



### **Senior Council Opinion on the Namibia Investment Promotion Bill**

On behalf of the Namibia Institute for Economic Policy (NIEP), the following opinion was submitted to the Ministry of International Relations and Trade. The opinion was prepared by Adv Heathcote, a distinguished senior advocate, and focuses on the legality of the Namibia Investment Promotion Bill. This opinion was commissioned by NIEP at the request of various Namibian investors and affected parties, who have expressed significant concerns over the Bill's potential implications.

Over recent years, this Bill has undergone multiple iterations, during which extensive input has been provided by stakeholders highlighting its potentially damaging economic impacts. While some concerns have been addressed vis-à-vis earlier iterations, material concerns remain. These include, but are not limited to, increased bureaucratic hurdles, restrictions on investor rights, erosion of general property rights, and barriers to both domestic and foreign investment that could hinder sustainable economic growth, job creation, and Namibia's competitiveness in the global market. In light of these concerns, NIEP sought this independent legal assessment to evaluate the Bill's compliance with Namibian constitutional principles, international obligations, and best practices in investment policy. The opinion addresses key aspects such as the Bill's alignment with the constitution, investor protections, and the balance between regulatory oversight and economic facilitation.

NIEP, as an independent economic policy think tank dedicated to promoting sound policies for the benefit of all Namibians, believes this opinion will contribute constructively to the ongoing consultations and refinements of the Bill. We remain committed to supporting evidence-based policymaking that fosters an enabling environment for investment while safeguarding national interests.

# OPINION

In re:

**CONSTITUTIONALITY OF THE INVESTMENT PROMOTION ACT AND  
FOREIGN INVESTMENT BILL AND ITS REGULATION**

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## A. MANDATE

1. During the end of last year, the Ministry circulated for comment, a Bill which, if passed, will become the “Investment Promotion Act.” This Bill was circulated alongside draft “Regulations”. I have been requested to advise whether this Bill, if enacted, will be Constitutionally compliant.

2. Let me make this clear. My mandate is not to cast aspersions on any individual. I accept without hesitation and point out that the Bill has not been approved by the Attorney General or Parliament. Neither has the President of Namibia signed – or given her approval – to the Bill. I can also not say whether Parliament – applying its mind – would or would not, approve the Bill.

3. Regrettably however, the method of consultation adopted by the Ministry, being first a “one man draft”, and only thereafter consultation, has many pitfalls. First and foremost, those who were involved in the drafting of the Bill, by necessity, must have invested heavily in time, resources and intellectual capacity, in producing such a Bill. And human nature being what it is, when a Bill is drafted first, and only then circulated for comment, any criticism of the Bill may lead to a perception that the comments provided are aimed at the individual drafters. Yet that is not the purpose of this opinion. But the topic here – foreign investment to the benefit of the entire Namibian nation – is much to an important constitutional principle, for this opinion to be sugar coated. So, in sum, I provide my main conclusions up-front;

3.1. The Bill, if enacted, will be unconstitutional;

3.2. The Bill, if enacted, will “discourage” instead of “encourage” foreign investment.

3.3. When Parliament wants to encourage foreign investment, it should do so in terms of Article 99 of the Constitution.

3.4. The legislative instrument that was handpicked by the founding fathers to encourage foreign investment, is to adopt a Foreign Investment Code. Not an Act of Parliament;

