

Namibia

Namibia Investment Promotion Act (2016)

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Namibia Investment Promotion Act

Law No. 199 of 2016

Official Gazette No. 6110 of 31 August 2016

[Preamble]

The following Act which has been passed by the Parliament and signed by the President in terms of the Namibian Constitution is hereby published in terms of Article 56 of that Constitution.

To provide for the promotion of sustainable economic development and growth through the mobilisation and attraction of foreign and domestic investment to enhance economic development, reduce unemployment, accelerate growth and diversify the economy; to provide for reservation of certain economic sectors and business activities to certain categories of investors; to provide for dispute resolution mechanisms involving investment; and to provide for incidental matters.

(Signed by the President on 12 August 2016)

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

Part I. Introductory provisions

Section 1. Definitions

In this Act, unless the context otherwise indicates:

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

“business activity” means any activity carried out in Namibia:

a. that involves the commitment of capital, the expectation of gain or profit and the assumption of risk; and

b. that creates a contribution to the economic development of Namibia;

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

“expansion of investment”, for the purposes of the definition of “investment”, includes:

a. a major expansion of facilities beyond the original investment plan or size of a pre-existing investment so as to require new approvals under applicable law; and

b. an expansion of an investment into new business sectors not included in the original proposal or the previous activities of an investment;

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

“fair market value” means the estimated amount for which a property exchanges on the date of valuation between a willing buyer and a willing seller in an arm’s-length transaction;

“foreign investor” means:

a. a natural person who is not a Namibian that has made or is seeking to make an investment into Namibia; or

b. a company incorporated, registered or constituted in accordance with the laws of:

i. Namibia; or

ii. any country other than Namibia,

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

“freely convertible currency” means any currency designated as such by the Bank of Namibia established by section 2 of the Bank of Namibia Act, 1997 (Act No. 15 of 1997);

“interest rate” means the percentage rate to be paid by reference to the LIBOR (London Interbank Offered Rates) rate;

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

“investment” means:

a. any enterprise:

i. lawfully established, acquired or expanded by an investor in accordance with the laws of Namibia; and

ii. that carries out a business activity through a substantial operation in accordance with the investment proposal and the nature of the business in Namibia; or

b. any enterprise in Namibia that an investor is seeking to:

i. establish, acquire, merge with or expand, whether through the constitution, maintenance or acquisition of a juridical person inside Namibia or outside Namibia;

ii. merge with another enterprise inside Namibia or outside Namibia; or

iii. acquire shares, debentures or other ownership instruments of directly or indirectly;

c. the acquisition by any means of any license, permit or concession issued by the State directly related to the operation of an investment in Namibia, including such instruments relating to the exploration or exploitation of natural resources; or

d. the acquisition by any means of a minority ownership interest or joint venture interest in accordance with this Act, in relation to any of the preceding paragraphs, but such interest must constitute more than 10% of the share of the company and the investor exercises effective management, or influence on the management, of the investment,

– but for the purposes of this definition, a foreign enterprise may not regard the following assets as assets for the purposes of the definition of an investment, though they are considered as assets for enterprises incorporated in Namibia:

i. shares, stocks, debentures and other equity instruments of the enterprise or another enterprise;

ii. a debt security of another enterprise;

iii. loans to an enterprise;

iv. movable or immovable property and other property rights such as mortgages, liens or pledges;

v. claims to money or to any performance under contract having a financial value;

vi. copyrights, know how, goodwill and industrial property rights such as patents, trademarks, industrial designs and trade names, to the extent they are recognised under the law of Namibia;

vii. returns such as profits, dividends, royalties and income yielded by an investment;

viii. rights or concessions conferred by law or under contract, including licenses to cultivate, extract or exploit natural resources; and

ix. long term leases over land or property,

– and investment does not include:

aa. assets that are of a personal nature, unrelated to any business activity;

bb. debt securities issued by a government or loans to a government;

cc. portfolio investment that constitutes less than 10% of the share of the company or otherwise does not give the investor the possibility to exercise an effective management or influence on the management of the investment;

dd. claims to money or commission that arise solely from commercial contracts for the sale of goods or provision of services by a national or enterprise outside Namibia into the territory of Namibia, or the extension of credit in connection with a commercial transaction, or any other claims to money that do not involve the kind of interests in an enterprise set out above; or

ee. claims to money for the performance of services or provision of goods to any branch of government procured through tender, contract including public-private partnership agreements or any other means;

