

Gateway to Southern Africa

NAMIBIA

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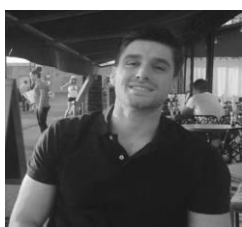
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Responsibility for errors and omissions in this report rests solely with the authors, and no other person or institution.

CAPSTONE WORKSHOP GOALS

This Capstone Report is a culmination of a capstone workshop at Columbia University's School of International and Public Affairs ("SIPA"). The report team comprised of seven SIPA students with interdisciplinary backgrounds spanning economics, finance, journalism, foreign affairs and development, together with four lawyers from Columbia Law School and a faculty adviser, Professor Jenik Radon. Accordingly, the contents of this report are completely independent of any pecuniary or personal interest in Namibia. The report aims to further a vision of Namibia as the *Gateway to Southern Africa*. It illustrates Namibia's potential to transform into a world class logistics hub that will form the link between Namibia's neighbouring countries, including South Africa, Botswana, Angola, Zambia, and the rest of the world.

The Office of the President of the Republic of Namibia is already supporting infrastructure development projects to expand Walvis Bay, so it can become the major deep-water port for transferring goods to and from southern Africa. The topic of research for this report emerged out of in-country discussions and which explores the possibility of Walvis Bay becoming the driving force that establishes Namibia, not only as a major port, but also as a logistics hub and financial administrative centre.

This report provides recommendations for policies and legislation to support both human and legal capacities required to make the logistics hub vision a reality. It aims to provide practical advice to Namibia on how to reform, improve and build on its current legal and institutional framework to promote economic development and good governance for Namibia and its people.

This report will address various sectors and areas in need of development in Namibia including education, governance, international relations, tourism, foreign direct investment, arbitration and fisheries licencing.

OTHER REPORTS

This report is published by SIPA as part of a series of reports on natural resource management and development in Africa, Asia and Latin America. Other publications include:

- Oil: Uganda's Opportunity for Prosperity (2012)
- Politics and Economics of Rare Earths (2012)
- China, Natural Resources and the World: What Needs to be Disclosed (2013)
- Mozambique: Mobilizing Extractive Resources for Development (2013)
- Colombia: Extractives for Prosperity (2014)
- Tanzania: Harnessing Resource Wealth for Sustainable Development (2014)
- Mining in Peru: Benefiting from Natural Resources and Preventing the Resource Curse (2015)
- Mining in Peru: Preventing Social Conflict in the Peruvian Mining Industry (2017)
- Mauritius: What future for Mauritius in the Wake of the Panama Papers (2017)

RESEARCH APPROACH

The findings in this report are based on extensive research and review of Namibian literature and, in addition, we have drawn on the best practices and model laws from other comparatively smaller nations which have successfully implemented similar goals. These countries include the likes of Singapore and Estonia. This research was complemented by over thirty in-person interviews conducted with stakeholders, both in Namibia and New York. These included government officials, members of civil society, embassy officials, academics, judicial officials and people active in the financial sector.



PREAMBLE

RECLAIMING THE NAMIBIAN NARRATIVE

Introduction

“To the Namibian people, I would like to state, on this solemn and historic occasion, that our nation blazed the trail to freedom. It has risen to its feet. As from today, we are the masters of this vast land of our ancestors. The destiny of this country is now fully in our own hands. We should, therefore, look forward to the future with confidence and hope.”

Dr. Sam Nujoma, Inaugural Speech, 21 March 1990

More often than not a story gets told about a nation that was once successful in overcoming past hardships and injustices. The story goes on to reveal the country’s struggles as well as the strides taken towards the country’s advancement. The story finally concludes with an aspirational statement aimed at promoting further progression. From these types of stories, it becomes clear that almost every nation in the world has suffered some form of adversity and, for many African countries, this is often attributable to another nations benefitting from their very suffering.

While this undoubtedly forms the foundation on which a nation’s identity and culture is formed, the struggle for progress and social justice does not in itself dictate the very progress that is needed to propel a nation towards a prosperous future. The story of humble beginnings and those strides that particular nation has taken, while not irrelevant, is on its own not enough to guarantee further progress.

Namibia’s success story hinges on its independence and the liberation of both the country and its people from colonial oppression. Its founding father, Sam Nujoma, went on to say that *“We surprised our colonial enemies.... The hoisting of our flags means that the management and the promotion of the economic welfare of our people, now lies in our own hands.”*¹

¹ Conferment of an Honorary Degree of Doctor of Law, University of Zimbabwe, 18 November 1999, Harare, Zimbabwe

This essentially means that for Namibia, while the fight for independence was successful, the road towards achieving the social, economic and political ideals envisioned by this progression is long. It requires an unwavering determination and commitment to conquer whatever challenges lie ahead. It necessitates strength in leadership and devoutness to innovation, technology and communication.

Namibia is armed with a resource base that could easily be transformed to facilitate a future worth investing in. There is no better time than the present to implement and enforce practical strategies which leverage on its geographical location, environment, economy, political stability and relative population size. In doing so, Namibia should remain cognisant of the fact that if it wants to stand out, it does not need to be different, it just needs to be outstanding.

The Geographical Environment and Location

Namibia is located in the south-western part of Africa. Its bordering countries are South Africa to the south and southeast, Angola to the north, Botswana to the east and Zambia to the northeast. Namibia also has the Atlantic Ocean to the west. The Namibian terrain ranges from high plateau mountains and canyons with a climate ranging from arid in the Namib Desert along the coast, and the Kalahari Desert in the east. The other parts of Namibia maintain a subtropical climate.



The Economy

Namibia is heavily dependent on its export -driven mining industry which is vital to foreign currency earnings. The most important mineral commodities exported are diamonds (south coast), copper, gold, zinc, lead, uranium (northern and central Namibia) and salt (coastal central Namibia).² Its major export partners include South Africa and the United Kingdom followed by Angola, Canada and the U.S. The Namibian economy is relatively stable compared to many other sub-Saharan African countries. Growth rates have been consistently above 5 percent over the past five years, although this growth is now slowing. Historically, the Namibian government has been fiscally conservative; however, in 2015 it issued a US\$750 million Eurobond,³ which tends to show a move towards liberalization.

Namibia's economic growth is subject to the global economic environment and the country maintains a relatively high degree of regulatory efficiency and involvement in global commerce. That said, economic freedom in Namibia is curtailed by institutional weakness and a lack of commitment to deeper reforms.⁴ There is, however, ample opportunity to diversify the economy away from minerals into areas such as tourism and financial services given the country's sound governance, environment, low crime rate, solid infrastructure, beautiful landscape and scenery.⁵

The Population

The Namibian population is projected to increase by 57 953 in 2017, reaching a population size of 2 600 857 at the beginning of 2018.⁶ There is positive trajectory in the number of births, which is expected to exceed the number of deaths by 58 258. Notwithstanding this, if external migration remains on par with previous years there will be a decline in the Namibian population as a result of migration.⁷ This essentially means that more people will leave Namibia to permanently settle elsewhere.

² Namibia Country Report, p. 7,

³ Managing Natural Resources in Namibia : The Mining and Fisheries Sector, School of International and Public Affairs, Columbia University, Spring 2016, p. xi.

⁴ 2017 Index on Economic Freedom in Namibia.

⁵ Namibia Country Report.

⁶ Country meters, Namibian Population accessible on <http://countrymeters.info/en/Namibia>.

⁷ Country meters, Namibian Population accessible on <http://countrymeters.info/en/Namibia>.

The Political System

Since independence from South Africa in 1990, Namibia has remained relatively stable on the political front. The South West Africa People Organization (“SWAPO”) has won every parliamentary election since 1990 with President Hage Geingob winning a five-year term in 2014.⁸ The country operates under a semi presidential democratic system in terms of which the President operates alongside the cabinet and the prime minister. This essentially means that the President is both the head of state as well as the head of government. The legislative branch is made up of the National Assembly and the National Council, with the latter playing a more advisory role. The judiciary is independent of both the executive and legislative branches.

Moving forward

In light of the above considerations, Namibia, as a small nation with ambitious goals, needs to acknowledge the need for change, but maintain the necessary desire to achieve this change. One way to do this is to guide the mindsets of the Namibia people to envision the ‘big picture’ that Namibia is. While it’s no hard task to identify an area for economic, social or political development, it is more so when trying to envision the thread that ties each developmental goal into a bigger nationwide vision.

Solid recommendations, which provide for the endless possibilities that Namibia may implement are of little value if such recommendations are not contextualized. Our approach is to assist Namibia in both concretizing and contextualizing its goals by forging the Namibian footprint through the eyes of the youth. One way to do this, as expressed below, is by providing Namibia with an aspirational letter from the Namibian youth, highlighting the Namibia they see in their future.

“Dear Namibia

It has been long since we gained independence in 1990. Our nation, geographically consisting of savannah, dry land as well as the Kalahari and Namib Desserts is rich in minerals such as uranium, vanadium, lithium, tungsten and diamonds. We have fought hard to prevent our resources from being exploited. We backed historical change and liberated ourselves. We pushed out from under adverse powers and gained both political

⁸ 2017 Index on Economic Freedom accessible on <http://www.heritage.org/index/country/namibia>.

and social rights and freedoms. Through an undying willpower we forged our own national identity destroying the unjust constructs embedded in the identity we were destined to retain.