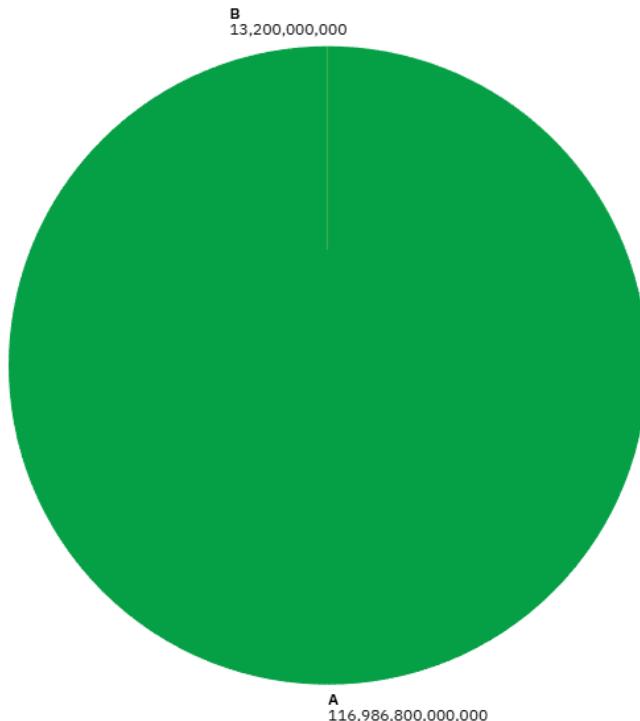
3.5. In turn, Article 23 legislation may only be based on an Act of Parliament, not in the Code as envisaged in Article 99 of the Constitution;

3.6. It is part of Namibia's international customary law obligations to treat foreign investors not less favourable than the treatment it accords in like circumstances to Namibian investors. It is accordingly wholly and constitutionally impermissible to house and apply affirmative action measures only against foreign investors in circumstances where the same measures are not also applicable to Namibian businesses.

3.7. Penultimately, the Bill is also unconstitutional because – if enacted – Parliament will give its own powers away (i.e. the power to enact laws will be given to a Minister). That is what the law calls impermissible abdication.

3.8. Lastly, the Bill is also unconstitutional because it incorporates just too many vague administrative measures. In short, if the principle of "**encouragement**" of foreign investment is to be seen as the dog in the Bill, and the limiting provisions as the tail of the dog; the tail in the Bill wags the dog.

**B. PERSPECTIVE: NAMIBIA'S ECONOMY THROUGH THE GLOBAL LENSE**



4. What is illustrated above is not a pie-chart produced by a dysfunctional copy-machine. The hardly detectable white sliver in the pie chart serves a crucial illustrative purpose. It represents the real-life GDP of Namibia in 2025, captured against in the vast lucrative GDP of the entire world during the same period. The white sliver equals roughly 0.038% of the world's GDP. A mere drop in the ocean.

5. While sources may differ slightly, the total Namibian GDP in 2025 was US\$ 13.2 billion, while the world's GDP was US\$ 117 trillion. Yes, US\$ 117 000 000 000.

6. If Namibia succeeds to double its GDP by the end of this year, each of the ± 400 000 households in Namibia may just receive N\$ 524 000 (just over half a million) for Christmas. This example may be unrealistic, but the message lies in the small numbers of the Namibian population compared with the massive advantage of encouraging foreign investment. Thus, the minutest diversion of the

world's GDP to Namibia – through constitutionally mandated encouragement – will lead to exponential growth of the Namibian economy. In short, just another 0,038% of the world's GDP to Namibia, leads to the fine amount per household in my – rather optimistic – example.

7. Therefore, to understand the possible impact of the proposed Bill, one must view Namibia's economic standing through a global lens. It is accordingly pivotal to accept the reality. We are all proud Namibians and like to remind others that we do not want to live anywhere else. But the stark financial reality is that Namibia is a "price-taker" in the market for international capital. Any legislative framework that imposes restrictive barriers, rather than competitive incentives, ignore this fundamental reality and risk, rendering the country invisible to the global investor.

### **C. TRADITIONAL VS MODERN INTERNATIONAL CUSTOMARY LAW**

8. Traditionally, it was part of customary international law that any State may refuse – altogether – to do any business whatsoever with foreigners. The Namibian State could therefore – under this old regime – refuse altogether to engage in business economic transactions with foreigners. In short, the State was almost untouchable in deciding **not** doing business with foreigners.