“Minister” means the Minister responsible for investment; “Ministry” means the Ministry administering investment matters;

“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, binding executive decision and agreement, unless otherwise excluded from the scope of this Act;

“Namibia Investment Centre” means the Namibia Investment Centre referred to in section 6;

“Namibian” means:

a. a natural person who is a citizen of Namibia;

b. a permanent resident of Namibia who is in possession of a permanent residence permit issued to him or her in terms of the Immigration Control Act, 1993 (Act No. 7 of 1993); or

c. a company incorporated, registered or constituted in accordance with the laws of Namibia or any state other than Namibia:

i. of which the majority of the issued share capital is directly or indirectly owned by a Namibian who proportionally benefits from the dividends or otherwise; or

ii. which is directly or indirectly controlled by a person referred to in paragraph (a) or (b);

“Namibian investor” means a Namibian investor investing in Namibia and registered in terms of section 19;

“prescribed” means prescribed by regulation; “regulation” means a regulation made under section 30;

“State”, means the Republic of Namibia, whether acting in a commercial or sovereign capacity, and includes an enterprise owned by the State and any ministry, office and agency of the State;

“this Act”, includes the regulations; and

“threshold” means the monetary threshold determined under section 4(3)(c) as qualification for registration as investor in terms of this Act.

Section 2. Objects of the Act

The objects of this Act are:

a. to provide a clear and transparent framework for investment in Namibia;

- b. to provide for an efficient dispute resolution mechanism involving investment;
- c. to provide for a mechanism for inter-ministerial coordination on regulatory provisions and incentives and support mechanisms for investments;
- d. to promote sustainable economic development and growth through the mobilization and attraction of domestic and foreign investments that:
 - i. enhance the economic development objectives of Namibia to build a prosperous, industrialised society with adequate direct investment to, among other things, encourage the creation of employment, wealth, technology transfer, capacity building, value addition to natural resources and foreign currency generation;
 - ii. reduce unemployment, poverty and economic inequality in Namibia;
 - iii. accelerate the growth and diversification of the Namibian economy;
 - iv. facilitate domestic investments, particularly in priority economic sectors; and
 - v. provide for other matters on investment promotion, admission, treatment and management.

Part II. Administration of act

Section 3. Administration and implementation of Act

- 1) The Minister is responsible for the administration and implementation of this Act.
- 2) The Minister may, in writing, delegate any power, except the power to make regulations, to the Namibia Investment Centre or a body designated by the Minister for that purpose by notice in the Gazette.

Section 4. Powers and functions of Minister

- 1) Where a foreign investor made an investment proposal to the Minister for consideration, the Minister:
 - a. must receive and consider the proposal together with the recommendation of the Namibia Investment Centre; and
 - b. may approve or disapprove the proposal and must in writing give the reasons for his or her decision.
- 2) The Minister may approve the investment proposal after having considered and satisfied himself or herself that:
 - a. the conditions set out in section 14 have been met; and
 - b. a substantial number of the following requirements, as each case may require, are fulfilled or likely to be fulfilled in a specified period:
 - i. the joint venture with Namibians;
 - ii. the employment creation for Namibians;
 - iii. the contribution of the investment to the advancement of persons who have been socially, economically or educationally disadvantaged by past discriminatory laws and practices;
 - iv. the contribution of the investment to the implementation of programmes and policies aimed at redressing social and economic imbalances in Namibia, including gender-based imbalances;
 - v. the transfer of technology and technological skills;
 - vi. the development of managerial skills;

- vii. the promotion of research, development and innovation;
- viii. the value addition to the natural resources and manufacturing sector and procurement of goods and services;
- ix. the environmental impact and contribution to environmental benefits; and
- x. other matters relating to the improvement of the economy and development benefits in the public interest as the Minister may prescribe.

