considered. To expect businesses to deliver on government objectives is a recipe for disaster – much like Mao Zedong's Great Leap Forward, whereby the agricultural industry was forced into complying with what we would call today a government objective (a noble one, to feed the nation). Between 15 and 45 million starved to death as a result. This policy direction of control and coercion to achieve "government objectives" (already existing in numerous other laws in Namibia) must be avoided at all costs. It already created massive unemployment, substantially lowered Namibia's appeal as investment destination, and caused widespread socio-economic hardship. Unless policymakers accept this truth, this deplorable situation is unlikely to improve. Judging from the Investment Bill (evidence that the above truth is not yet accepted), it is more likely that our situation will become far worse.

**Why is this a Problem?**

The Investment Bill tries to convert capital allocation into social engineering.

**What is the Solution?**

Again, the only approval considerations should be the financial solvency of the investor, the legality of the source of funding, competition law compliance (only to avoid monopolies, and not for political reasons), and (genuine and objectively proven) national security risks. No demographic, social, geographic, procurement or empowerment criteria should be imposed as conditions of approval. No single Minister should have the unlimited powers conferred in this Bill.

**Part 6**

**5.12. Administration of Investments**

Section 38 requires investors (and their investments) to obtain a "certificate of approval" when "the requirements of any other law have been complied with" (in terms of section 34 (3)) and an approval of an investment has been obtained (under subsection 34 (1) (a)).

Crucially, section 38 (6) states:

"*An investor or investment may not be considered for incentives or benefits including public-private partnerships, joint ventures, business relationships with the State, procurement of a designated amount or designated licences or permits with access to natural resources, as determined by the Minister by notice in the Gazette, granted by any public entity unless the investor or investment is duly registered in terms of this section.*"

In other words, unregistered investors (both Namibian and foreign) cannot access PPPs, cannot access licences, and cannot access procurement (unless they are "registered" and "approved").

As a sidenote, the Bill is inconsistent, or at least confusing. It specifically excludes in the scope of investments (that needs approval) products and services provided to government (section 2(3)(d)). In section 38(6) any "business relationship with the State" is however included.

**Why is this a Problem?**

This creates an economic licensing gate controlled solely by the Minister (through an Agency).

**What is the Solution?**

Ideally, registration with the Agency should be voluntary and should not be a precondition for licensing, procurement, PPP participation, or access to natural resources. Registration should serve convenience, statistical and facilitation purposes only.

As per section 39(1)(f) the Agency is responsible for advising on the "choice or suitability of partners in a joint venture". This must be understood in the context of the Agency playing a pivotal role in approving and registering investors and investments. This opens the door for nepotism, corruption, and effective control (even beyond what the Bill already expressly provides for) over who may invest in Namibia (local or foreign). To explain the possible rent-seeking, coercion and abuse, the Agency can say: "*We are looking at your application, but here are some IDs of a few persons you may wish to 'consider' as partners before we make a final decision on your investment*". In this regard it must be kept in mind that the Minister exercises full political control over the Agency.

Also, the Agency will not be any improvement on the current Namibia Investment Promotion and Facilitation Board (NIPDB). It will not have more powers to facilitate investment than NIPDB currently has, as it can merely “seek cooperation” of other public entities. At least NIPDB is not as much under political control as the Agency will be. The Agency will in fact become the Minister’s policing arm to police investors, whereas NIPDB does in fact make a bona fide attempts to facilitate investment and advise on investment policy - to what degree of success we do not know. Given the caliber and expertise of the current directors of NIPDB we find it difficult to believe that NIPDB is in favour of the Investment Bill. This may explain why the Bill makes specific provision for NIPDB’s dissolution.

### 5.13. Policing of Investments – “Big Brother is watching…”

In terms of section 40, the Agency must monitor investors (both Namibian and foreign) and investments and “*all operational processes and procedures using a compliance management system*” to ensure compliance with the Investment Bill. The Agency may request “*relevant information*” and the investor “*must comply*” within 30 days of the Agency’s request. Investors must also permit officers of the Agency entry to their premises.