Thank you to those who saw what Namibia was and what Namibia could be before its inception. Thank you for giving purpose to a nation's birth before many understood what it meant to be Namibian. Thank you to those who fought so that we could live freely, elect our own leaders and continue to shape the Republic of Namibia. It was you who taught us that with hard work, blood, sweat, tears and heart, we can do anything we put our minds to.

Allowing us to grow in diversity and celebrate our differences has forged the path lined with greatness. This greatness encompasses the nation's willingness to invest in its youth, facilitate the opportunities for growth and development and allow us to maintain our independence while we progress on an international stage. We are the future of this great nation and all we ask for is a platform, a platform to invoke our ideas, start our own businesses and explore our ambitions.

We see our future as one cemented on a world class education system which allows all to attain cognitive, life and work skills. A future in a nation with integrated communities and meaningful employment opportunities, narrowly tailored to our particular skills sets. We see a Namibia with a powerful international presence and no corruption or bad governance. We see a Namibia that relies on technology and innovation to create new systems of accountability and transparency for both public and private sectors. We see our nation becoming less reliant on the SACU revenue and rising in the ranks of world economic leaders. We see a nation with updated and modern laws, laws that not only promote domestic resilience but also create international incentives to do business in the country.

Namibia, we, as the youth of this great nation, are ready to play our part in securing our own future. While Namibia is our home and our hearts will remain in our home, we want our future to be firmly rooted here. So let's start working on our future and those for the generations to follow. It's time to make history and not merely have our time pass us by.

Yours faithfully,

*The Namibian Youth*⁹

⁹ Aspirational Letter prepared by Capstone report team.

EXECUTIVE SUMMARY

The Namibian Capstone team from Columbia University's School of International and Public Affairs, led by Adjunct Professor Jenik Radon, has put together this Report which presents the legal, social and policy changes to be considered by Namibia if it is to take its current position as an African success story to the next level. The Capstone Team firmly believes that Namibia can become the "Gateway to Southern Africa" by turning itself to a world-class administrative and logistics centre on par with other successful small nations like Singapore.

The Report builds on the Harambee Prosperity Plan (HPP), which outlined key priorities in effective governance, economic advancement, social progression, infrastructure development, and international cooperation. The Capstone team focussed on identifying some areas that will need reform if Namibia is to become the Gateway to Southern Africa. The recommendations focus on the following key illustrative areas:

Part Two (2) discusses strengthening Namibia's tourism sector. Since tourism is the third largest contributor to the Namibian GDP, the aim is to create a platform to bring Namibia to the world and the world to Namibia. We encourage Namibia to employ modern innovative technology resources aimed at optimizing and promoting the Namibian brand. Namibia should be viewed as a home, with tourists filling the role of welcome guests. With the aim of having these guests return to add value to the Namibian economy, we recommend a dynamic approach with the goal of creating heightened perceptions through national dialogue and awareness as well as, streamlining the investment strategies and filling the labour gaps.

Part Three (3) addresses Namibia's educational needs. Education in this context includes basic, tertiary and vocational education and training. In terms of basic education, both primary and secondary schooling, Namibia faces an entire host of challenges that need to be addressed. These include the imbalances between quantity and quality of teachers, elevated drop-out rates and grave disparity between educational institutions, to name but a few. We recommend various reforms through the piloting of the special economic zone concept, aimed at addressing some of these very challenges. In terms of tertiary education, the Namibian youth form the cornerstone of the Namibian future, economically, socially and even politically. Namibia needs, in addition to creating a national education policy and providing funding, to connect students to professional development opportunities outside of

the school building process. This can be done by facilitating a national dialogue geared towards international and entrepreneurship opportunities and moving towards a youth centred environment by investing in information and communication technology. Additionally, vocational education and training leads the way to global competitiveness, economic development and enjoyment and its significance is highlighted in the Harambee Prosperity Plan. As such, the move towards a better vocational education and training system is crucial to enhancing human capacity in Namibia.

Part Four (4) discusses strengthening Namibia’s international relations framework, and recommends measures aimed at promoting Namibia’s economic self-reliance. Currently, Namibia has an office of International Relations and Cooperation with a stated purpose of improving Namibia’s position of regional, continental and world issues affecting the nation’s national interests. The department of Bilateral Affairs focuses on strategic priorities specifically aimed at creating high and sustained economic growth, increased income equality and employment creation. An office for International Relations and Cooperation – Logistics Cluster (IRCLC) should be added to the list of strategic priorities. Since regional relations of a bilateral and multilateral nature are of paramount importance in Namibia, the IRCLC would be mandated to formulate, coordinate, implement and manage Namibia’s national interests and values to facilitate its position as a logistics hub. Through this office, Namibia would essentially be able to enhance bilateral and multilateral interactions; promote bilateral and multilateral agreements in order to give Namibia a secure foothold in the international system; promote Namibia’s policy objectives by conducting and coordinating Namibia’s international relations; establish a monitoring unit that will keep track of and advise the Namibian government on international developments as well as policy and domestic related matters; create pertinent ministries that will protect Namibia’s sovereignty and territorial integrity in tandem with the Ministry of Foreign Affairs and Ministry of Defence; contribute to the creation of international law and promote the enforcement thereof upon legislative approval and establish international relations by promoting regional and global integration, strengthening international partnerships for development and, contributing to regional and global relationships.

Part Five (5) discusses measures aimed at increasing Namibia’s foreign direct investment (FDI) by considering the necessary policy reforms. Since a steady flow of foreign investments into Namibia will undoubtedly contribute to monetary stability in the country, Namibia should leap at the opportunity to implement recommendations aimed at making it an attractive investment candidate. By adapting immigration rules aimed at temporally attracting talent; strengthen the one-stop-shop for investors;

focusing on marketing campaigns and financial support of underpenetrated sectors (small FDI); developing new and attractive opportunities for investors, such as a global call centre model; and investing in skills development as a driver of long term FDI and sustainable development, Namibia will remain in good standing with the international community when being considered as a recipient of investment income.

Part Six (6) discusses reforming Namibia's foreign investment laws, and recommends major changes to, or a repeal of, the Namibian Investment Promotion Act. While the preamble to the Act has a stated objective aimed at promoting domestic and foreign investment in Namibia, there is great uncertainty created in the body of the Act as to whether domestic investment is being favoured over, and to the detriment of, foreign funding. Our concern is that a cursory glance of the Act by an impartial outside investor would, unfortunately, give the impression that Namibia is in fact 'closed' for business, especially as many provisions create ambiguity, and in turn, uncertainty, for investors, both domestic and foreign. This has the potential to impede the country's economic growth as Namibia needs to continue to attract foreign capital to achieve its long-term growth objectives.

Part Seven (7) discusses strengthening Namibia's anti-corruption regime. While Namibia ranks very highly against other African nations in international transparency and anti-corruption rankings, if it is to become a world-class logistics hub it needs to develop world-class anti-corruption and transparency measures. Being the best in Africa is not good enough, and sells short Namibia's great potential to be a global leader and example to many other nations.

Our suggested amendments to the Anti-Corruption Act add crimes such as the acceptance of or solicitation for a bribe by foreign public officials and embezzlement committed by the private sector, as well as corruption in employment. We also propose adding a provision regarding illicit enrichment, which requires public officials to explain significant increases in wealth beyond what would be expected based on the official's salary. Our proposal here carefully changes the evidential burden while maintaining the protection of important rights of criminal defendants. The amendments also add a new section that provides for the freezing of assets and the forfeiture of proceeds of corruption. The proposed amendments also envision reducing the discretion to not prosecute corruption and empowering the ACC to conduct criminal proceedings.

We also propose strengthening the current draft Whistleblower Protection Bill to better protect those who report corruption, improvements to the Public Procurement Act, and enabling public interest litigation by private parties to fight corruption and redress the harm created by corruption. Finally, we encourage Namibia to develop a strong multi-sectoral alliance against corruption, and to devote more resources to the fight against corruption at all levels.

Part Eight (8) discusses reforming and modernizing Namibia's arbitration law. Our specific proposals include formally acceding to the New York Convention (something the international community believes Namibia has not done), enacting the UNCITRAL Model Law on Arbitration, and striving to create an international arbitration centre in Namibia.

Part Nine (9) proposes improvements to Namibia's fisheries licencing process, with a focus on full disclosure of beneficial ownership, clarifying the criteria for granting of fishing rights, a reduction in the opportunities to exercise discretion in the granting of licences, and a robust system of public disclosure.

The appendices contain details of our proposals and form and integral part of this Report.