9. But this traditional international customary law approach, is nowadays – I say with some relief – limited by at least:

9.1. the Namibian Constitution itself:

9.2. other obligations arising from Treaties entered by Namibia:

9.3. Modern customary international law also dictates that once a foreigner is admitted into Namibia to do business, he/she must be accorded an "international minimum standard" of treatment, which includes protection against arbitrary confiscation of property. In short, once

admitted into Namibia to do business, the foreigner must – as a rule – have the same constitutional protection as that of a local person or business.

#### D. WISDOM OF THE FOUNDING FATHERS

10. It is in the above context that we must applaud the founding fathers of the Namibian Constitution. They were not only excellent freedom fighters, but they also possessed a profound financial acumen. They realized that Namibia's future is heavily dependent on the successful encouragement of foreign investment. They also realized that for Namibia to become financially independent, this country must be able and tap into the vast global economy. Hence, they inserted **Article 99** into the Namibian Constitution. They made plain that:

*“Foreign investments **shall be encouraged** within Namibia subject to the provisions of an Investment Code to **be adopted** by Parliament.”*

11. And it is crucial to realize that the founding fathers wanted an Investment Code to achieve this goal. They did not authorize an Act of Parliament to do so.

12. The dominant portion of Article 99 is “**shall be encouraged**”. In other words, the Investment Code's main purpose must be to **encourage** foreign investment; If any provision of the Investment Code leads to discouragement, it will be *ultra vires* the Constitutional imperative of “encouragement”. In short, if encouragement is the dog in the Investment Code, and the provisions to which the dog may be subjected is the tail, any Investment Code allowing the tail to wag the dog will be unconstitutional.

13. It is with some regret that it must be recorded here that some 35 years after Namibia's independence, no such Investment Code exists.

#### E. THE DISTINCTION BETWEEN AN ACT AND A CODE

14. There is, according to the Namibian Constitution, a pertinent difference between an **Act** (legislation) adopted by Parliament and an **Investment**

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**Code** adopted by Parliament. This distinction (between a Code and Act of Parliament) is not merely semantic; It is structural and procedural. Major differences between a Code and an Act may immediately be pointed out:

14.1. Firstly, **Executive Assent**: An Act of Parliament must be signed by the President before it becomes enforceable. An Investment Code, being a *sui generis* instrument of law under Article 99, does not require such signature.

14.2. Secondly, **The Bicameral Quorum**: For an Investment Code to be passed, both the National Assembly and National Council must agree to it by majority of 50% plus 1.

15. While the National Assembly may override a National Council's objection to a regular Bill by a two-thirds majority when the Bill returns to the National Assembly, no such override is contemplated for the adoption of the Investment Code. If 50% plus 1 of the members of National Council do not agree to the Investment Code, it cannot be adopted.

16. This difference between an "Investment Code" and ordinary legislation is a very powerful constitutional safeguard when important issues relating to foreign investment are to be debated. National Council represents the Namibian people at regional – grassroots – level. The representatives of the people at National Council are in touch – so to speak – with those who are, most deserved of upliftment and economic emancipation.

17. If one has a message for National Council representatives, it is probably this; "**The founding fathers made plain that, for all Namibians to participate and share in the riches which foreign investment promises or may bring, the National Council yields a powerful tool. It may say "No" to a Code which does not ensure that foreign investment is encouraged. It may also say "No" to a Code which is aimed at uplifting – not every Namibian who so deserves - but only a few selective, if not pre-selected individuals who will**

**exclusively receive the benefits that foreign investment may bring.** Look for instance at section at the draft Regulations in its current form<sup>1</sup>. If the Bill is approved as an Act, only the following categories of persons will benefit; qualified architects and engineers, and quantity surveyors. How many of the people – at grass root level – who are represented by National Council members are architects, engineers and quantity surveyors, one may ask rhetorically?

18. So, the bottom line is that National Council may block the Code if it is not satisfied that the Code will not **encourage** foreign investment; and it may also block the Code if the Code only benefits a selective few. Once National Council blocks such a Code, National Council members may not be outvoted by 2/3 of National Assembly members. No, both houses will have to go back to the drawing board. In short, when it comes to foreign investment, the founding fathers gave the ultimate form of power to the people.