The powers of the Agency to enter business premises comes with no judicial oversight. In this regard the Agency has arguably more powers than the Namibian police. Moreover, there is no protection of the businesses’ intellectual property as the Agency “monitor’s” (read polices) “operational processes and procedures” of a business. This is not exactly a “business-friendly” environment.

**Part 7**

### 5.14. Treatment of Foreign Investors

This part appears to apply the principle of equal treatment of foreign and local investors as is Namibia’s legal duty under international treaties. The unequal treatment in the 2021 Investment Bill was in fact one of EPRA’s major concerns. Unfortunately, the Investment Bill now simply treats foreign and local investors equally badly. However, a closer reading of this part reveals a catch-all provision (section 41(4)(a)) whereby this version of the Bill continues to apply unequal treatment of foreign and local investors. As per this section, nothing prevents Namibia from adopting or maintaining a measure (and “measures” can be put in place by the Minister and form part of "this Act"), that prescribes special formalities in connection with the investment of foreign investors which is designed to protect and enhance "public policy objectives". The term "public policy objectives" is not defined, is open ended, and essentially creates unlimited powers for the Minister to impose any "measure" on foreign investors.

### 5.15. Expropriation and Expatriation of Funds

The word "expropriation" sends shivers down the spine of any investor, especially if there is no hard-currency guarantee, no advance payment rule, no neutral valuation clause, and no international enforcement mechanism.

As per sections 42 and 43, the State may expropriate any asset or right of an investor (local or foreign), on grounds of "public interest". The term "public interest" is not defined. This creates enormous uncertainty for investors. "Just compensation" must be paid (as this is a requirement in the Namibian Constitution). However, the Bill proceeds to somehow define just compensation. In a nutshell, just compensation will be an amount determined by the Minister and approved by Cabinet (at least Cabinet and not the Minister can make the final decision here). Most free-market economies provide for expropriation, but the baseline for the amount of compensation starts off with market value, and then they pay more than market value for things like inconvenience, relocation costs, professional fees, etc.

The Investment Bill does the opposite. The baseline is fair market value, but then this amount may be reduced due to "public interest" (undefined). After a process of consultations with Ministers and experts, the Minister ultimately determines the amount (to be approved by Cabinet). Interest will be paid based on "applicable international rates" – with no indication as to which "international rates" are referred to.

If a potential investor (local or foreign) would ask for a legal opinion on the question: "*What guarantees do I have that I will receive just compensation as understood in international terms in the case of the Namibian State expropriating my investment?*", the answer will be simple - "*None*". This does not improve Namibia's competitiveness. This does not attract local or foreign investment.

All expropriation compensation should be paid before possession, reflect full fair market value, be independently valued, be payable in a freely convertible currency, and be directly enforceable through international arbitration.

To add insult to injury, as per section 47(4), the State may "delay or prevent" any transfer of funds out of Namibia to protect creditors, ensure compliance with judgements, ensure compliance with tax obligations, to comply with lawful administrative decisions, in response to exceptional balance of payment difficulties (a government problem), or in the case of difficulties for macroeconomic management (again, this is a "government problem" which gets shifted to become an "investor problem").

In the first four instances, legal protection already exists in our laws. In the latter two instances the investor is being punished for government's problems, which if these events occur, will likely have been caused by government itself. The "public interest" criteria for expropriation also means that the investor's frozen funds can in any event be expropriated (as funds form part of an investor's "property" – section 42(2)).

**Part 8**

### 5.16. Obligations of Investors

All investors (local and foreign, existing or new) must register with the Agency. We refer to our comments under "Big Brother" above (paragraph 5.13). We also reiterate that the Agency has unlimited powers to collect information and documents, and has the right to enter business premises, without judicial oversight.

This part also places a positive obligation on foreign investors to train Namibians (section 50). We reiterate our concerns discussed before. Investors should not be required to stand in for government's failure. Government must create an enabling environment to attract investment, not restrict investment by imposing obligations on investors to do what government should have done. For example: It is the duty of government to ensure that our educational standards and institutions are of sufficient quality to satisfy the private sector's demand for skilled people.

