Decoding the Draft Namibia Investment Promotion and Facilitation Bill



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1. **Introduction**

This week we witness the temporary withdrawal of the draft Namibia Investment Promotion and Facilitation Bill (NIPA) by the Minister of Industrialisation and Trade (MIT) in the National Assembly. The withdrawal was prompted by a series of articles notably in 'The *Namibian'*, '*Die Republikein'* and '*The Sun'* dailies, which castigated the draft Bill for the perceived 'SuperMinister'powers it accords. The Ministry is to do further consultation before re-tabling the Bill. This article is an attempt to decode the draft Bill in lieu of modern investment legislation' central themes. It further aims to dispel the unfortunate misdiagnosis on the intentions and orientation of the Bill that the media managed to successfully posit thereby creating confusion and unjustifiable

fear-inducing analyses among its readership. The article therefore first provides a short overview of key themes that modern investment policy and legislation covers. Thereafter it decodes these themes in terms of the draft NIPA before it concludes. It attempts to dispel the unfortunate false notion so created as it decodes the NIPA's provisions.

2. Modern Investment Policy and Legislation: Key Themes

Modern investment policy legislation is characterised by certain key themes that are become pervasive across many of the world's national settings. These pertains to ensuring the equal treatment of both domestic and foreign investors, as many older investment agendas were fixated on foreign investors only. In addition, as much of the world subscribes to the Sustainable Development Goals (SDGs) and is fixated with the Climate Change Agenda ensuring that the investment so attract is sustainable becomes an imperative. Thus in modern investment policy and legislation it is increasingly becoming common that investment is coaxed towards the definition of sustainable investment and largely becomes the policy and law object thereof. The issue of private-public partnerships (PPP), as defined as transaction whereby a private entity provides public infrastructure or services for use by the public (in lieu of performance-linked payments) is also imperative to align such to sustainable development. There is no point thus to facilitate investment through PPP, which will degrade the Namibian environment or cause further social inequality or upheaval. Finally Official Development Assistance (ODA) flows are increasingly being driven towards investments and fostering of business opportunities as opposed to the normal plain vanilla solidarity aid to the Global South. This has massive implications in how such ODA shape investments flows into the Global South as well.

This leads us to a key feature that is becoming central in national investment legislations. Sector reservations or defining a 'negative lists, restricted lists, encouraged lists etc' to delineate which sectors are reserved for nationals or the State

or for Strategic investments may be classified as economic nationalism in certain quarters. However, it is actually meant to create a pathway towards self-reliance through developing entrepreneurship, fostering backward and forward linkages in the economy as well as guarding against Public Interest. Many jurisdictions around the world explicitly mention which economic sectors are reserved for which category in their law and policy. Many countries also advances the National Security argument in relation to risks that may arise over loss of control of domestic inputs such as critical goods and infrastructure and technology to foreign hands. Resultantly many countries have actually adopted ex-ante Foreign Direct Investment screening regimes to identify, calculate and prevent security-related risks and implications.

Furthermore existing and entrenched global asymmetries drives certain key themes that are becoming pervasive across national investment policy and legislation. The developing world, inclusive of Namibia, is faced with increasing global asymmetries manifesting through for example unequal access to global financing, concentration of wealth and technology in developed economies, concentration of fiscal stimulus and investments in the developed world, unequal access to vaccines and vaccination levels, increasing digital divide and disparities in climate responsibilities and responses. This threaten the attainment of the SDG Goal 10-'*reducing inequality within and among countries'*. A key measure to overcome such increasing global asymmetries is obviously to ensure increasing both public and private investments on green and sustainable investments and to enable green industrialisation through access to technology, investment and infrastructure. This is where the interface of national domestic investment law become imperative with activities pertaining to PPPs, and economic sectors reserved for the state, strategic investments, innovation or joint ventures seeking to leverage mainly on public procurement opportunities and reformed ODA flows. Crucially dictates from a national investment policy over such matters are vital to ensure effective permeability into the law but also to ensure alignment to national development goals.

It is very clear that the design of national investment law and policy has evolved around the central themes of equality of treatment of both foreign and domestic investors, aligning the law and policy to sustainability and country developmental goals whilst ensuring that risks pertaining to national security, entrepreneurship development and public interests are managed through sector reservations. For developing countries such as Namibia, increasing global asymmetries requires a much more nuanced and focused approach to a national investment policy inclusive of sector reservations and an applicable rules regime thereof. Moreso it is paramount for Namibia, which is unduly classified as an Upper Middle Income country although it has the second highest income inequality levels in the world. Keep in mind that as a Middle-Income Country, the twin threats of a *Middle-Income Trap* and *Premature Deindustrialisation* stares us right in the face-as we have no or little competent capacities built to compete on the basis of innovation, technological change and the production of knowledge-intensive goods and services. The design of one's national investment policy and law therefore should be a critical tool to help ameliorate these structural developmental limitations and act as a bulwark against the twin threats.