3) The Minister may:

- a. coordinate decisions and approval of investments which are of strategic importance for national economic growth with other relevant offices, ministries and agencies;
- b. identify different sectors and regions for investment or business activities in accordance with Part 3; or
- c. determine the monetary thresholds for different economic sectors above which Namibian and foreign investors are required to register with the Namibia Investment Centre, and the Minister may determine different thresholds for Namibian and foreign investors in this regard.

4) The Minister may introduce incentives and other support mechanisms consistent with any applicable law as may be required for investments:

- a. after consultation with the minister responsible for any specific economic sector; and
- b. with the consent of the Minister responsible for finance, where revenue is involved.

5) Subject to sections 27 and 28, when:

- a. the requirements by any other law have been complied with;
- b. an approval of investment under this Act has been received by the foreign investor; and
- c. the foreign investor has notified the Minister of the acceptance of the approval of the investment,

– the Minister must issue a certificate of approval of investment that allows the foreign investor to register with the Namibia Investment Centre and commence with the investment.

Section 5. Performance agreements with investors

1) The Minister may, on behalf of the State, enter into a legally binding performance agreement with any foreign investor seeking approval under this Act to agree on matters related to the contributions of the investment to the development objectives of Namibia.

2) A performance agreement entered into under subsection (1) may become binding on the parties at the time the investment is approved in accordance with this Act.

3) An agreement entered into in terms of subsection (2) must be in accordance with the applicable laws of Namibia.

4) Where an element of an agreement under this section relates to the application or implementation of another Act under the authority of another minister, the Minister must consult with the other minister prior to concluding the agreement.

Section 6. Namibia Investment centre

1) The Investment Centre established by section 2 of the Foreign Investment Act, 1990 (Act No. 27 of 1990) repealed by section 36 continues:

- a. to exist as a department of the Ministry;

b. to exist under the name Namibia Investment Centre; and

c. to assist the Minister in the implementation of this Act.

2) The functions of the Namibia Investment Centre are:

a. to assist the Minister in implementing this Act by exercising or performing the powers or functions conferred or imposed on it by this Act or delegated or assigned to it by the Minister;

b. to promote both foreign and domestic investment by identifying specific projects and inviting interested investors for participation in those projects;

c. to undertake, either in Namibia or outside Namibia, promotional activities to attract foreign investments that are beneficial to the economy and development objectives of Namibia;

d. to register and keep the register of Namibian and foreign investors and their investments in accordance with the prescribed requirements;

e. to provide support services to investors and investments after establishment in order to assist them in their on-going relations with the State;

f. to assess economic sectors and investment proposals and projects for investment potential, opportunities and social economic impact, including local and public sector participation;

g. to undertake periodic reviews on investment policies and trends in Namibia and globally in achieving the overall objects of the Act, including the review of levels of domestic and foreign investment in different sectors and the development benefits of these investments;

h. to review compliance with any approval, registration requirements and conditions by investors and investments; and

i. to coordinate the investment related functions of commercial representatives.

Section 7. Integrated client service facility

1) The Namibia Investment Centre must establish and manage within its operations an integrated client service facility for potential investors to:

a. facilitate the sharing of information between the State, investors and the public;

b. facilitate the application and approval process for required permits and licenses in relation to investments; and

c. facilitate the timely receipt of State approvals for permits, registrations, licenses and other documents.

2) The Minister must seek the cooperation of other relevant ministries to ensure inclusive representation of investment related activities and requirements in the operation of the integrated client service facility.

3) An integrated client service facility may provide a list of various items including licences, permits and approvals issued or made under this Act or any other law which may be applied through the integrated client service facility.

4) An investor may, among others, apply for a licence, permit or approval of investment through an integrated client service facility.

Part III. Investors, economic sectors and business activities

Section 8. Reservation of categories of economic sectors and business activities for certain categories of investors

1) The Minister, in recognition of the sustainable economic sectors, business activities and development objectives of Namibia, its national security interests and the public interest, may, by regulations, reserve certain categories of:

a. economic sectors; or

b. business activities,

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

2) The category of reserved economic sectors or business activities contemplated in subsection (1) are those:

a. reserved for the State;

b. reserved for Namibians and entities whose majority shareholdings are owned by Namibians;

c. reserved for joint venture partnership between Namibian investors and foreign investors; and

d. reserved for investors that meet the requirements of section 4 and the prescribed specific conditions.