19. Thus, the founding fathers clearly intended for the "will of the people" to manifest more stringently when an Investment Code is passed, ensuring a higher degree of national consensus than a standard statute requires.

20. Accordingly:

20.1. the Bill is fundamentally flawed as it envisages an Act of Parliament to be adopted, instead of an Investment Code. The Bill ignores the specific nomenclature and procedural instructions of the supreme law, the Namibian Constitution; Parliament is compelled by **Article 99** of the Namibian Constitution to "**encourage**" foreign investment "subject to" the provisions of an **Investment Code**, not an Act, to be adopted by Parliament". This does not mean that foreigners will not have to comply with the remaining laws of the land. They will have to comply with those laws as well. But the Investment Code to be adopted by Parliament is a bespoke legal instrument which must deal with **encouragement** and the provisions lawfully regulating such investments in a manner as authorized in Article 99 of The Constitution.

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<sup>1</sup> Regulation 5

20.2. By attempting to pass an Investment Act instead of a *Code*, Parliament will fail to discharge the specific constitutional duty imposed by Article 99.

20.3. The Constitution does not grant Parliament a choice of instrument when Parliament manifests an intention of encouraging foreign investments; it mandates an Investment Code to be adopted by both houses.

#### **F. COUNTERING THE "DIRECTIVE PRINCIPLE" OBJECTION**

21. Some may say that Article 99 falls under Chapter 11 (*Directive Principles of State Policy*). It is therefore shielded from judicial enforcement by **Article 101**. Such an objection is legally flawed for the following reasons:

21.1. First, let us look at Article 101 of the Constitution. It says:

**"Article 101 Application of the Principles contained in this Chapter**

The principles of state policy contained in this Chapter shall **not of and by themselves** be legally enforceable by any Court, but shall nevertheless guide the Government in making and applying laws to give effect to the fundamental objectives of the said principles. The Courts are entitled to have regard to the said principles in interpreting any laws based on them."

21.2. The "**of and by themselves**" qualification is important: Unlike the Indian Constitution, which states that directive principles "**shall not be enforceable by any court**", the Namibian Constitution employs a more nuanced limitation. **Article 101** specifies that these principles shall not be legally enforceable, but only "**of and by themselves**".

21.3. This distinction is critical. It means that, while a directive like Article 99 cannot be the *sole* cause of enforcement, - **of and by itself** – it becomes enforceable when coupled with other constitutional provisions or independent legal obligations. In this instance, the compulsory mandate for an "**Investment Code**" to be adopted as commanded in Article 99 is coupled with:

21.3.1. Firstly, an intention to comply with the directive principle. Thus, once the intention manifests (as it has in the Bill, and in previous – regrettably Acts), Article 99 itself becomes enforceable.

21.3.2. Secondly; Time<sup>2</sup>. Clearly, the founding fathers wanted Article 99 to be given effect to within a reasonable time. Once such a time lapsed, it becomes enforceable. Not by "**and of itself**" but coupled with Parliaments lengthy inaction. In the landmark judgment of *Government of the Republic of Namibia v Mwilima* it was held that, while the State has a discretion in implementing directives (such as legal aid under Article 95), this discretion is not absolute. If the delay in implementing a directive is so prolonged (now 35 years for the Investment Code) that it undermines fundamental rights or the Rule of Law, the Court may intervene to compel compliance. To ignore the specific requirement of an **Investment Code** for decades, is not an exercise of policy discretion; it is a constitutional default.