The education sector is a restricted economic sector and business activity (regulation 6(g)(c)). Government failed to equip our citizens with relevant skills but now restricts investors from investing in the education sector. If there is a lack of quality educational institutions in Namibia, it makes no sense to restrict private investment in such institutions.
Where a lack of skills exists, the investor must be free to decide whether he or she will develop local skills or import skills. To attract investment, the importation of skills should be easy, and

not be a burden, especially not a prohibitive one. This is how economic activity is increased, which, due to increased demand for skills, will lead to improved local skills development. The bottom line is that skills should be developed at institutional level, it should not be a condition at investment level.

**Part 9**

### 5.17. Grievance Resolution Committee

Section 51 establishes a "Grievance Resolution Committee" for post investment disputes. This committee is established by the Minister. This committee is chaired by a senior official of the Agency who is designated by the Minister as per section 51 (5).

Tasked with hearing and resolving grievances of the State and investors, it is important to note that this committee is not impartial. Also, staff from the Agency may serve on this committee, despite the reality that grievances of investors may be directed against the Agency itself. The circumstances in which an investor may approach the court directly are limited (section 52(3)), which means that an investor has no option but to first go through the internal grievance procedure under this committee before the court may be approached for relief.

**Why is this a Problem**

Investors are unlikely to trust a political committee to resolve disputes.

**What is the Solution?**

Investors should, at their election, be able to refer disputes directly to ICSID; UNCITRAL Arbitration, or any arbitration forum agreed with the State. The Grievances Resolution Committee should be optional and non-binding.

**Part 10**

## 5.18. Contraventions and Offences

The Bill introduces numerous offences whereby investors can be held criminally liable and punished with imprisonment for up to five years. These offences include (but are not limited to):

- Investing in a reserved, or designated sector or business activity without approval from the Minister;
- Changing the "nature of the investment";
- Breaching the conditions set by the Minister (the Act states "conditions agreed with the Minister", but clearly these conditions are imposed by the Minister, failing which the Minister will not approve the investment);
- Transferring any license, permit, authorisation or concession without approval of the Minister;
- Providing "misleading" information.

The message to investors is clear: The government will allow you to invest, on conditions, and with obligations determined by a Minister, failing which you will be criminally liable. This is not exactly an inviting message to potential investors (local and foreign). It is conceivable that existing investors may already be making alternative arrangements, or disinvestment decisions, given the real possibility that the Investment Bill may become law soon. We have after all already witnessed the drastic reduction in investment subsequent to the introduction of the Namibia Equitable Economic Empowerment Bill in 2016. The direction of government policy has real life consequences. We see the consequences all around us today.

Investors should not be subjected to criminal offences which are not applicable in a country's general law.

## 5.19. "Cease Operations"

As if criminal sanction is not enough of a deterrent to investment, certain "contraventions" by investors (in the sole discretion of the Minister) may also lead to the Minister suspending, withdrawing or cancelling an approval for investment. Shockingly, the Minister may also direct the investor or investment to "cease operations". Then further, apart from the criminal penalties, and the order to cease operations, the Minister may also apply to the court to impose an “administrative fine” on the investor. The fine can be up to the “value of economic benefits that have accrued to the investor”.

An investor who fails to “cease operations” as directed by the Minister commits another offence for which the investor may be imprisoned for up to five years (sections 56(1)(d) and 56(9)).

### 5.20. Appeals to the High Court Limited

When the Minister suspends, withdraws or cancels an approval, the investor’s right to appeal (which will include a review application) to the High Court is limited. The investor is first forced to go through the process set out in section 55, whereby the Minister may provide an opportunity for the investor to comply. This may sound noble, but in reality the Minister can drag that process out for a considerable period of time, during which time the business remains closed, and will after some time have to permanently close due to losses accumulating as a result from being unable to trade. There is no legal recourse against the Minister for these damages. The Minister acts with impunity.

### 5.21. Delegation And Exemptions

Sections 58 to 60 state that the Minister may delegate (certain) powers and may provide exemptions. The criteria for granting exemptions is extremely vague. It includes “interests of the general public” and “negative or positive impact on investors and investments”.