3) The regulations contemplated in subsection (1) must set out:

a. the economic sectors or business activities;

b. conditions that may be included in any agreement between the Minister and the investor or investment regarding specific project or undertaking;

c. criteria relating to investment, economic sectors or business activities, including among other things:

i. the value of the investment;

ii. the number of employees;

iii. the region or local authority in which the investment is to be located; and

iv. specific sub-sectors of business activity, if any.

4) A foreign investor must meet the applicable requirements for categories of investors in order to invest in the reserved economic sectors or business activities.

5) The expansion of an existing investment in a manner that qualifies as a new investment, merger or acquisition in terms of this Act is treated as an investment that is subject to this Part.

6) Where a foreign investor or investment:

a. has made more than one investment; or

b. proposes to make more than one investment,

– that is below the threshold set by the Minister in terms of value or number of employees, but the total value for such investments would be over the threshold, the investor must treat such investments in a cumulated fashion as a single investment for the purposes of this Act.

Section 9. Savings of existing investments after reservation of economic sectors and business activities not reserved

1) A reservation of an economic sector or business activity under section 8 is effective from the prescribed date.

2) Despite anything to the contrary in this Act, an investor who had lawfully invested in an economic sector or business activity before the sector or activity has been reserved under section 8 is entitled to maintain his or her investment after the effective date of the reservation of the sector or activity.

3) Any change in ownership or control of the maintained investments contemplated in subsection (2) is subject to the applicable requirements of Part 4.

Section 10. Economic sectors and business activities not reserved

An economic sector or business activity that has not been reserved pursuant to section 8 is open for investment and ownership participation by any investor in any legal form permitted by this Act and the generally applicable law.

Part IV. Change of ownership and control of investments

Section 11. Approval of proposed change of ownership and control of investment

1) An investor or investment in the natural resource sector or in any other sector which is above the threshold may not:

- a. change the ownership or control of investment; or
- b. transfer any licence, permit, authorisation or concession owned by the investor or investment, to a foreign investor through any form of merger, acquisition, direct sale or transfer without the approval of the Minister as required by subsection (2).

2) An investor or investment in Namibia contemplated in subsection (1) who wishes:

- a. to change ownership or control of the investment in favour of a foreign investor; or
- b. to transfer any license, permit, authorisation or concession owned by the investor or investment to a foreign investor through any form of merger, acquisition, direct sale or other disposal,

– must, subject to the requirements of the Competition Act, 2003 (Act No. 2 of 2003), apply to the Minister in the prescribed form and manner for approval of such proposed change or transfer at least 60 days before the date of intended change or transfer or any earlier date as the Minister may allow in any particular circumstances.

3) Upon receipt of the application referred to in subsection (2), the Minister may approve with or without conditions or decline any change or transfer of:

- a. ownership or control of investment;
- b. control of an investment located inside Namibia whether through:
 - i. the constitution, maintenance or acquisition of an enterprise inside Namibia or outside Namibia,
 - ii. the merger with another enterprise inside Namibia or outside Namibia; or
 - iii. the acquisition, directly or indirectly, of shares, debentures or other ownership instruments of an enterprise inside Namibia or outside Namibia; or
- c. any licence, permit, authorisation or concession owned by the investment.

4) If an investor contravenes subsection (1), the Minister may, despite any other law to the contrary, suspend, withdraw or cancel:

- a. the existing approval of the investment;
- b. any license, permit, authorisation or concession granted by any relevant issuing authority; or
- c. refer the matter to the prosecution authority as the case may require.

5) The Minister must notify the investor and investment of his or her intention before the Minister takes any decision under subsection (4).

6) Upon receipt of the notice in terms of subsection (5), an investor must respond and may make oral or written representation within 30 days of receipt of the notice or any extended period as the Minister may determine.

7) If after the investor or investment having made the representation under subsection (6), the Minister finds that the investor or investment failed to comply with subsection (2), the Minister may give the investor or investment an opportunity to remedy the failure as prescribed.