21.3.3. Thirdly, the incorporation of certain international law treaties into Namibian law, makes it obligatory to give effect to Article 99. Namibia is a signatory to various international investment and trade agreements. When Article 99's directive to

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<sup>2</sup> If the state organs – especially the legislator – have not executed a directive principle for a considerable period of time, even though the circumstances are such that it is clear to everyone that state action is imperative, or if state organs are acting in conflict with the directive principle in some other way, the court can force the legislator to execute the objective properly - *The Constitutional Enforceability of Economic and Social Rights Dr Erika de Wet*

"encourage" investment is read alongside these binding international obligations, it ceases to be a mere aspiration. The State's failure to adopt the mandated *Investment Code*—while instead proposing a restrictive, discretionary *Act*—places Namibia in breach of the "fair and equitable treatment" standards common in such treaties.

21.3.4. Fourthly, in Namibia, the courts are explicitly "entitled to have regard to the said principles in interpreting any laws based on them". Thus, any Bill that claims to further the "economic order" of Namibia must be strictly measured against the procedural and substantive requirements of Article 99.

## G. THE MISPLACEMENT OF ARTICLE 23 PROVISIONS IN THE BILL

22. The Bill anticipates the redress of social, educational and economic imbalances through the enactment of Article 23 provisions contained in the Namibian Constitution<sup>3</sup>.

23. As already pointed out, once Parliaments manifests an intention to comply with Article 99 of the Constitution, it must do so in the *Investment Code*.

24. In turn, the only place in which **Article 23** affirmative action provisions may be housed, is in an Act of Parliament (legislation), and not in an *Investment Code*. This is evident from the text of Article 23 itself, which explicitly references the enactment of "**legislation**" and "**Acts of Parliament**" to redress social, economic, or educational imbalances.

25. The distinction here is critical: while Article 99 mandates an *Investment Code* for investment, Article 23 requires *legislation* for redress. Using the constitutional provisions for redress to mask a restrictive regulatory regime

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<sup>3</sup> Sections 35(1)(b); 41(4)(b)

that the Constitution intended to be an "encouragement" under Article 99, is not permissible.

26. Also, by attempting to fuse these socio-political redress mechanisms into an investment framework by using an intended Act, instead of an Investment Code, the State will create a constitutional conflict. Should Parliament utilize an "Act" to circumvent the more onerous adoption provisions of an "Investment Code" (as required by Article 99), Parliament will also act in ***fraudem legis*** (in fraud of the law).

27. With respect, the founding father's choice of instrument – an Investment Code – makes perfect sense. As International Customary law compels Namibia to treat foreigners not less favourable than it would treat locals in like circumstances<sup>4</sup>, it can never be permissible to promulgate Article 23 affirmative action legislation which is only applicable to foreigners. But regrettably, that is exactly what the Bill envisages.

#### **H. ABDICATION OF PARLIAMENTARY DUTY; LACK OF TRANSPARENCY AND UNGUIDED DISCRETIONS**

28. The provisions of the Investment Promotion Bill are the antithesis of the objectives proclaimed in Section 4, which purports to "***...provide a clear and transparent framework for sustainable investment in Namibia.***" With respect, nothing could be further from the truth.

29. The Bill is neither clear nor transparent. This failure arises from the invasion of the entire text by the authorization of **unguided powers** granted to the Minister. The Bill abdicates Parliament's duty by allowing a Minister and his Executive Director to take over Parliament's sacred duty to make legislation. This creates a "permission-based" regime that replaces the Rule of Law with

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<sup>4</sup> Section 41 of the Bill purportedly recognized this obligation.

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administrative uncertainty, rendering the framework opaque to the very global market Namibia must attract. Let me explain:

29.1. The concept “**this Act**” is defined in the Bill to mean “**includes regulations, directives, and guidelines issued under this Act**”

29.2. So, wherever the Bill uses the concept subject to “**this Act**”, it automatically refers to directives and guidelines. The purpose of the definition is clearly to make all directives and guidelines automatically enforceable by law and to be enforced against foreigners.

29.3. Here is the catch, however. The concept “**this Act**” is used no less than 108 times in the Bill. Thus, wherever and whenever the reader (or more ominously the aspiring foreign investor) reads “**this Act**” he/she must go in search for regulations, directives and guidelines.