**Why is this a Problem?**

This destroys predictability, legal certainty and equality of treatment.

**What is the Solution?**

Ideally, no exemption, deviation, waiver or special approval affecting investor rights should be granted except by Act of Parliament.

### 5.22. “Preservation of Secrecy”

Section 61(1) states:

"*An investor or investment referred to in subsection (2) may not disclose to any person information relating to the affairs of the Agency or of any other person, acquired in the performance of duties or the exercise of powers under this Act, except –*
*(a) for the purpose of the exercise of powers or the performance of duties under this Act; or*
*(b) when required to disclose that information before a court or under any law*."

This prohibition means that no investor may report anything relating to the Agency to any person unless required by court order or under "any law". That means an investor cannot report his experience with the Agency to another person, the media, the Minister, the President or any member of Parliament. It effectively creates a clandestine agency operating in the shadows. That is absurd.

### 5.23. Regulations

Investors will have to pay fees to the Agency. The amounts are not yet known.

The Minister may make regulations to set requirements that must be met by Namibian and foreign investors, which may differ. Again, the "equal treatment" of foreign and local investors is simply not true, as discussed before.

As per section 63(1)(h) the Minister (with already unlimited powers as discussed before) may also make regulations on "*any matter in respect of which the Minister considers necessary or expedient to prescribe in order to achieve the objectives of the Act*". If there was any doubt that the Minister has virtually unlimited powers with regard to investment, that doubt should by now be erased.

## 6. SECTOR DESIGNATION: HOW THE BILL CONVERTS MARKETS INTO POLITICAL SPACE

The sector designation framework transforms ordinary commercial activity into a permission-based system, allowing entire industries to be closed or conditioned by executive decision.

The Investment Bill attached regulations which set out the restricted categories of investments and investment activities. These are of course subject to change, but it gives us helpful insight into how broad the legislator wants to cast the net of investment restrictions.

### 6.1. Economic Sector or Business Activities Reserved for the State

Only the State may conduct central banking activities (sections 2 and 3 of the regulations). This is reasonable.

### 6.2. Economic Sectors or Business Activities Reserved Exclusively for Namibians

Only Namibians (i.e. no foreigners) may be involved in the following economic sectors or business activities (section 4 of the regulations):

- Retail sectors under the threshold of N$ 7,5 million;
- Agriculture under the threshold of N$ 7,5 million (but excluding (i) crops grown in an enclosed or substantially enclosed facility; (ii) crops grown by hotels and restaurants for their own use; and (iii) crop growing that are land-based and over the threshold of N$ 7,5 million);
- Construction activities under N$ 200 million capitalisation;
- Fresh water fishing;
- Small-scale prospecting operations and small-scale mining operations as determined by the Minister of Industries, Mines and Energy;
- Guesthouses and bed and breakfast (below the threshold of N$ 5 million);
- Camping grounds, recreational vehicle parks and trailer parks (all amounts);
- Child day care service activities conducted on a profitable basis;
- Passenger land transport such as taxi operations and airport shuttles;
- Freight transport by road relating to the distribution of petroleum products;

- Warehousing and storage of petroleum products;

- Hairdressing and other beauty treatments;

- Renting and leasing of other machinery, equipment and tangible goods (provided that if it is not available for use in the construction industry, it may only be imported for the duration of a project it is required for); and

- Customs clearance.

### 6.3. Economic Sectors or Business Activities That Require at Least 33,3 Percent Joint Venture Partnerships with Namibians

The following economic sectors and business activities are reserved for joint venture partnerships with Namibians:

- Marine fishing, subject to the granting of rights to harvest marine resources and the allocation of fishing quotas as per the Marine Resources Act (Act No. 27 of 2000), and its regulations and policy guidelines;

- Architectural and engineering activities and related technical consultancy;

- Activities of quantity surveyors;

- Silviculture and other forestry activities;

- Logging; and

- Lodges and hotels up to the threshold of N$ 200 million.