SUMMARY OF RECOMMENDATIONS

SECTOR	RECOMMENDATION	PAGE
TOURISM	<p>Use social media to refine Namibia’s brand and promote tourism.</p> <p>Raise awareness regarding conservation efforts in Namibia.</p> <p>Change Namibian perceptions of tourism through national dialogue.</p> <p>Issue short-term working holiday visa’s to fill labour market gaps and ancillary need; and</p> <p>Increase domestic and foreign private Investment in tourism by streamlining the process for gaining permits and licenses.</p>	23
BASIC EDUCATION	<p>Pilot the special economic zone concept – or Special Education Zone (SEZ) – for the basic education sector in the northern region. Under the SEZ:-</p> <p>Brand Namibia as the cost-effective Education Hub in Africa, with a safe and creative learning environment for children and youth;</p> <p>Streamline teacher and student visa application processes;</p> <p>Lengthen teaching work permits from three to five years;</p> <p>Create education promotion bodies overseas to attract global academic institutes and students into Namibia;</p> <p>Institutionalize knowledge transfers from foreign schools/teachers to Namibian counterparts; and</p> <p>Teach English from Grade 1 in tandem with mother tongues.</p>	31
TERTIARY EDUCATION	<p>Expand opportunities for Namibian students to study abroad.</p> <p>Create an ecosystem for entrepreneurship in Namibia.</p>	43

Provide an internship model by hiring interns at government ministries and offices; and
Invest in information and communication technology.

VOCATIONAL TRAINING

Incorporate “Lesson Study” to enhance teaching quality of trainers as well as tailor the classes to students at the vocational training centers (VTC’s). Assist NTA in collecting career information of graduates from VTC’s as well as feedback on programs for future improvement.
Assist the Ministry of Labor and Social Welfare in enhancing its Namibia Integrated Employment Information System by improving accessibility, PR strategies and system infrastructure.
Assist NTA to change Namibians’ mindset on vocational training.

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INTERNATIONAL RELATIONS

Enhance bilateral and multilateral interactions that protect and promote Namibian national interests in line with the NDP4.
Promote bilateral and multilateral agreements in order to give Namibia a secure foothold in the International system.
Promote Namibia’s policy objectives by conducting and coordinating Namibia’s international relations.
Establish a monitoring unit that will keep track of and advise the Namibian government on international developments as well as policy and domestic related matters.
Create pertinent ministries that will protect Namibia’s sovereignty and territorial integrity in tandem with the Ministry of Foreign Affairs and Ministry of Defence.
Contribute to the creation of international law and promote the enforcement thereof upon legislative approval.
Establish international relations by promoting regional and global integration, strengthening international partnerships for development and,

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contributing to regional and global relationships.

FOREIGN DIRECT INVESTMENT	Adapt immigration rules to temporarily attract talents. Strengthen one-stop-shop for investors with the help of young Namibians. Focus marketing campaigns and financial support on underpenetrated sectors/small FDI. Develop new and attractive opportunities for investors, such as a global call centre model; and Skills development as the only driver of long term FDI and sustainable development.	58
REFORMING NAMIBIA'S FOREIGN INVESTMENT LAWS	Repeal the Namibian Investment Protection Act No. 199 of 2016; or Amend the contentious and harmful provisions of the Namibian Investment Protection Act No.199 of 2016 in accordance with the comments on the legislation annexed to this report.	65
STRENGTHENING NAMIBIA'S ANTI-CORRUPTION REGIME	Amend the Anti-Corruption Act in accordance with the draft legislation annexed to this report. Revise the Whistleblower Protection Bill in accordance with the comments in this report. Revise the Public Procurement Act in accordance with the comments in this report. Once enacted, credible and strong implementation and enforcement is needed. Increase the budget and size of the staff of the Anti-Corruption Commission, the Office of the Prosecutor-General and the Judiciary. Form an alliance between the Anti-Corruption Commission, the Ombudsman, civil society, local authorities and the media to educate the Namibian people and officials and mobilize them in the fight against corruption. Namibia should form national working groups and advisory groups. Existing platforms should ensure extensive public participation; Ensure fair and equal investigations and prosecutions of all cases. The prosecuting and	75

investigating bodies should refrain from making public comments on the quality of evidence or lack of resources in pending investigations or prosecutions of high-profile cases.

Enable anti-corruption public interest litigation by creating a public interest standing framework and supporting effective access to information by working with civil society and the private sector.

**REFORMING NAMIBIA'S
ARBITRATION LAWS**

Formally join the New York Convention on Recognition and Enforcement of Arbitration Awards.

98

Modernize Namibia's arbitration law.

Position Namibia as the premiere arbitration center for Southern Africa.

**IMPROVING NAMIBIA'S
FISHERIES LICENCING
PROCESS**

Set criteria for granting rights, licenses and quotas should which are clear, objective and (to the maximum extent feasible) non-discretionary.

108

Strengthen requirements for the disclosure of beneficial ownership.

Increase transparency/publication of information.



1. INTRODUCTION

NAMIBIA – THE SUCCESS STORY FEW HAVE HEARD ABOUT AND A FUTURE GATEWAY TO SOUTHERN AFRICA

Namibia is the African success story that should be making headlines. In 1990 Namibia gained its independence, after having been a German colony, a mandate under the League of Nations and an administrative extension of South Africa. By 2013, in almost record speed, Namibia was already declared an upper middle income nation, notwithstanding that significant income inequity and poverty still existed. Statistics, however, tell only part of the story.

While the world's economies struggled to recover from the aftereffects of the economic meltdown in 2007/08, Namibia nevertheless succeeded in reducing its GINI coefficient, the internationally accepted standard on the measurement of income inequality, by 25 points from 0.597 in 2009/10 to 0.572 in 2015/16. Extreme poverty (based on \$1.90 per day and measured by PPP (purchase power parity) has been reduced from the time of independence in 1990 from more than half the population to 22.6% in 2010. Over the same period, secondary school enrollment increased from 38% to 65% of the school age group. The literacy rate, which measures only bare basic knowledge, increased from 75.8% in 1991, which was for a developing nation already relatively quite high, to 90.8% by 2015. While these figures are impressive and demonstrate that Namibian success is strongly correlated with improved education, Namibia still has significant challenges.

On the Human Development Index of the UN Development Program, Namibia is ranked 12th in Africa, behind Seychelles and Mauritius, which are ranked 1st and 2nd, and also behind its neighbors Botswana and South Africa, which are ranked 6th and 9th respectively. But 12th in Africa still places Namibia only 125th in the world, which can at best be described as a middling rank. So one can ask why Namibia is considered a success story. And the answer is simple. Namibia has since its independence in 1990 made steady, step-by-step, progress, building a solid cultural and political foundation on which to build a prosperous future.

Namibia has taken the words of its founding father Sam Nujoma to heart: “Progress generates demand for more progress, and that is what ultimately drives and accelerates progress.” It is the demands of the Namibian people which generate ever more progress, demand for education and demand for fiscal frugality.

Namibia has until recently avoided the debt death trap of borrowing to pay for expenses. The Government followed a conservative or cautious fiscal policy. Government debt to GDP averaged just 21.59% from 1993 to 2016 when it suddenly ballooned by doubling to 40.70 %, which makes it comparable to similarly emerging nations. Annual economic growth had slowed to below 2% which necessitated taking on debt, but also made the repayment of that debt, particularly as a significant portion is in foreign currency, a challenge, notwithstanding that government expenses have recently been drastically cut by delaying or cancelling high cost infrastructure projects. But while attention on present day-to-day challenges are a necessity, political will requires envisioning a prosperous future.

This author, as an outside observer and friend of Namibia, believes that Namibia can “punch above its weight” and join the ranks of the world’s leading (small) nations, specifically Singapore, an Asian nation which moved from being a British colonial outpost to being a global financial and corporate centre and which now challenges the world with the educational performance of its students, and Estonia, a northern European nation which moved from being locked in the Soviet Union to being the inventor of Skype and which now challenges the world with its e-governance and e-residency programs.

Namibia can realize and ensure its potential by becoming “the” transport hub of Southern Africa, by being a solar energy producer and exporter to its neighbors, by being a tourist destination of choice, and, very importantly, by continuing to be a symbol of media freedom in Africa, as well as the world. On an index of media freedom, Namibia ranks 1st in Africa, and 24th in the world, just two spots behind Canada. Media freedom gives meaning to the words of Sam Nujoma: “The foundation of all good solutions to problems is discussion and debate.” And media is the core of this foundation.

Namibia also has assets that have served Singapore, Estonia and other dynamic small nations well. Namibia has a pivotal geographical location at the tip of Africa. Namibia has focused

on the education of its people as both Singapore and Estonia have. Namibia has made a virtue of stability as both Singapore and Estonia have. But as Singapore and Estonia have demonstrated, success requires more. The foundation of economic progress presupposes that a nation is a beacon to the world that it is open to do business and that it welcomes investors from around the world. Here, unfortunately, Namibia still falls short.

In the World Bank's ease of doing business ranking, Singapore ranks 2nd and Estonia, which, as noted, got a start only in 1991, already ranks 12th. Namibia, which became independent a year before Estonia, ranks 9th in Africa but just 108th in the world, considerably behind the African leader, Mauritius, which is 1st in Africa and 49th in the world, Rwanda, 2nd in Africa and 59th in the world, and Namibia's neighbor, Botswana, 3rd in Africa and 71st in the world. Still Namibia has the potential to surpass its African competitors and rank with the global leaders, Singapore and Estonia. As already noted, Namibia possesses still significant untapped assets: location, sun (solar), and natural resources. But for Namibia to realize its potential, good governance, sound fiscal and monetary policy, and economic planning will be required. President Hage Geingob's Haramabee Prosperity Plan will have to be regularly renewed and extended to 2050.