29.4. But during this search, the aspiring foreign investor will enter a sea of uncertainty. This is so because directives and guidelines – unlike regulations – are not made in terms of section 63 of the Bill. At least, Regulations will have to be published in the Government Gazette. But directives and guidelines are not in Government Gazettes. They are often pulled from beneath bureaucratic cloaks if it suits the decision makers.

30. The problem is this. Although such directives and guidelines may one day be found to be unenforceable by a court of law, they will be treated as binding and enforceable by the Government officials who administer – or must administer – the Act if the Bill is adopted by Parliament.

31. Let us now look at “**guidelines**”. The word guidelines appear no less than 9 times in the Bill. Firstly, in section 6(3), where it is stated that the Minister may issue general or specific or specific (whatever the difference may be) guidelines. Secondly, in section 8(3) of the Bill it is stated that the Agency must perform its functions, **subject to the policy “guidelines”**. Thirdly, even the Board of Director of the Agency is subject to the guidelines or directives issued by the Minister. So,

whatever happens, or whatever is going to take place, these unpublished, uncertain, or at least not readily ascertainable directives and guidelines, will rule the roost, so to speak.

Astoundingly, there is something even more threatening to the Rule of Law lurking in the Bill. In terms of section 54 of the Bill, it is a crime for any investor to submit false information in relation to any matter required by or under "**this Act**". Tellingly therefore, a crime may be committed in respect of a transgression in relation to any directive or guideline, wherever those guidelines or directives may be found. The investor may end up with a conviction; a fine not exceeding N\$ 50 000.00, or if not so lucky, imprisonment of a period not exceeding 5 years. All this in respect of unknown guidelines. I accept that many an astute lawyer may immediately say that it is an impossibility in law to be convicted of such a vague crime. But that is not the point now. The truth is, no foreign investor will ever be encouraged to invest in Namibia if nothing is certain or ascertainable.

32. As if the above directives and guidelines are not a sufficient deterrent, here is section 5 of the Bill.

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

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

33. Let me say immediately, there is nothing wrong with making policy. But policies – if adopted and for them to become enforceable law – must find their way into enforceable legislation by publication in the Government Gazette. That is not what the Bill does.

34. Section 5(1) of the Bill therefor increases the – quite ominous – unknown regulatory sweep of the Bill. It invites into the room a whole new concept which is called “**other related sub-ordinate measures**”

35. **Measures?** The word “**measures**” appears in section 6(1)(i), and 11(4)(a) of the Bill. Pivots, it also appears in section 41 of the Bill, where a promise is made to foreign investors that they will not be treated “**less favourable than**” the treatment the State accords to Namibians. That sounds all fair and well. But, regrettably, such a promise of equal treatment is subject to, this Act, which means, if a directive or guideline says otherwise, then the foreign investor has no right to be treated equally. Also, such equal treatment evaporates when there are other “measures”. The reader may still be contemplating – or wondering – just where such measures will be found when he/she comes across this definition of measure in the Bill.

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

36. I now turn to just one other concept in the Bill: “**Investor**”. The word investor – unsurprisingly – is used 139 times in the Bill. One would expect that such an important word - where the Bill deals with foreign investment – would mean just what one would expect it to mean, being “**foreign investor**”. Not so, however. Investor is defined in the Bill as:

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

37. In turn foreign investor is defined as:

“**Foreign investor**” means –

(a) a natural person, who is not a Namibian, who has made or is seeking to make an investment in Namibia; or

(b) an enterprise incorporated, registered or constituted in accordance with the laws of –

(i) Namibia; or

(ii) any country other than Namibia, that is not directly or indirectly owned or controlled by a Namibian and that has made or is seeking to make an investment into Namibia in terms of this Act.”

38. It is accordingly clear that the Bill, whenever it refers to investor without the word foreign or Namibian linked to it, means also Namibian investor. This exposes the incoherence of the Bill. By design or result, almost the entire Bill becomes applicable to local investors. Surely, that cannot be the idea.