### 6.4. Designation of Strategic Economic Sectors or Business Activities

The following economic sectors and business activities are classified as strategic, which require the approval of the Minister (in terms of section 33):

- Retail sectors above the threshold of N$ 300 million;
- Mining, oil and gas;
- Crop growing over the threshold of N$ 7,5 million (but excluding crops grown in an enclosed or substantially enclosed facility and crops grown by hotels and restaurants for their own use);
- Construction activities with capitalisation above the threshold of N$ 200 million;
- Lodges and hotels over the threshold of N$ 200 million;
- Marine and freshwater aquaculture;
- Pre-primary, primary education and general secondary education; and
- Research, tertiary and vocational education.

### 6.5. Comments on the Above Restrictions

The above regulations are deeply restrictive, structurally coercive, and economically chilling. They are protectionist, and in no way incentivize investment. They do not operate as neutral administrative machinery. They function as the primary instruments through which executive discretion is converted into binding economic control, with minimal legislative constraint. These restrictions entrench the idea that investment is not a right, but a privilege granted by the State.

Parts 1 and 2 of the regulations transform the Investment Bill from a facilitative investment statute into a discretionary screening regime. Far from merely operationalizing the Act, they entrench executive control over market entry, ownership, and expansion, substituting legal certainty with regulatory permission and policy alignment.

The regulations do not regulate investment; they ration it. In substance, they complete the Bill's architecture of restriction.

# 7. MEASURING THE DAMAGE: HOW THE INVESTMENT BILL PERFORMS AGAINST REALITY

When assessed against the factors that actually drive investment decisions, the Investment Bill fails on predictability, property protection, exit certainty, and institutional trust.

If the Investment Bill passes as currently proposed, it risks turning Namibia's (already stressed but relatively open) economy into a permission-based economy. Most investment decisions will become an exercise in political approval, control, and discretion. The Minister will tell investors (both Namibian and foreign) where to invest, what to invest, how to invest, and how to divest. Namibia then becomes a high-risk jurisdiction that is hostile to investment.

## 7.1. What Makes a Country Attractive (For Investment)?

A country does not become attractive for investment by accident. It is the result of deliberate policy decisions (consistently taken over many years) that seek to attract (or at least not actively repel) investments. A country becomes attractive for foreign investment when it reduces risk, protects capital, enables profit, and allows easy exit.

It is important to remember that investors are not driven by patriotism or goodwill. They price risk, return, and predictability.

We set out below the core drivers (in no particular order), broadly structured the way international investors and ratings agencies actually assess them. We will then set out a balanced scorecard to see how the Investment Bill performs on a sample selection of metrics.

## 7.2. Core Investment Drivers

### 7.2.1. Political & Legal Stability (Foundational Layer)

This is non-negotiable. Investors want a stable government (low coup/revolution risk), independent courts, predictable law-making, enforceable contracts, and strong property rights.

Red flags are ministerial discretion replacing fixed rules, retroactive laws, expropriation without proper compensation, and weak judicial independence.

Investors can tolerate high taxes (to a level). They cannot tolerate unpredictability.

### 7.2.2. Protection of Property & Capital

Investors look for constitutional protection of property, protection against arbitrary nationalisation, Bilateral Investment Treaties (BITs), access to international arbitration (ICSID, UNCITRAL) and free profit repatriation.

Without this, cheap labour, big markets, or natural resources do not matter. The risk of investing just becomes to high.

### 7.2.3. Ease of Doing Business (Transaction Friction)

This determines whether capital actually flows after interest is created. Key indicators are speed of company registration, visa/work permit efficiency, construction approvals, customs effectiveness, tax compliance simplicity and access to energy and utilities.

The best systems have digital registrations, time-bound approvals and one-stop investment authorities.

### 7.2.4. Tax & Financial Predictability

Namibia already has some of the highest tax rates in the world. But it is not just about low tax, it is about stable tax. Investors value predictable corporate tax, clear VAT rules, double taxation treaties, transparent transfer-pricing rules and no surprise “windfall” or sector-specific taxes. They model returns over 10 to 30 years. Sudden tax shifts destroy confidence instantly.