By applying Namibia's assets as the basis of its economic development and by educating all of its people, not just at the secondary school level, but at the tertiary (university) level, and, with all due respect, implementing recommendations from this Columbia Capstone Report, which have extended the Harambee Prosperity Plan and have recommended strengthening and deepening Namibia's rule of law regime with, among other things, the revision or amendment of its investment law. This law needs to stand as a beacon to the world that Namibia is a transparent country and open for investment so that Namibia can attract the significant investment it needs to be a prosperous country for all of its people. Namibia will then live up to the words of its founding father, Sam Nujoma: "The spirit of ubuntu – "I am because you are" and "you are because we are" – needs to pervade our [African] relationships at all levels in our [African] society, that is at company level, Government level, and especially at regional level, so that we [in Africa] can act as a family of nations ... We need to fast-track industrial development by bringing both high-tech and appropriate technology to our shores. We do not

have time to ride the learning curve which others have done before us.”

Openness is the path to success for Namibia as it will permit all to contribute, and creatively contribute, albeit only if economic activity is embedded in an equitable rule of law system. By 2050, the worldwide media will herald the success of Namibian openness by headlining the dynamic small tigers of the world: Estonia and Singapore as well as Namibia.

Jenik Radon, Esq.

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2. TOURISM

BRING NAMIBIA TO THE WORLD AND THE WORLD TO NAMIBIA

Travel and tourism play a critical role as Namibia emerges as the gateway to southern Africa. As the third largest contributor to Namibia's Gross Domestic Product (GDP), the sector is a critical pillar of the Namibian economy. With revenues expected to rise from 15.9 percent of GDP in 2014 to 21.6 percent of GDP by 2025, tourism is positioned to increase revenue, offer employment opportunities, spark investment and innovation, and raise Namibia's profile on the world stage.

The Namibian government's support for tourism development in legislative and policy arenas has grown significantly in recent years. Additionally, national development plans have highlighted the importance of the travel and tourism sectors respectively.

However, with an influx of visitors anticipated, Namibia needs to ensure that its tourism sector is prepared. This necessitates a dynamic approach to optimize the potential benefits which will follow.

Recommendations

- **Use social media to refine Namibia's brand and promote tourism;**
- **Educate tourists about conservation efforts upon arrival in the country;**
- **Change Namibian perceptions of tourism through national dialogue;**
- **Issue short-term working holiday visa's to fill labour market gaps and ancillary needs; and**
- **Increase domestic and foreign private investment in tourism by streamlining the process for gaining permits and licenses.**

2.1 Use social media to refine Namibia's brand and promote tourism

Namibia has an outstanding asset base which yields both attractive and unique tourism opportunities. This includes the landscape, wildlife, peaceful environment and a spectrum of indigenous cultures. Namibia is the only country in the world where the black rhino population, outside of protected areas, is increasing and, where the entire coastline is protected. That said, the country lacks a strong identity in

the international tourism market, and Namibia's resource limitations restrict its financial capacity to strengthen its brand.

Fortunately, data suggests that tourists visiting Namibia would go on to recommend it as a praiseworthy destination. This emphasises how powerful shared experiences could influence the tourism sector. It also proves a cost efficient way of exposing Namibia to the international community. Another equally important tool in promoting tourism in Namibia is social media. If used effectively, social media could have the effect of bringing Namibia onto the radar of many vacation destination sites. While this may seem like a farfetched proposition, its effect is far reaching and can generate a positive international branding for the country. The Instagram, Pinterest, Flickr, Twitter, and YouTube accounts can also produce data that can be used to sense-test global perceptions of the country for future campaigns to attract visitors or to promote Namibia. The National Tourism Board (NTB) has expanded the use of social media in recent years. For example, NTB shared conservation stories and travel experiences in the six-week "Conservation Destination" Facebook campaign in 2012. Posts, however, are irregular across these platforms. The most recent Flickr photo was shared in October 2013. In addition, messaging across these platforms are not integrated and many of these social media accounts are not referenced on the NTB website. This essentially creates gaps for message leakage and confusion.

Another, more exciting tool to be utilized to enhance Namibia's tourism sector includes participant-driven campaigns. With the growing prevalence in smartphone technology, these campaigns are increasingly accessible. Photo and video contests, for example, can engage not just visitors, but Namibian students from primary to tertiary levels, as well as creative associations and organizations across the country. While not necessarily essential, prizes could be arranged through NTB partners, such as accommodation with Namibia Wildlife Resorts or a free flight with Air Namibia. The key factors to consider for a successful social media campaign include, having consistent language to describe the campaign, with a possible hashtag; allowing ample time for participation (campaigns could even be ongoing or involve predictable annual contests) and adopting a centralized method of collecting entries that is widely accessible and promoted across all social media platforms.¹⁰

Namibia should also create a dedicated, easy-to-navigate website, with a possible title being "Boutique Namibia," which is supplemented and linked to four primary social media platforms. The website should

¹⁰ Photograph by Jordan Siemens, Getty Images, Carrie Miller. "How Instagram Is Changing Travel." National Geographic. National Geographic, 26 Jan. 2017, 1 May 2017.

launch with a large marketing effort: by implementing an international campaign targeting the Namibian people and overseas visitors to submit images, videos and stories that represent the uniqueness of Namibia. High profile Namibian cultural and political figures should be invited to publicly participate in the campaign. Namibian nationals should be encouraged to share stories with the international community via social media to further extend the campaigns reach. Campaign momentum can culminate with a Namibian concert featuring Namibian and international musicians and live streaming.



2.2 *Raise awareness regarding Namibia's conservation efforts*

Namibia prides itself on its conservation efforts, including its status as the only country in the world where the entire coastline is protected. As tourist numbers increase, Namibia will need to protect and preserve its rich environmental and cultural assets. These efforts span both legal and policy realms but, is primarily linked to the Namibian branding. Strengthening Namibia's reputation as a world champion in conservation is one step aimed at securing tourists.

As tourists arrive in Namibia, they should learn about conservation and how their actions help or hinder the environments they encounter during their stay. As international visitors fill out arrival forms, for example, and wait in line for passport control at Windhoek Hosea Kutako International Airport, they can

read a sign detailing Namibia’s current anti-poaching efforts. While installing signage may seem like a small step, it shifts some of the onus onto tourists and arms them with information about how to travel with an attitude of understanding and respect in Namibia. According to the Namibian Airports Company Annual Report 2012/13, Windhoek Hosea Kutako International Airport receives approximately 140,000 passengers every year on international flights.¹¹ A single sign at the passport control room could be read by thousands of people every year. The same could be done on the waterfront at Walvis Bay.

Another option to balance conservation goals and tourism sector development is to focus on high-value tourists rather than appealing to a wide base of potential visitors. While high-value tourists benefit Namibia, focusing exclusively on bringing in high net worth individuals leaves the tourism sector vulnerable to the changing tastes of individuals, as well as to economic and political fluctuations outside of the country’s control. With the current tourism levy system geared towards mass tourism and the potential growth of cruise and conference tourism, the best option is to plan for increasing tourist numbers.

Case study: Iceland

Countries such as Iceland can provide inspiration to Namibia on how to promote tourism, as well as how to adapt to the challenges of a rapidly growing tourist sector. Iceland has been successful at marketing itself as a destination for natural landscapes which resulted in the number of foreign tourists doubling since 2010, growing some 20 percent year after year, to more than 1.2 million in 2015.¹² The country has also promoted itself as a pit stop on long-distance flights, a strategy that Namibia could also consider.

The rapid growth in visitors has put pressure on infrastructure and prices and has caused environmental damage as some visitors have driven off of designated roads and disrupted vegetation and wildlife.

¹¹ Namibia Airports Company. “Annual Report 2012/13.” <http://www.airports.com.na/files/files/NAC%20Annual%20report%20for%20website.pdf>, p. 17.

¹² Icelandic Tourist Board. “Tourism in Iceland in Figures: May 2016.”, p. 5, May 2016, <http://www.ferdamalastofa.is/en/research-and-statistics/tourism-in-iceland-in-figures>.

2.3 *Change Namibian perceptions of tourism through national dialogue*

As visitors move through Namibia, they come in contact with hotel staff, taxi drivers, customs officials, bank tellers, cashiers, wait staff, and other people across many sectors throughout the country. Fast and friendly customer service will create positive travel experiences and keep tourists excited to return. Satisfied tourists are subsequent and fervent promoters of Namibia as an ideal tourist and investment destination to friends and colleagues.

A service mind set and skill base is still developing in Namibia. Sometimes, service connotes servitude to Namibians, dampening enthusiasm about helping tourists who visit the country. While customer service trainings are beneficial, these trainings may not feasibly reach all Namibians who come into contact with visitors.

A service mind set can also be spread through nationwide dialogue about the tourism sector. Service can be redefined as showing pride and ownership in the country through internal messaging about tourism, which is as important as external messaging. A metaphor to build upon is the idea of Namibia as a house or as a home. This theme may resonate well as Namibians often mention ideas of hominess and family when asked to describe their country, and the metaphor of building a Namibian house was used throughout the Harambee Report. Tourists should be seen as welcome guests to this home.