39. The Bill merely pretends to encourage foreign investors to Namibia. I am afraid, no foreign investor will even dream to enter the Namibian market, where the Bill does not envisage structured certainty, but invites the foreign investor into a state of flux. With respect, I have no doubt that no foreign investor may even tentatively feel encouraged to invest in Namibia if the rules of the game are opaque, alterable daily, not determinable, or not published in a Gazette.

40. Lastly, and as if the above is not a great enough deterrent to foreign investors, the Bill puts the final nail in the investment coffin by declaring that the Minister may assign any function or delegate “**any power which is vested in the Minister**<sup>5</sup> to his Executive Director, (except powers in relation to making of regulations, and formulation of policies).

41. Now, with respect, let us ask a simple question. Will foreign investment be encouraged or discouraged if the Minister, or anyone with delegated powers may enforce against such investor, unpublished, daily fluctuating directives,

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<sup>5</sup> Section 58

guidelines, measures in any form, of binding acts (not Act) of State, directly affecting an investor or investment, which includes procedures, requirement binding executive decisions or agreements (unless excluded by the Act) and in addition, guidelines and other related subordinate measures?

42. Lastly, and probably the most constitutionally defective provision in the Bill is Section 30. What Parliament would do, if the Bill is enacted, is to say to the Minister in section 30<sup>6</sup>; “Go and do, basically whatever you want to do”. In

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<sup>6</sup> 30. (1) The Minister, in recognition of –

- (a) Namibia's national interests;
- (b) the socioeconomic inclusion of all inhabitants of Namibia;
- (c) the sustainable economic sectors, business activities and development objectives of Namibia;
- (d) the ecological sustainability of the environment in Namibia;
- (e) gender equality and youth empowerment;
- (f) enhancement of innovation capability in Namibia; and
- (g) the public interest,

must, after following the procedure set out in section 30, refer to Cabinet for input on the designation and classification of certain categories of –

- (i) economic sectors; or
- (ii) business activities; as exclusive to certain categories of investors and investments as set out in subsection (2).

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

- (a) designated as reserved for the State;
- (b) designated as reserved for Namibians;
- (c) designated as requiring foreign investors to enter into joint venture partnerships with Namibian investors, of which the percentage is set out in the regulations; and
- (d) designated as strategic economic sectors or, business activities, which require the approval of the Minister in terms of section 33(1)(a);

(3) Any person may propose, for consideration, to the Minister to designate an economic sector or business activities in terms of subsection (2).

(4) On receipt of the input contemplated in subsection (1) from Cabinet, the Minister may, after considering the input, by regulation, designate the categories of economic sectors and business activities for the different categories of investors and investments.

(5) Designations contemplated in subsection (1) may set out –

- (a) the economic sectors or business activities to be designated for each category of designated sectors or business activity;
- (b) if appropriate, specific thresholds or criteria relating to the economic sectors or business activities to be covered including, but not limited to –
  - (i) the value of the investment;
  - (ii) the number of jobs created;
  - (iii) the region as defined in section 1 of the Regional Councils Act, 1992 (Act No. 22 of 1992) or local authority area as defined in section 1 of the Local Authorities Act, 1992 (Act No. 23 of 1992), in which the investment is to be located; and
  - (iv) specific sub-activities of any business activity, if any.

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

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

(8) In order to value the expansion of an existing investment for the purposes of determining the application of this Act, only the costs of the additional investment proposed will be considered on condition that the expansion proposed is not an attempt to circumvent subsection (9).

(9) If an investor –

essence Parliament will create its own one-man Parliament. That is not permissible.