8) If an investor or investment is not able to remedy the failure as required under subsection (7), the Minister must take an appropriate decision under subsection (4).

Section 12. Application for approval of investments

1) A foreign investor may not:

- a. invest in Namibia; or
- b. acquire any licence, permit, authorisation or concession in Namibia,
 - through any form of merger, acquisition, direct or indirect sale or transfer without the approval of the Minister.

2) A foreign investor seeking to make an investment in Namibia must apply to the Minister for approval of the proposed investment in the prescribed form and manner.

3) An investor who is proposing to invest in Namibia as contemplated in subsection (2) may apply for:

- a. any proposed investment, acquisition or establishment of an investment whether directly or indirectly;
- b. any proposed merger, whether directly or indirectly, subject to the requirements of the Competition Act, 2003 (Act No. 2 of 2003); or
- c. the acquisition of any license, permit, authorisation or concession issued by the State, including such instruments relating to the exploration and exploitation of natural resources,
 - and apart from the requirement of subsection (2) the application must include other information as the Minister may prescribe to enable the Minister to make an informed decision.

Section 13. Provisional approval of investments

1) Before making a decision pursuant to the application under section 12 and following the due consideration of the circumstances:

- a. to cater for an emergency situation; and
- b. to give ample time to the process of considering the proposal for the granting of any permit, license, authorisation or concession which are necessary for the final approval of the proposed investment,

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

Section 14. Criteria for approval of investments

In considering the application for approval of investment and in addition to any other provisions of this Act, the Minister must consider the net benefit for Namibia, taking into account:

- a. the contribution of the investment to the national development, economic growth, public policy and national security objectives of Namibia;
- b. the contribution of the investment to the advancement of persons who have been socially, economically or educationally disadvantaged by past discriminatory laws and practices;
- c. the contribution of the investment to the implementation of programmes and policies aimed at redressing social and economic imbalances in Namibia, including gender-based imbalances;
- d. the contribution of the investment towards increasing employment creation in Namibia;
- e. the contribution of the investment to the advancement of the development of a geographical area of a low social and economic development;
- f. the contribution of the investment to the transfer of technological and managerial skills, knowledge and innovation;
- g. the contribution of the investment to value addition to the natural resources and manufacturing sector of Namibia;
- h. the extent to which the investment will procure goods and services from the SME sector and Namibian suppliers in general; and
- i. the impact on the environment and contribution to environmental benefits and any other factors the Minister may prescribe.

Section 15. Time period for approval of investment

The Minister may prescribe time periods for the approval of any application or review of any decision relating to the approval of investment under this Act.

Section 16. Transfer of rights and obligations

1) Where the Minister has approved a change in ownership or control pursuant to section 11, the investor who has received such approval must accept:

- a. the approval of such change of ownership or control including any conditions set out by the Minister; and
- b. all the obligations, conditions and responsibilities of the prior investor, in the prescribed form and manner.

2) The approval by the Minister of any change of ownership or control of investment contemplated in subsection (1) has no legal effect until:

- a. the investor submits the acceptance of the approval of change of ownership or control of investment to the Minister; and
- b. the Minister issues a certificate of change of ownership or control of investment that authorises the investor to commence or continue with the investment.

Section 17. Exception to requirements for approval for transfer of ownership or control

1) Where a finance contract, mortgage or similar instrument permits the provider of finance to take possession of the financed investment:

- a. in the event of a default by the debtor; or

b. in the event of the bankruptcy or insolvency of the investment in accordance with the Insolvency Act, 1936 (Act No. 24 of 1936), by that or another creditor,

– the transfer of ownership for this purpose may not be subject to approval under this Act.

2) Despite subsection (1), the transfer of ownership by such financier or creditor is subject to this Act.

3) If the financier or creditor seeks to operate the investment, other than for essential maintenance and temporary operation, including to maintaining the business value of the enterprise, until:

a. a buyer is determined; or

b. the investment is dissolved in an orderly manner, the provisions relating to the transfer of ownership apply with the necessary changes.

Part V. Rights and obligations for investors

Section 18. Compliance with all applicable laws

Investors must carry out their activities at all times in full compliance with all the applicable laws of Namibia.