2.4 *Issue short-term working holiday visas to fill labour market gaps and other needs*

The majority of Namibia's current foreign visitors are visiting friends and relatives or on holiday, making up 46% and 39% of total tourist arrivals, respectively, in 2015.¹³ The National Tourism Investment Profile & Promotion Strategy 2016 – 2026 (NTIPPS) included promotion strategies for additional forms of tourism, including conference and cruise tourism. Another way to diversify the tourist base in Namibia is to issue short-term working holiday visas. This way, Namibia can tap into new and growing markets, particularly young professionals.

Visitors on short-term working holiday visas can also assist with current labour market challenges in Namibia. If these visitors are employed within the tourism sector itself, they can fill deficiencies in

¹³ Republic of Namibia. Ministry of Environment and Tourism. *Tourist Statistical Report 2015*.

operations and management roles and offer vocational training to increase customer service quality and knowledge.

The visa offering can guide visitors to participate in certain industry sectors and roles, and a marketing campaign can promote the option to target countries. The offering would increase Namibia's competitiveness in tourism compared with its regional neighbours and capitalize on a rising interest across the world to live and work in multiple countries. Cultural exchange between local and foreign staff can influence both how local employees think and work, as well as inspire foreigners to invest more deeply in the country in the long term, including coming back for return trips in the future or investing in local businesses.

Case study: New Zealand

New Zealand is a successful example of using working holiday visas to fill its labour market gaps, opening opportunities to 44 countries. The New Zealand immigration website details information about the working holiday visa. The specific criteria is clearly listed on their website.

The age range is 18-30 years and the duration is 12 months or 23 months if you are from the UK or Canada. Return flight tickets are required to prove short-term stay in New Zealand. Visitors on short-term working holiday visas should intend to travel after the work stint is over. This in turn stimulates tourism and diversifies income sources. To control the number of travellers into the country, New Zealand opens a different quota each year depending on different establishments with various countries. If qualified, applications are over the allocated quota, a lottery will help New Zealand authorities select recipients of these visas in a fair and transparent way. Clear instructions and links for travellers to find a job to cover expenses and enjoy their holiday are also on the website.

2.5 *Increase local and foreign private investment in tourism by streamlining the process for gaining permits and licenses*

The Namibian Government currently plays a central role in funding and operating businesses in the travel and tourism sector. In the most recent NTIPPS, the Government of Namibia is set to provide 60

percent of the funding for the N\$801 million tourism investment plan through 2016 - 2026.¹⁴ Reliance on government funding increases pressure on the national budget and slows the rapid adjustment to customer feedback that is necessary for the growth of the tourism sector.

Less capital intensive than most industries, tourism is an arena prime for private investment. Private companies can own and operate hotels, car rental shops, tour agencies, restaurants, and more. International brands, such as Hilton, Marriott and Hertz, associate Namibia with familiar global names. Meanwhile, local enterprises, like restaurants and boutique hotels, can provide innovative and uniquely Namibian experiences to visitors. Furthermore, small private business growth will increase employment opportunities for Namibians.

The Namibian government should also build local and foreign interest in the tourism sector by increasing the demand for tourism goods and services through marketing Namibia as a travel destination across the world. Similarly, by streamlining licensing and permit application processes for private companies and investors within Namibia, the local entrepreneurs can tap the growing tourism sector by building businesses that serve the foreign visitors.

A one-stop shop investment centre is ideal for the tourism sector. Speedy processing, effective and integrated management, and information sharing would be welcomed for investors. Additional incentives for investors can be considered, such as tax benefits and low interest loans for local enterprises.

The government can also facilitate cross-promotion and collaborations between businesses by creating forums, online or through conferences, to spread ideas and business strategies within the sector.

¹⁴ Republic of Namibia. Ministry of Environment and Tourism. *National Tourism Investment Profile & Promotion Strategy 2016-2026*.

3. EDUCATION

3.1 BASIC EDUCATION – SPECIAL EDUCATION ZONE

Education is a fundamental human right and essential for the exercise of all other human rights.

~ United Nations Educational, Scientific and Cultural Organization (UNESCO)

Namibia has achieved much success in basic education. Primary and secondary education is free of charge for all young Namibians. The school feeding programme ensures that children get nutritious meals at school every day, directly improving their attendance. This is made possible due to the Namibian government's unwavering belief in the importance of education.

That said, the low-hanging fruits have mostly been picked. Dropout rates, particularly in the secondary level, remain stubbornly high.¹⁵ Both the quality and quantity of teachers are still not on par with where Namibia aims to be. The disparity in school facilities between the capital and other parts of the country persist. This imbalance also extends to the quality of teaching. To tackle these challenges, the Ministry of Education, Arts and Culture have implemented a series of changes. For example, the three-phase reform, beginning in 2009, first resulted in institutional decentralization where fourteen regional offices were formed across the country. The second phase created staff secondments where administrators were obliged to work in one of the fourteen offices outside Windhoek. The final phase devolves budgetary powers to five regional offices that allow each to decide fund disbursement in areas where there is pressing financial needs. The Ministry also aims to scrap the Grade 10 national exams in 2018 which see the highest student dropout rates. These measures are specifically targeted at addressing some of the challenges mentioned above but, nevertheless create new challenges in and of itself.

Once the Grade 10 exam, one of the key factors to high dropout rates, is removed, there would be a quick upsurge in the number of upper secondary students and a swift downward pressure on the capacity of school facilities and teachers to handle the pressures associated with the growth in learners.

¹⁵ Ministry of Education, Arts and Culture, UNESCO, and UNICEF. "School Drop-out and Out-of-School Children In Namibia: A National Review 2015 (Abridged Version)." SpringerReference (n.d.): n. pag. 2015, 4 May 2017, [https://www.unicef.org/namibia/na.Creative_OOSR_Booklet_Final\(1\).pdf](https://www.unicef.org/namibia/na.Creative_OOSR_Booklet_Final(1).pdf).

A large increase in funding is needed to build more schools and hire more teachers. Greater finances are also required to increase the training of the existing pool of teachers. Access to more funding and poor teaching quality are the Ministry's biggest challenges going forward.

Recommendations

- **Pilot the special economic zone concept – or Special Education Zone (SEZ) – for the basic education sector in the northern region.**

Under the SEZ:-

- **Brand Namibia as the cost-effective Education Hub in Africa, with a safe and creative learning environment for children and youth;**
- **Streamline teacher and student visa application processes;**
- **Lengthen teaching work permits from three to five years;**
- **Create education promotion bodies overseas to attract global academic institutes and students into Namibia;**
- **Institutionalize knowledge transfers from foreign schools/teachers to Namibian counterparts; and**
- **Teach English from Grade 1 in tandem with mother tongues.**

3.1.1 *Pilot the Special Education Zone (SEZ) in the northern region, as a laboratory for new policies and legislation*

The SEZ harnesses some key features of the special economic zone concept and applies them in basic education. These features aim at creating a more enabling regulatory, investment and working environment for all involved in the education sector. The pilot SEZ is targeted at the northern regions where a large population of learners reside. For example, according to the 2015 statistics, the Ohangwena and Omaheke regions contain a combined 27 percent of learners which could be selected for the SEZ.¹⁶ The SEZ will potentially support creative policies and laws that can nurture an inviting climate for private investment, both domestic and foreign, and promote a welcoming, multicultural atmosphere for teachers and students from all over the world to learn from and teach alongside Namibians.

¹⁶ Ministry of Education, Arts and Culture, and UNICEF. Namibia Fifteenth School Day Report 2015. Rep. N.p.: n.p., 2015.

At the backbone of a successful logistics hub is a well-educated and talented population. Additionally, a successful logistics hub has the potential to harness the knowledge and expertise of people from all over the world to do business, learn and reside in Namibia. The SEZ can kick start the growth of such an inviting environment.

The special economic zone concept has been widely used around the world. Its practitioners, however, generally apply it to industrial sectors, particularly in manufacturing. It is defined as:

"...demarcated geographic areas contained within a country's national boundaries where the rules of business are different from those that prevail in the national territory. These differential rules principally deal with investment conditions, international trade and customs, taxation, and the regulatory environment; whereby the zone is given a business environment that is intended to be more liberal from a policy perspective and more effective from an administrative perspective than that of the national territory."¹⁷

The Ministry of Education, Arts and Culture has achieved much success at the primary and secondary levels. Building on its achievements, the Ministry aims to further reduce dropout rates and raise teaching quality, as well as increase student access to ICT and library facilities, and rapidly build on creating additional capacity in schools in hopes of accommodating more learners. Namibia's 2017/2018 budget allocation of N\$15.05 billion to education, however, is 16 percent lower than the prior year. Basic education and culture received N\$11.98 billion, of which 85 percent (or N\$10 billion) will go to staff salaries and remuneration, with the remainder going to infrastructure development.^{18,19} Despite

¹⁷ Farole, Thomas, and Gokhan Akinci. "Special Economic Zones: Progress, Emerging Challenges, and Future Directions." (2011): p. 3. The World Bank, <https://openknowledge.worldbank.org/bitstream/handle/10986/2341/638440PUB0Ext00Box0361527B0PUBLIC0.pdf>.

¹⁸ Brand, Gerda, et al. "Namibia Budget 2017/18: Making Impact Where It Matters." (2016), Deloitte, <https://www2.deloitte.com/content/dam/Deloitte/na/Documents/tax/Deloitte%20Namibian%20Budget%202017%20Infographic.pdf>.