43. With respect, one cannot but respectfully wonder why the honourable justices of Namibia's apex court – The Supreme Court – have laid down trite principles on what is correct and incorrect when laws are made. Consistently and repeatedly, they held that Namibia is a governed by laws, not men/women; For a law to be enforceable, people must know where to find it – normally in Government Gazettes – and when they read them, the people must be able to understand them<sup>7</sup>. So, fluctuating policies kept in drawers and sometimes only in the mind of bureaucratic, are not laws. Similarly, to give law making power to agents of the State to enforce these non-laws, is the anthesis of the Rule of Law. Moreover, countless times it was laid down by the Supreme Court that Parliament may not abdicate its legislative power. And if Parliament wants to lawfully delegate (not abdicate) certain powers to responsible Ministers, guidelines must be set. If this is not done, one person – a Minister – may become a super or indeed a supra-Parliament. And that is plainly not permissible. If that is not done - confirmed Justice Damaseb <sup>8</sup>- it becomes possible for the Minister to proceed,

**from enmity or prejudice, from partisan zeal or animosity, from favouritism and other improper influences and motives easy of concealment, and difficult to be detected and exposed, it becomes unnecessary to suggest or comment upon the injustice capable of being wrought under cover of such a power; or**

**“there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which**

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(a) has made more than one investment; or

(b) proposes to make more than one investment,

that is below any threshold set by the Minister as contemplated in subsection (5)(b), but the total relevant quantities for such investments would be over the threshold, such investments must be treated in a cumulative fashion as a single investment for the purposes of this Act.

(10) An economic sector or business activity that has not been designated by regulation made under section 30(4) is open for investment and ownership participation by any investor in any legal form permitted by the applicable law.”

<sup>7</sup> Article 22 of the Constitution says.

<sup>8</sup> Medical Association of Namibia and Others v Minister of Health and Social Services and Others 2017 (2) NR 544 SC

**officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus escape the political retribution that might be visited upon them if larger numbers were affected.'**

44. The Bill ultimately fails the tests of transparency and legal certainty. In its current form the Bill also represents an abdication of Parliament's primary legislative duties. Rather than providing a clear, certain, and rule-based environment, the Bill delegates wide, unguided discretions to the Minister.

45. Under the Bill, the Minister is empowered to reserve sectors or approve investments based on subjective criteria. This "permission-based" system replaces the rule of law with administrative whim. Where the Constitution compels Parliament to set the rules, Parliament will – if the Bill is adopted - instead grant a "blank cheque" to the Minister. Such unguided discretion is contrary to the principle of legality and creates a climate of uncertainty that no rational investor, in a global ocean of competing options, would choose to navigate.

46. Furthermore, experience suggests that at the drafting level, well-placed individuals often succeed in inserting their own professions or interest into a preferred "pigeon-hole" within the regulatory framework. I do not remotely suggest that such an evil occurred here. But we may never truly know the internal mechanics or the specific lobbying that led the draft Regulations to contain only a few identified businesses for preferred treatment, to the exclusion of others.

## **I. CONCLUSION**

I conclude that the Bill is not constitutionally compliant. With respect, the Bill, if ever enacted, will have the effect of discouragement of foreign investment. Such a legislative instrument will be wholly unconstitutional and *ultra vires* the noble object of Article 99 of the Constitution.

## J. THE WAY FORWARD

47. I advise a strategic pause. This Bill is a high priority for promulgation, but its sensitive nature – impacting local empowerment and foreign capital – means Namibia must “get it right” to avoid deterring the very investment it seeks.

48. The current “**draft first (by unknown drafters), listen later**” approach is not the preferred way of getting it right. I recommend to my consultants that they seek permission from the relevant authorities to establish a Technical Committee of Experts to restart the process at the policy level:

48.1. The Composition of the committee should be a blend of government and private experts.

48.2. The Mandate of the committee should be to first determine the specific policy objectives – such as balancing “reserved sectors” for Namibians with “equal treatment” expected by foreign investors – before any new legal text is written. Thereafter, a draft Bill may be created for wider public comment.

49. Ultimately, Parliament (both houses) must adopt the Foreign Investment Code, for it to be published in the Government Gazette.

I advise accordingly

**R Heathcote SC.**