### 7.2.5. Currency & Capital Controls

Investors hate exchange controls, hard profit repatriation rules, forced local reinvestment and blocked dividend payments. They prefer convertible currencies, free cross-border capital movement, deep banking systems and stable inflation targeting.

### 7.2.6. Labour Market Functionality

Investors look for skills availability, flexible hiring/firing (free movement of labour), predictable unions, and clear productivity–wage relationships. They avoid over-politicised labour, mandatory empowerment quotas without productivity alignment and excessive severance obligations.

### 7.2.7. Infrastructure & Logistics

Capital flows to countries where goods, data, and energy move efficiently. This means good ports, a solid roads/rail infrastructure network, power stability, water security and good telecoms & broadband connectivity. The reason is simple: Infrastructure reduces operating cost volatility.

### 7.2.8. Market Access & Trade Integration

Countries become attractive when they act as platforms, not islands. This means having access to regional markets, trade agreements, customs unions and investment gateways. Examples are Singapore (ASEAN gateway), UAE (Middle East & Africa) and the Netherlands (EU logistics hub).

### 7.2.9. Investment Policy Philosophy (Most Overlooked Driver)

There are two competing philosophies when it comes to FDI:

The one is an Open-Access Model ("High FDI Countries"). Here capital is "welcome unless explicitly prohibited". High FDI Countries have rules-based approvals, neutral treatment of local & foreign investors and sector access is defined upfront in law.

The other is a Permission-Based Model ("Low FDI Countries"). Here capital is "allowed only if approved". Low FDI Countries have ministerial discretion, sector caps decided politically and ownership limits which can change without warning.

This second model might sound good in political speeches, but it frightens institutional capital.

### 7.2.10. Reputation, Not Just Policy

Talk is cheap. Investors don't only listen to what a government says, they also watch what it does. Investors follow World Bank indicators, credit ratings, arbitration history, past treaty violations and political rhetoric toward business.

It takes 20 years to build credibility and one speech to destroy it.

The most attractive investment destinations (e.g. Singapore, Switzerland, Netherlands, UAE, Ireland, New Zealand) all share contract certainty, zero or minimal ministerial discretion, free capital movement, strong courts, clear sector rules, low corruption, strategic market access, and stable tax regimes. They do not rely on natural resources. They rely on institutional trust.

The brutal truth about FDI is that foreign investors will accept high environmental standards, strong labour laws, high corporate taxes and strict compliance BUT THEY WILL NOT ACCEPT arbitrary state power, unclear ownership rules, political interference in business, discretion replacing law, and capital traps.

## 7.3. Scorecard: How Does the Investment Bill Compare With Global Best Practice?

The following table compares the Namibian Investment Bill with Global Best Practice.

| Section of the Bill | Global Best Practice | Bill's Approach | Score | Comments |
|---|---|---|---|---|
| **Definition of "Investor"** | Limited restrict to foreign investors only | Applies to both foreign and Namibian investors | ❌ Fail | Over-regulates local business; not standard |
| **Sector Reservation** | Negative list, open by default | Minister can designate sectors at will | ❌ Fail | Creates unpredictability; increases risk |
| **Dispute Resolution** | International arbitration guaranteed | Internal committee, limited arbitration | ❌ Fail | Deters institutional investment |

| | | | | |
|---|---|---|---|---|
| **Expropriation** | Hard currency, advance payment, independent valuation | Weaker protection, no guarantee | ❌ Fail | High risk for investors |
| **Incentives** | Automatic, clear criteria | Discretionary, opaque approval | ❌ Fail | Encourages rent-seeking, lacks transparency |
| **Ministerial Discretion** | Limited, rules-based, independent regulators | Broad, open-ended powers for Minister | ❌ Fail | Centralises control, reduces predictability |
| **Change of Control** | Only for national security, clear criteria | All changes require ministerial approval | ❌ Fail | Blocks exits, M&A, and project finance |
| **Performance Agreements** | Rights/obligations set by statute | Negotiated contracts with Minister | ❌ Fail | Rent-seeking, unequal treatment |
| **Monitoring & Registration** | Voluntary, for facilitation/statistics only | Mandatory, gatekeeping for licences and PPPs | ❌ Fail | Creates barriers to entry |
| **Exemptions & Delegations** | Only by Act of Parliament | Minister may delegate powers and grant exemptions | ❌ Fail | Destroys legal certainty and equal treatment |