¹⁹ Nakale, Albertina. "Education Budgets N\$10 Billion for Staff." New Era Newspaper Namibia. New Era Newspaper Namibia, 10 Apr. 2017, 27 Apr. 2017, <https://www.newera.com.na/2017/04/10/education-budgets-n10-billion-for-staff/>.

education – both basic and higher – being the top spending priority this fiscal year, a greater level of external funding is clearly required to finance the Ministry’s plans.²⁰

Current procurement laws restrict the Ministry of Education, Arts and Culture to tap the private sector investment, at home and abroad. A key priority that the Ministry has emphasized is to change procurement laws to allow the primary and secondary education sectors to pursue Public-Private Partnerships (PPP).²¹ At the time of writing, it is unclear and uncertain if these laws would be changed to permit the Ministry to freely attract and partner private educational institutes and investors. This issue is particularly pressing. The Ministry aims to remove the Grade 10 national exam in 2018, potentially reducing the dropout rate of sixteen and seventeen-year-old Namibians – keeping them in school and off the streets. But this move would dramatically increase the number of students in the basic education system, putting further strain on the existing school infrastructure.

A second priority that the Ministry aims to achieve is to increase the quantity and quality of teachers across Namibia. There is an insufficient number of teachers with expertise in English and IT literacy across both primary and secondary levels, and a general shortage of teachers in the secondary level.²² Particularly in English literacy, 98 percent of Namibian teachers were found, in 2012, to be “not sufficiently proficient” in the English language.²³ Teachers in Namibia generally face the issue of being under-qualified or unqualified. Unqualified teachers are defined as those with lower than Grade 12 education, while under-qualified teachers are those who do not have the specific teaching qualifications.²⁴ The Ministry has already begun a program, in conjunction with University of Namibia, to train some 4,000 unqualified teachers. There are, however, still a large number of under-qualified teachers.

Namibia currently welcomes foreign teachers via two channels. The first is through volunteer programs. Namibia works with the Peace Corps and World Teach to invite volunteer teachers into Namibia. The other is through bilateral agreements with SADC countries like Zimbabwe and Botswana.

²⁰ PricewaterhouseCoopers. "Budget." PwC. PwC, 27 Apr. 2017, <http://www.pwc.com/na/en/budget.html>.

²¹ Interview at Ministry of Education, Arts and Culture, March 16, 2017.

²² Interview at Ministry of Education, Arts and Culture, March 16, 2017.

²³ Kisting, Denver. "Namibia's Language Policy is 'poisoning' Its Children." *The Guardian*. Guardian News and Media, 10 Jan. 2012, <https://www.theguardian.com/education/2012/jan/10/namibia-english-crisis>.

²⁴ Interview at Ministry of Education, Arts and Culture, March 16, 2017.

More teachers, however, are needed to address the shortfall in quantity and quality. Foreign teachers should complement the skills and knowledge of their Namibian counterparts, not substitute them. Anecdotal evidence, however, suggests that foreign teachers, usually given a three-year work permit, do not get their visas renewed, despite the need for teachers in the country. This creates a fear of job security and is also counter-productive towards Namibia's aim to elevate educational standards to international levels.

The SEZ aims to plug the short-term gaps in funding and teaching. The Namibian government and its people are socially conscious of the importance of education. As a result, the SEZ concept of adopting more favourable regulations and policies in education, compared to other sectors, could potentially be easier to implement, politically. Procurement laws can thus be changed under the SEZ umbrella to attract domestic and foreign private investment that is sorely needed to build new capacity in schools, purchase textbooks and learning materials. The Ministry is also free to explore PPP models with other countries or investors that can be customized to fit Namibia's needs. Similarly, the regulatory environment – within the SEZ – will ease and permit more foreign teachers to enter the teaching force. This will plug the short-term need for teachers to handle the rapid increase in students beginning 2018, and jumpstart the benefits of an improved education that students, teachers and the economy can enjoy.

Whilst short-term challenges are being tackled, the SEZ also serves as a laboratory for new policies and laws that could potentially be rolled out to other sectors of the Namibian economy. In the long term, the SEZ would help overcome political interests in maintaining the status quo and aid in the push for structural transformation and political evolution. The education sector can become the champion that pushes all sectors of the economy to grow. A 2011 World Bank report on special economic zones cited the success of the concept in Mauritius as follows:-

“...the true success of the Mauritius EPZ [export processing zone] program was not job creation, investments, or exports per se, but rather the reform process, both economic and (critically) political, that it catalysed...”²⁵

²⁵ Farole, Thomas, and Gokhan Akinci. "Special Economic Zones: Progress, Emerging Challenges, and Future Directions." (2011): p. 16. The World Bank,

Piloting the SEZ in Namibia's northern region will also create a tangible measure of its progress, with the more sophisticated education environment located in Windhoek. The Education Management Information System within the Ministry of Education, Arts and Culture would be responsible for determining the necessary metrics for comparison. Incremental adjustments can then be made to policies in the SEZ to fine-tune its effects and outcomes. This also complements the newly decentralized and devolved educational administrative system in Namibia, allowing each of the 14 regional offices to benchmark against each other, using nationwide metrics creating a healthy, competitive environment. In the long-term, successful policies can be replicated across other regions in Namibia, even in Windhoek. The educational standards across the country can thus be elevated together – to international standards.

Namibia is familiar with the special economic zone concept. The Namibian government introduced the Economic Processing Zone (EPZ) Act in 1995, with little success. Consequently, there will be political resistance towards creating a SEZ in the country. The SEZ is also not a strong job creation tool since the education sector requires skilled teachers and is generally, not labour intensive. Given its small population, Namibia could not provide a large labour force to underpin the EPZ's manufacturing export businesses. To further exacerbate the situation, on-the-ground investigations revealed a general aversion towards foreigners entering the Namibian job market.

3.1.2 Brand Namibia as the cost-effective Education Hub in Africa, with a safe and creative learning environment for children and youth

The SEZ is just the beginning. Its long-term strategy is to position Namibia as the Education Hub of Africa – where the best and brightest come to study. Many established logistics hubs around the world – like Singapore, Hong Kong and Dubai – also boast having the best global educational facilities and talents. Exposing Namibian students and teachers alike to the world would raise education standards to international levels and brand the nation as the preeminent education hub in Africa. Equally, creating a multi-cultural, multi-ethnic learning environment would not only benefit Namibia, it would open the

<https://openknowledge.worldbank.org/bitstream/handle/10986/2341/638440PUB0Ext00Box0361527B0PUBLIC0.pdf>.

country, and the continent, to the world as the first port-of-call in Africa for volunteer teachers, foreign students and investors. The international education hub is an indispensable component of a logistics hub.

Namibia's relative political stability, low-crime and low-cost environment are important selling points. Its closest competitor for an education hub – South Africa – is undergoing a phase of political instability and has a higher cost environment than Namibia. Namibia can capitalize on this window of opportunity and act decisively.

Progress towards an education hub will be incremental and organic. Part of that push will be to form more bilateral or multilateral cooperative projects with other countries. The December 2016 agreement between Namibia and the European Union to develop early childhood education is a good example of a successful bilateral project. The N\$400 million support, however, is tapped from the European Development Fund. Given its status as a middle-income country, the chance of receiving developmental assistance is shrinking, and Namibia needs to wean itself from this source of funding. The SEZ would free the Ministry to pursue mutually beneficial cooperative projects with other countries.

An example of a model for sustainable development is the China-Singapore Suzhou Industrial Park. China learnt from Singapore's experiences and aspired to do better than them. Singapore benefitted from the low-cost environment to replicate its integrated development model that includes "industrial, housing, commercial, and recreational components in 'the Singapore way'." This holistic development approach can be applied in Namibia's education sector. The wider vision, for both China and Singapore, is to implement a model for "reform and innovation".²⁶ This is also a crucial aspect of development for Namibia.

²⁶ Farole, Thomas, and Gokhan Akinci. "Special Economic Zones: Progress, Emerging Challenges, and Future Directions." (2011): p. 104-105. The World Bank, <https://openknowledge.worldbank.org/bitstream/handle/10986/2341/638440PUB0Ext00Box0361527B0PUBLIC0.pdf>.

The “key principles for success” that can be replicated in the SEZ model are as follows:

“(1) the importance of high-level political commitment; (2) the need to align fiscal incentives among all partners (including local government); (3) the need to balance investments in infrastructure with a strong focus on “software”; and (4) the critical importance of putting in place an institutionalized process for learning and knowledge transfer between partners.”²⁷

Another part of the education hub strategy will be to attract international preparatory and boarding schools to build their campuses in Namibia. Singapore started the “Global Schoolhouse” program, in 2002, to position the city-state as a global education hub.²⁸ Today, Singapore houses the ISS International School, GEMS World Academy and United World College (to name a few) that provide high quality basic education for domestic and overseas students at globally recognized standards.



²⁷ Farole, Thomas, and Gokhan Akinci. "Special Economic Zones: Progress, Emerging Challenges, and Future Directions." (2011): p. 12. The World Bank, <https://openknowledge.worldbank.org/bitstream/handle/10986/2341/638440PUB0Ext00Box0361527B0PUBLIC0.pdf>.