Section 19. Registration of investors and investments

1) A new investor in any investment above the threshold for registration must register in the manner and form prescribed for this purpose.

2) Despite anything to the contrary in this Act, the obligation to register in terms of subsection (1) applies to existing investors and investments, subject to subsection (3).

3) An investor or investment existing at the commencement of this Act and which qualifies for registration as investor or investment under this Act has 12 months from the date of the commencement to register in accordance with subsection (1).

4) An investment that is below the threshold for registration but that grows to exceed the level of the threshold must register in accordance with subsection (1) within 12 months of exceeding the threshold above which registration is required.

5) Subject to this Act, the State must accord to foreign investors and their investments treatment no less favourable than the treatment it accords, in like circumstances, to Namibian investors and their investments, with respect to the management, operation and disposition of investments within Namibia.

6) In the assessment of the “like circumstances” contemplated in subsection (5), the State must take into account:

a. the effects on third persons and the local community;

b. the effects on the local, regional or national environment, including the cumulative effects of all investments on the environment;

c. the sector of investment;

d. the linkages to other sectors;

e. the aim of the measure concerned; and

f. the regulatory process generally applied in relation to the measure concerned.

Section 20. Application of Act to matters under treaties

1) The obligations in this Act may not apply in relation to any concessions, advantages, exemptions or other measures in favour of a foreign or Namibian investor or investment that may result from the existence or implementation of:

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

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

Section 21. Expropriation

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

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

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

Section 22. Payment of compensation

1) Unless provided for in other domestic laws of Namibia, the just compensation required for an expropriation of investment is subject to subsection (2), once it is determined it is:

- a. normally assessed in relation to the fair market value of the expropriated investment immediately before the expropriation took place; and
- b. paid promptly in a freely convertible currency.

2) The just compensation is based on an equitable balance between the public interest and the interest of those affected having regard to all relevant circumstances, including the:

- a. fair market value;
- b. profit of the investment to date of the expropriation;
- c. capital costs of the investment;
- d. the current and past use of the property;
- e. the history of its acquisition;
- f. the purpose of the expropriation; and
- g. the duration of the investment.

3) The assessment of fair market value may not reflect any change in value occurring because the intended expropriation had become known earlier.

4) Compensation must include simple interest at the rate defined in section 1:

- a. commencing on the date the act of expropriation occurs; and
- b. ending on the date the whole compensation amount is paid.

Section 23. Right of review concerning expropriation and compensation

The investor affected by an expropriation has a right to review by a judicial authority of Namibia and of the valuation of the compensation for his or her expropriated investment in accordance with the principles set out in section 22.

Section 24. Foreign personnel

1) Despite subsection (3), the Minister responsible for immigration, after consultation with any relevant minister as the circumstances may require, may on application authorise an investor to employ natural persons who are not Namibians to perform in Namibia:

- a. scarce key professional and managerial functions; or
- b. specialised services, scarce skills or specialities, required for the operation of the investment.

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

3) An investor must:

- a. absorb available skills in the Namibian labour market;
- b. invest in human capacity development in the Namibian labour market; and
- c. ensure the transfer of skills to the Namibians,

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

4) The foreign personnel referred to in subsection (1) excludes the investor and shareholder, his or her spouse and dependent children who, if non-Namibian, is deemed to have been granted, subject to immigration control requirements, the right to enter and work in Namibia at the point of admission once final approval of the investment has been granted.

Section 25. Facilitation of visa and permits of investors, dependants and foreign personnel

1) The Minister must engage the Minister responsible for immigration to facilitate the issuing of visas and residence permits to investors and their dependents and foreign personnel within a reasonable period.

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

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

3) The Minister, after consultation with the Ministers responsible for immigration and tertiary education, respectively, may generally prescribe positions as temporary in respect of foreign personnel within various investments to which section 26 applies even in the absence of the agreement contemplated in subsection (2).