3. Developments in Aspects of Administration, Approval, Implementation and Post Investment Interactions

Developments in aspects that covers administrative procedures and implementation are meant to ensure the elimination of a national process that is unnecessarily bureaucratic, onerous and antiquated. To this end, this area was largely across the world driven by *Ease of Doing Business Indicators* of the World Bank. Other countries looked at rather appreciating the World Economic Forum's *Global Competitiveness Reports*. However of late the Ease of Doing Business Indicators have suffered some reputational damage and is most likely to feature less as a barometer of global competitiveness.

Be as it may, experience over the years are pointing to some trends. There is more recognition of delineating the approval process from the investment and development phases (inclusive of acquiring necessary concessions and incentives where applicable). So using technological transformation to facilitate the investment proposal and approval process, whilst ensuring less turnaround time from the investment decision making and development phases is becoming more pronounced in countries 'strategies.

This also look at, as a policy measure, the availability of an integrated agency system that foster application programming interface technology, which then coordinate investment approval functions between relevant government agencies. At times countries move beyond this and firm it up through an Ease of Doing Business Act to provide more teeth to this aspect of what is sometimes call a *One-Stop-Shop*. This is quite pertinent as the issue of Ease of Doing business interface across various strata of policy regimes.

Namibia Intellectual Property Regime (IP) is also bound by the Paris Convention for the Protection of Industrial Property, which has implications on filling priority between and amongst states and even on the treatment of filling dates. It also provides opportunity in terms of attracting international innovators and technological investors who may rather wish to register IP across multi-jurisdictions simultaneously. Similar arguments can be made in terms of seamless integration on innovation through the National Commission on Research, Science and Technology) and on biotrade with the envisaged Research and Development Centre under the Access to Biological and Genetic Resources and Associated Traditional Knowledge Act, 2017 (Act No. 2 of 2017) and associated Regulations as published in August 2021. Ensuring policy coherence and cooperation around implementation interface around these vital investor registration outlets and platforms will be a constant activity beyond the enactment of the NIPA Bill. An emerging trend around this attempt to digitalise and interconnect governmental agency system is the realisation by many countries to buffer this with a national cybersecurity legislative framework.

Finally, it is also key to imbue flexibility in the institutional framework governing the legislation, especially of the promotional agency to ensure a dynamic approach towards its evolution. Utilising the accompany regulations to continuously ensure the updating and revamping of the promotional agency is a valuable outlet to utilise.

4. Decoding the Draft NIPA

We now in tabular form delineate the draft NIPA bill as per the key themes outlined in Sections 2 and 3 above:

Table 1: NIPA Bill Orientation as per Key Themes

Theme	NIPA Bill Orientation
Sustainable Investment Orientation	The Bill defines investment and place major emphasis on sustainability.
Equal treatment of National and Foreign	The Bill aims to enable both domestic and foreign investors unlike the old FIA Act.
Sector Reservations	The Bill makes a case for sector reservations however it posit a gradual and focused approach whereby the Minister must first get Cabinet approval. Further on rather than blanket sector reservation the Minister would be required to stipulate thresholds for sector reservation. Thus, this measure provides for say sector reservation in retail sector but only for investments up to say N$500,000 or employing a number of employees as an example. This implies that the Minister must satisfy certain empirical research to even convince Cabinet on the need to reserve a certain sector. This is more accommodative than closing a certain sector completely or denoting a Negative List in an Act.
Administrative, Approval and Implementation Procedures	The Act clearly stipulate that the administrative oversight rest under the Minister whilst the implementation is with the designated investment promotion agency-in this case the Namibian Investment Promotion and Development Board. The Bill also accord the Minister to approve, upon request by an investor the consideration to invest in the economic sectors that are reserved. No Ministerial approval is required for economic sectors that are not designated. The Minister may also, on behalf of the State or at the request of the Investment promotion agency or an investor also enter into a performance agreement. Such an agreement must be aligned to transparency, set timelines and national laws. Approval turnaround times are mainstreamed even for those investments requiring Minister's determination. The rights of investors are protected duly in terms of expropriation and payment of compensation rooted in market value. Obligations of the Investor are also clearly outlined as well as a provision for international arbitration in some instances as well as opportunity to rectify transgression as well as appeal to High Court in terms of Ministerial fines imposed. In-built flexibility in terms of the organisational imperative for the promotional agency is provided for in the Regulations.

5. Conclusion

The draft NIPA is actually a modern based piece of legislation that rather err on the side of caution and gradualisms as opposed to straightjacket provisions. Nowhere in the Bill is the Minister empowered to approve all economic sector and business activities as wrongly alluded to by the media. Moreover, a more accommodative stance is to be pursued through Regulations in terms of organisational flexibility of the investment promotion agency, application procedures and differentiation of requirements to be met between local and foreign investors when they wish to invest in reserved sectors. The Bill actually lend itself to evidence-based policymaking dictates as opposed to kneejerk policy reactions. The media articles took the Minister's determination powers over Reserved Economic Sectors and Business Activities and abrogated it across all investments wrongly. Although the resultant outcome is regrettable, perhaps it also shows the deficiencies in our nation's economic journalism competencies. Economic journalism is not a good tool when wielded blindly. Yours truly is willing to offer any free course for any interested local scribe surely. We need to reset and ensure the passing of the bill as soon as we all attune ourselves to the true orientation and intentions and contend of the Bill.

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