²⁸ Clark, Nick. "Developing International Education Hubs in Asia." WENR. World Education News & Reviews, 08 July 2015, <http://wenr.wes.org/2015/07/developing-international-education-hubs-asia>.

Case study: Singapore's Global Schoolhouse Policy - pitfalls to avoid^{29,30}

Singapore's Ministry of Trade and Industry initiated the "Global Schoolhouse" in 2002 to capture a slice of the trillion dollar education market, grow the economy and create jobs. The spike in global talent would also raise the level of human capital to global standards. After more than a decade, however, the policy has met with mixed results. Financial viability due to high costs forced a number of spin-offs of world-renowned academic institutes like New York University's Tisch School of the Arts to pull out of Singapore. Others like University of Chicago's Booth School of Business relocated to Hong Kong to be closer to the Chinese market. Despite these high-profile examples, Singapore has attracted the likes of French business school INSEAD and Yale to establish a firm foothold in the city-state, with no signs of them heading for the exits.

Namibia's low-cost environment and its ideal position as gateway to the African continent should ensure that Singapore's lessons would not be repeated.

Education itself is a long-term investment and returns are not immediately visible. Private investors who build school infrastructure, for example, would need to see returns before making financial decisions. Part of that challenge is the availability of land that investors can acquire or lease where schools can be built on. This calls for land reform – a touchy subject in the country.

Namibians, however, are socially conscious of the importance of education. The government has consistently allocated the highest public spending in this sector. This psyche is essential for overcoming political resistance. The very concept of SEZ, as mentioned early, is to create a liberal regulatory and legislative environment. Under the SEZ, sensitive political issues like land reform can potentially be broached and tackled. The SEZ would also allow the flexible movement of higher skilled foreign teachers into Namibia that would complement the expertise of domestic teachers. This policy would arguably see less resistance since there is a clear need, for instance, for teachers in English and IT literacy, quelling fears of foreigners taking jobs away from Namibians. Ultimately, the SEZ is a laboratory for the government to experiment different policies, adapt best practices from other countries to the Namibian

²⁹ Tan, Jason. "What Happened to the Global Schoolhouse?" University World News, 16 Sept. 2016, <http://www.universityworldnews.com/article.php?story=20160913131137765>.

³⁰ Chi, Leisha. "Mixed Fortunes for Singapore's Overseas Campuses." BBC News. BBC, 10 June 2015, <http://www.bbc.com/news/business-33066007>.

context. The success of the SEZ depends entirely on the political will of the government to pursue innovative policies.

3.1.3 *Streamline teacher and student visa application processes; lengthen teaching visas from three to five years*

The SEZ exercises liberal regulation and legislation to attract investment and talent. Creating an enabling environment for the flow of teachers and students from around the world is, therefore, crucial to the education hub. The Namibian government should ease the administrative process for teachers and students to apply for a visa. This would encourage international learners and teachers to come to Namibia. Namibia does not see as many foreign students at present and the streamlining of student visas can wait. The more urgent challenge is with foreign teachers.

As mentioned in other sections of this report, the Namibian government should extend work permits for teachers, in particular, from overseas to five years from three. This move would assuage fears of job security that foreign teachers currently face. Part of this fear stems from the slow administrative response to visa extensions. The more important reason is that foreign teachers know their Namibian counterparts – who are a shoo-in – will very likely replace them once their visas have expired. These replacement teachers do not necessarily have the right skills, at the time, to take over. This creates an environment where transfer of knowledge and interaction between teachers, foreign and Namibian, are limited. As a result, the gap in teaching quality remains.

Equally, foreign teachers should complement the skills and knowledge of their Namibian counterparts, not substitute them. The aforementioned expertise in teaching English and IT literacy, for example, are in demand. A more transparent and detailed selection of foreign teachers would prevent an influx of personnel that could squeeze out Namibians who are equally capable. The Namibian government could selectively award five-year visas to foreigners who could plug the gaps in English and IT.

3.1.4 *Institutionalize knowledge transfers from foreign schools/teachers to Namibian counterparts*

One of the chief arguments against an increase of foreign entities and teachers in Namibia, gathered from on-the-ground research, is the lack of knowledge transfer to raise domestic expertise. To this end, the Ministry should create a two-way knowledge transfer institution, under the SEZ umbrella, to oversee expertise sharing. This institution should be built into any formal partnerships with other countries or organizations (e.g. the early childhood development programme with the EU) or within a school entity itself.

The “Lesson Study” initiative is a good way to institutionalize knowledge transfer within each school.³¹ This initiative creates a formal space where teachers, foreign and domestic, share best practices, experiences and crystalize the findings into curriculum or lesson plans. A similar organization should be formed for high-level partnerships between countries. The Sino-Singapore Suzhou Industrial Park offers a successful example. China established the “Adapting Singapore Experience Office”; Singapore created the “Software Project Office”. Both offices, which meet quarterly, are mandated to facilitate staff exchange, training, and “software transfer”. Chinese officials, who attended the training, were required to report what they have learnt and draft laws and policies that customize Singapore’s experience into domestic conditions.³² This formal transfer of knowledge and expertise can easily be applied in the Namibian context. A knowledge transfer office institutionalizes the sharing of information and expertise, and best practices in governance and implementation.

³¹ For more details, please refer to the Vocational Education and Training section

³² Farole, Thomas, and Gokhan Akinci. "Special Economic Zones: Progress, Emerging Challenges, and Future Directions." (2011): p. 109. The World Bank, <https://openknowledge.worldbank.org/bitstream/handle/10986/2341/638440PUB0Ext00Box0361527B0PUBLIC0.pdf>.

3.1.5 *Create education promotion bodies overseas to attract global educational institutions and students into Namibia*

Long-term success of the SEZ depends a lot on attracting the best and brightest around the world to pursue education in Namibia. To establish Namibia's brand name as the education hub of Africa, the Ministry should create education promotion bodies overseas to connect with foreign students. The British Council of the United Kingdom and the US Education Information Centre (USEIC) are two successful examples. Both offices are located in many countries, providing detailed information about academic institutions in the UK and US. The British Council and USEIC also offer advice to potential students on finances, entry tests and visa applications. The British Council takes it one step further, for instance, offering English classes and other enrichment courses. These overseas education promotion bodies are an influential channel for projecting Namibia's brand name and soft power. Namibia's long-term goal should be to establish such offices around the world.

3.1.6 *Teach English from Grade 1, in tandem with mother tongues*

Namibian youth should learn English from Grade 1 – instead of Grade 4 – in tandem with mother tongue education. Namibia made English the official language, upon independence in 1990, with the aim of unifying the country whose people spoke around 30 languages. This will increase the competitiveness of Namibians in the global economy. As recent as five years ago, about eight percent of Namibians spoke English.³³ Under the SEZ, an increase in English teachers should steadily raise the command of the language of students. On the other side of the equation, Namibian youth should be taught English once they begin basic education. The current setup requires primary school students to spend the first three years of formal education learning their mother tongues and completely transition to English in Grade 4. Children, however, find this abrupt change difficult.³⁴

Singapore implemented its bilingual policy in 1966. As the late Lee Kuan Yew, founding father of the city-state, said:

³³ Kisting, Denver. "Namibia's Language Policy Is 'poisoning' Its Children." *The Guardian*. Guardian News and Media, 10 Jan. 2012., <https://www.theguardian.com/education/2012/jan/10/namibia-english-crisis>.

³⁴ Interview at Ministry of Education, Arts and Culture, March 16, 2017.

"If we were monolingual in our mother tongues, we would not make a living. Becoming monolingual in English would have been a setback...We would have lost our cultural identity, that quiet confidence about ourselves and our place in the world."³⁵

Adoption, however, is challenging. There is going to be much resistance. As Harvard Business Review suggests, buy-in and belief by the people are crucial towards successful implementation.³⁶ Although the article refers to global businesses adopting English as a medium of communication, its challenges are similar. The government should lead this charge. Bilingualism not only increases Namibia's competitiveness in the world, it breaks down the language barrier in the country and builds the foundation of a multi-racial society. To make the next generation of Namibian children proficient in English, the Ministry should implement English-medium education from the outset.

3.2 TERTIARY EDUCATION – BUILD HUMAN WEALTH IN NAMIBIA

Since independence, government budget allocations towards education have affirmed the importance of investing in youth for Namibia's future. For a logistics and administrative hub, it is the skills and expertise of people that will determine growth as much as physical infrastructure. In addition to creating national education policy and providing funding, key roles of government in the education sector can include shifting national culture through messaging and national-level dialogue, as well as representing Namibia in intergovernmental and multilateral forums. As educational access, equity, and quality increase in the tertiary education sector, more can be done to connect students to professional development opportunities outside of the school building.

³⁵ Ong, Yunita. "Lee Kuan Yew's Legacy For Singapore: A Language Policy For A Globalized World." Forbes. Forbes Magazine, 23 Mar. 2015, <https://www.forbes.com/sites/yunitaong/2015/03/23/lee-kuan-yews-legacy-for-singapore-a-language-policy-for-a-globalized-world/#5ee86d9d3ef9>.

³⁶ Neeley, Tsedal. "Global Business Speaks English." Harvard Business Review, 31 July 2014, <https://hbr.org/2012/05/global-business-speaks-english>.