Section 26. Capacity development and transfer of skills

1) Where:

- a. the Minister and investor have agreed on positions that may be filled on a temporary basis by foreign personnel on the basis of lack of appropriate skills in the Namibian market; or
 - b. the Minister has prescribed positions as temporary in respect of foreign personnel under section 24,
 - an investor must ensure that Namibians are trained to acquire relevant skills to assume those positions within the prescribed period or a period agreed upon between the Minister and the investor.
- 2) An investor must train Namibians to fill the positions occupied by foreign personnel on a one-to-one apprenticeship basis, unless otherwise agreed and specified in the agreement contemplated in section 25(2).

Section 27. Transfer of funds

- 1) A foreign investor may transfer into and outside Namibia funds relating to his or her investment subject to the laws of Namibia.
- 2) The funds referred to in subsection (1), include:
- a. the initial capital and additional amounts to maintain or increase the investment;
 - b. the profits, dividends, royalties and income yielded by an investment;
 - c. the funds in repayment of loans and interests of loans related to an investment;
 - d. the compensation paid under this Act;
 - e. proceeds from the total or partial sale or liquidation of an investment;
 - f. earnings and other remuneration of personnel engaged from abroad in connection with an investment; and
 - g. payments arising out of the settlement of a dispute between the investor and another party in Namibia.
- 3) The transfer of funds under this Act is made without undue delay in a freely convertible currency at the market value of exchange applicable on the date of transfer, subject to the exchange control regulations under the Currency and Exchanges Act, 1933 (Act No. 9 of 1933).
- 4) Despite subsection (1), the State may delay or prevent a transfer and any affected person may seek any redress through the judicial process, or through a fair, non-discriminatory and good faith application of measures, to delay or prevent a transfer:
- a. to protect the rights of the creditors in the event of actual or anticipated bankruptcy;
 - b. to ensure the compliance with judgments concerning criminal offences;
 - c. to ensure the compliance with tax obligations;
 - d. to comply with lawful administrative decisions and facilitate execution of judicial judgments;
 - e. in response to serious or exceptional balance of payments or external financial difficulties, or the anticipated financial risk; or
 - f. in exceptional circumstances, to prevent movements of capital that causes or threaten to cause serious difficulties for macroeconomic management, including monetary or exchange rate policies.

Part VI. Dispute settlement

Section 28. Resolution of post establishment disputes

- 1) A foreign investor or investment may notify the Minister of a dispute arising between the investor or the investment and the State after admission or after establishment of the investment.
- 2) The Minister, on request of the investor or investment and where appropriate, may assist in the resolution of the dispute, and may designate a mediator or mediation panel to mediate any dispute contemplated in subsection (1).
- 3) An investor or investment may choose to directly approach the courts of Namibia for remedy instead of using the mediation procedures referred to in subsection (2).
- 4) The jurisdiction over disputes relating to this Act lies exclusively with the courts of Namibia, but the Minister and investor or investment, as required by the circumstances of the alleged breach of rights or obligations, may, by written agreement, agree to arbitration in accordance with the Arbitration Act, 1965 (Act No. 42 of 1965) in Namibia.

Part VII. General provisions

Section 29. National security

Despite other provisions of this Act, the Minister may further prescribe and regulate investments in a manner necessary for the maintenance of:

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

Section 30. Regulations

- 1) The Minister may make regulations relating to:
 - a. the form of any application, notice, certificate and other document required for the purposes of this Act and the manner for making such application;
 - b. the organisation and operations and proceedings of a body that may be established under this Act to perform any functions in terms of this Act or as may be delegated to it;
 - c. any fees to be paid for services provided under this Act;
 - d. the facilitation of domestic investment in priority economic sectors;
 - e. the provision of incentives and support mechanisms to investors;
 - f. any matter which in terms of this Act is required or permitted to be prescribed; and
 - g. generally any matter in respect of which the Minister considers it necessary or expedient to prescribe in order to achieve the objects of this Act, but not inconsistent with the powers conferred to the Minister under this section.
- 2) A regulation made under this section may prescribe penalties not exceeding a fine of N\$50 000 or imprisonment for a period of six months, or both such fine and such imprisonment, for any contravention of or failure to comply with such regulation.