## 8. CONCLUSION: INVESTMENT CONTROL IS NOT ECONOMIC DEVELOPMENT

As drafted, the Investment Bill will not promote investment but will instead deter capital, suppress entrepreneurship, and entrench long-term economic stagnation.

The Investment Bill is regressive. It dilutes Namibia's (already wafer-thin) competitive advantage when it comes to attracting FDI (and investment in general). It is difficult to pick out the most egregious sections, but there are a few that immediately stand out:

Restrictions apply to both Namibian and foreign investors. No serious investment jurisdiction tries to regulate domestic capital as if it were foreign capital. The Bill gets the principle of "equal treatment" all wrong. The Investment Bill subjects Namibians to sector reservations, ministerial approvals, change-of-control approvals, monitoring, inspections, and sanctions, performance agreements and compliance reporting. This is gross government overreach. It is a command economy / central planning in all but name. It is a profound violation of Namibians' economic freedom.

Ministerial discretion is structurally virtually unlimited. The Minister may set policy, introduce incentives, designate sectors, require approvals, impose conditions, add approval criteria by regulation, exempt or restrict investors, and issue binding directives. Top FDI jurisdictions, by contrast, use Parliamentary negative lists, have narrow national security tests, use independent regulators and use competition law, not political discretion, to regulate investment. Namibia now effectively replaces administrative law with executive (political) preference. This makes foreign and domestic capital equally insecure.

Change of control is effectively nationalised (for both Namibian and foreign investors). Any change of control in a designated sector (by way of mergers, acquisitions, offshore transactions affecting Namibia, license transfers, etc.) requires ministerial approval beforehand. This approval hinges solely on a political agenda. This kills investment because it means no private exits without state permission, no clean M&A market, no easy refinancing, and no convertible valuations. This alone breaks private equity, breaks project finance, breaks venture capital and breaks IPO feasibility. No serious institutional investor will invest under this regime.

The "Net Benefit Test To Namibia" is ideological, not economic. Approval criteria include redress priorities, youth empowerment, gender interests, SME procurement, geographic redistribution, past compliance behaviour in other states, and any factor the Minister prescribes. It does not involve economically objective sensible criteria like rate of return neutrality, capital efficiency, productivity, export competitiveness, financial solvency or balance sheet strength. The Investment Bill proposes an ideological screening test, not an investment test.

Performance agreements become negotiated compliance contracts. This converts predictable and stable laws into negotiated political bargains. It is not difficult to see how such a system can be abused by politically connected actors: It invites rent-seeking, elite capture, selective enforcement, and unequal treatment.

The Investment Bill creates potential constitutional challenges. Several clauses raise serious Article 16 (property) and Article 21 (the right to practise any profession, or carry on any occupation, trade or business) concerns. This includes forced approvals, forced joint ventures, transfer restrictions, monitoring entry and sector closures. It materially increases the probability of constitutional litigation by local investors, not just foreigners.

In summary, top FDI jurisdictions use negative lists passed by Parliament for security screening only. They have no local investor restrictions, automatic change-of-control except for security, guaranteed international arbitration, no negotiated performance contracts, no ministerial ownership decisions, and incentives are locked in by statute, not decided by arbitrary regulations. Namibia's Investment Bill does the exact opposite on most of these points. It increases government control, centralises economic power, politicises sector access, weakens investor rights, deters private equity & project finance, treats Namibian investors as regulated subjects, and creates a negotiated economy rather than a rules-based one.

The bottom line is that the Investment Bill, as currently drafted, will only attract extractive majors with political risk pricing, state-to-state investments, firms dependent on concessions, and politically connected capital. It will not facilitate investment.