Section 31. Offences

- 1) A foreign investor or investment commits an offence, if the investor or investment:
 - a. undertakes, establishes or operates an investment in a manner contrary to sections 11 or 12(1);

- b. invests in a sector in which such investment is not permitted pursuant to the reservations made in terms of section 8;
- c. changes the nature of the investment in a manner that makes it materially different from the approved investment;
- d. fails to comply with the requirement to cumulate investments into a singular investment for the purposes of this Act when so required; or
- e. is, despite any other law to the contrary, in material breach of any conditions agreed with the Minister in relation to the establishment or operation of investment.

2) An investor or investment commits an offence, if the investor or investment submits information which the investor or investment:

- a. knows to be false, misleading or fraudulent; or
- b. does not believe to be true, in relation to any matter required by or under this Act.

3) An investor or investment commits an offence, if the investor or investment:

- a. changes the ownership or control of his or her investment; or
- b. transfers any licence, permit, authorisation or concession owned by the investor or investment,

– to a foreign investor in contravention of section 11(1).

Section 32. Opportunity for compliance with law

1) Where the Minister has reason to believe that an investor or investment has committed any offence in terms of section 31, the Minister may, when appropriate:

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

2) If an investor or investment agreed to implement corrective measures as contemplated in subsection (1), the investor or investment must implement corrective measures for any alleged offence within a period agreed upon with the Minister.

3) Where the Minister is of the belief that an effort has been made in good faith to ensure compliance within the period referred to in subsection (2), the Minister may delay any further enforcement of any action he or she intends to do under section 34.

Section 33. Penalties for offences

1) Where the Minister is of the opinion that an investor or investment has committed an offence, the Minister may afford the investor or investment opportunity to remedy the situation by implementing the required corrective measures, but if the investor or investment fails to do so, the Minister may:

- a. suspend, withdraw or cancel the approval of the investment issued under this Act or the licence, permit, authorisation or concession issued under any law; and
- b. cause the investment to cease operations until the suspension, withdrawal or cancellation is lifted or until the offence is remedied.

2) An investor or investment may appeal to court against any suspension, withdrawal or cancellation on the grounds that:

- a. no offence has been committed;
 - b. the offence so committed has no material impact on the issuance of the approval of the investment under this Act; or
 - c. the penalty imposed is manifestly excessive given the nature of the offence.
- 3) Apart from suspension, withdrawal or cancellation of approval under this section, the Minister may seek a court order imposing a fine not exceeding 100% of the economic benefits that have accrued to the investor or investment as a result of the offence.
- 4) If a court imposes a fine under subsection (3), the fine:
- a. is payable to the Ministry of Finance; and
 - b. is regarded as a debt due to the Ministry of Finance, and is recoverable in a court of law in case of default.
- 5) Where the offence committed under this Act is also an offence under any other law, the fine imposed under subsection (3) is in addition to such other applicable penalties in such other law.
- 6) Section 32(1) does not apply to subsection (2) of section 31, and a person convicted of an offence under that subsection is liable to a fine not exceeding N\$2 000 000 or to imprisonment for a term not exceeding 10 years, or to both such fine and such imprisonment.

Section 34. Repeal of laws

The Foreign Investment Act, 1990 (Act No. 27 of 1990) and the Foreign Investment Amendment Act, 1993 (Act No. 24 of 1993) are repealed.

Section 35. Savings

- 1) Despite the repeal of the Foreign Investment Act, 1990 (Act No. 27 of 1990), and subject to this Act, any investment contract or permit executed under it and in force at the date of commencement of this Act continues to be in force as if it has been made under this Act.
- 2) Despite subsection (1), the investment contract or permit contemplated in that subsection:
- a. is subject to review by the State and may be aligned to the requirements of this Act if the circumstances so require; and
 - b. ceases to be of effect upon its expiry, unless the Minister and the investor agree to its renewal on terms consistent with this Act.
- 3) Anything done under a provision of the repealed Foreign Investment Act, 1990 (Act No. 27 of 1990), and that could have been done under this Act is deemed to have been done under a corresponding provision of this Act.

Section 36. Short title and commencement

- 1) This Act:
- a. is called the Namibia Investment Promotion Act, 2016; and
 - b. commences on a date determined by the Minister by notice in the Gazette.
- 2) The Minister may determine different dates under subsection (1) in respect of different sections of this Act.