Recommendations:

- **Expand opportunities for Namibian students to study abroad;**
- **Create an ecosystem for entrepreneurship in Namibia;**
- **Provide an internship model by hiring interns at government ministries and offices; and**
- **Invest in information and communication technology.**

3.2.1 *Expand opportunities for Namibian students to study abroad*

Although peer institutions outside Namibia are interested in hosting Namibian students, few Namibian students study abroad each year. The key issue is lack of funding to support study abroad experiences.³⁷ A potential solution is to solicit donor grants specifically to support study abroad programs for Namibian students. Across the globe, student mobility is growing. In 2001, 2.1 million students in higher education studied abroad. In 2006, five years later, the number nearly doubled to approximately 4.1 million.³⁸

For Namibia, there are benefits of increasing international educational opportunities. In addition to personal development, students who study abroad are exposed to new skills and knowledge that they can bring back to Namibia, reducing the need for foreign workers and foreign teachers. As Namibian students engage with host countries abroad, they also expose more people to Namibia. This contributes to external knowledge and recognition of the country on a world stage.

A potential negative implication of increased study abroad opportunities for Namibian students could be that more qualified and motivated young people continue living abroad after finishing their degrees rather than returning to Namibia. One way to mitigate this is to embed study abroad summers, semesters, or years within degree programs that start and finish in Namibia. By increasing opportunities for short-term international experiences, motivated students can benefit from studying abroad without spending multiple years completing entire degree programs outside of Namibia.

Increasing such opportunities requires coordination between Namibian universities and peer institutions across the continent and the world. Fortunately, such coordination is already ongoing. Namibia

³⁷ Interview at Namibia University of Science and Technology (NUST), March 14, 2017.

³⁸ Current Infographics. Digital image. IIE: The Power of International Education, <https://www.iie.org/en/Research-and-Insights/Project-Atlas/Tools/Current-Infographics..>

University of Science and Technology (NUST) and the University of Namibia (UNAM) currently collaborate with other institutions on research and curriculum.

The key challenge is that there is insufficient funding available for qualified Namibian students to study abroad. Currently, students with greater personal access to resources are better able to access study abroad opportunities or to move outside of the country for tertiary education, rather than such opportunities being readily available to all students based on interest or merit.

There are multiple ways to address this issue. Instead of allocating more budgetary resources to study abroad programs, other options include specifically soliciting grants and scholarships to support students from outside organizations. This is a way of involving foreign resources towards a specific goal. Universities could manage and distribute the funding while the Namibian government could assist with attracting the funds. This option has potential challenges in so far as it may be time intensive to attract foreign interest, administer the funding to students who need it and follow up with funders. Additionally, there may be certain strings attached to funding and the funding may be temporary.

However, study abroad experiences offer a multitude of benefits to students and to Namibia as a whole. Young Namibians can meet and work with other youth around the globe, find common experiences, and build skills and expertise to benefit themselves and Namibia in the future.

3.2.2 *Create an ecosystem for entrepreneurship in Namibia*

Conversations are occurring across governmental agencies, educational institutions, and the private sector in Namibia, on the best ways of encouraging and supporting entrepreneurship. Efforts, particularly in education, are paying off. Namibia topped the Ashish J Thakkar Global Entrepreneurship Index for Africa in 2016.³⁹

While skills development is vital, Namibia also needs a better “ecosystem” for entrepreneurship in the country to allow fledgling businesses to grow and become sustainable.

Governmental policy plays a critical role in creating this ecosystem. University of Western Australia professor Tim Mazzarol studies the balance that governments should strike between a hands-on and

³⁹ Mara Foundation. "Ashish J. Thakkar Global Entrepreneurship Index 2016.", <https://s3.eu-central-1.amazonaws.com/mara-foundation/Ashish-J-Thakkar-Global-Entrepreneurship-Index-2016.pdf>.

hands-off approach to nurturing sustainable small business growth.⁴⁰ He advocates against grants, tax breaks, and other programs that incentivize entrepreneurship within certain sectors of the economy. Mazzarol wrote in an article for World Economic Forum in 2014:

“Care must be taken by governments not to try to pick winners or over engineer the system...“High growth firms by nature are inherently risky and highly innovative firms are typically unique. As such there is no magic formula for their success.”⁴¹

Instead, Mazzarol argues that governments should take on the role of facilitator, creating a climate in which entrepreneurship can flourish:

“Helping such firms to succeed is more about removing obstacles to their growth such as anti-competitive cultures, unfair taxation on small firms, unnecessary ‘red tape’ or lack of access to markets, skilled employees or investment capital.”⁴²

This ecosystem model would work well in Namibia. Increasing competitive access to capital and streamlining legal, bureaucratic, and regulatory frameworks should be top priorities.

3.2.3 Provide an internship model by hiring interns at government ministries and offices

Internships link academic studies and employment after graduation by providing an opportunity to explore a potential career path while developing work experience and professionalism.

The Namibian government can encourage private firms and non-profit organizations to create internship programmes by demonstrating a best practices model in government ministries and offices. Creating competitive internship positions at government ministries and offices will not only build the skills of Namibia’s leaders of tomorrow, it will also show companies a model of how to recruit, hire, manage,

⁴⁰ Mazzarol, Tim. “SEAANZ White Paper: Growing and sustaining entrepreneurial ecosystems: What they are and the role of government policy,” Small Enterprise Association of Australia and New Zealand, 2014, http://seanz.org/sites/seanz/documents/reports/SEAANZ_WP_01_2014_Mazzarol.pdf

⁴¹ Mazzarol, Tim. “6 ways governments can encourage entrepreneurship,” World Economic Forum, 29 December 2014, <https://www.weforum.org/agenda/2014/12/6-ways-governments-can-encourage-entrepreneurship/>.

⁴² Mazzarol, Tim. “6 ways governments can encourage entrepreneurship,” World Economic Forum, 29 December 2014, <https://www.weforum.org/agenda/2014/12/6-ways-governments-can-encourage-entrepreneurship/>.

and support interns. The Namibian government can draw on internship processes in city, state, and multilateral organizations for inspiration.

3.2.4 *Invest in information and communication technology*

Across sectors, information and communication technology (ICT) is a backbone for growth. In education, ICT allows students and teachers to access new information. Currently, ICT is cited as a challenge by educational institutions and the private sector. Among infrastructure improvement projects, developing ICT should be a top priority. One way to increase resources for ICT development could be to sell state-owned telecom companies and reallocating money and effort towards physical infrastructure development.

3.3 VOCATIONAL EDUCATION & TRAINING – ENHANCING HUMAN CAPACITY

Vocational Education and Training (VET) is crucial towards enhancing the human capacity Namibia needs in order to achieve its vision of becoming the gateway to Southern Africa. VET leads the way to global competitiveness, economic development, and employment. The significance of VET is also realized in the Harambee Prosperity Plan.

Recommendations:

- **Incorporate “Lesson Study” to enhance teaching quality of trainers as well as tailor the classes to students at the vocational training centers (VTC’s);**
- **Assist NTA in collecting career information of graduates from VTC’s as well as feedback on programs for future improvement;**
- **Assist the Ministry of Labor and Social Welfare in enhancing its Namibia Integrated Employment Information System by improving accessibility, PR strategies and system infrastructure; and**
- **Assist NTA to change Namibians’ mindset on vocational training.**

3.3.1 *Incorporate “Lesson Study” to enhance teaching quality of trainers as well as tailor classes to students at the VTCs*

“Lesson Study” is a teacher-led initiative aimed at improving teaching methods by sharing experiences and knowledge.⁴³ This unique program originated from Japan. Teachers get together in groups to share past experiences as well as teaching material, with the aim of planning study lessons under a specific goal or research question.⁴⁴ Once the content of the study lesson is formed, it will be implemented publicly and other teachers will observe and take notes. After the class, teachers share evaluations and areas of improvement with each other. After the evaluation, they will either refine the lesson and carry out an improved version of it, or move onto another topic. Details of the findings from the study lesson can be shared widely through reports or presentations. The “Lesson Study” program has seen a success not only in Japan but in multiple countries.⁴⁵

There is an urgent need to enhance the quality of trainers at the vocational training centres in Namibia. Without an improvement in the quality of teaching, Namibia will be unable to build on its human capacity required to operate a logistics and administrative centre. Ideally, an influx of foreign expertise capable of supporting the enhancement of the teaching quality should be pursued however; current immigration policies are not amenable to the increase of foreign trained educators. It is therefore important to fully utilize existing training programs which enable Namibian teachers to take responsibility in the improvement of the quality of education as well as, to customise lesson programmes that fit the local context.

“Lesson Study” will enable Namibian teachers to take ownership in improving the quality of classes by making them change agents, rather than the subjects of training.⁴⁶ The programme is flexible in terms of implementation, and it is relatively low cost since it can be incorporated into existing training programs.⁴⁷ “Lesson Study” utilizes domestic resources, which is faster and easier than bringing in overseas instructors - overcoming the domestic aversion towards bringing in foreigners. Improving the

⁴³ *LESSON STUDY SCALING UP PEER-TO-PEER LEARNING FOR TEACHERS IN ZAMBIA*. Washington D.C.: Brookings Institution, 2016. Print. Slide 3.

⁴⁴ Fernandez, Clea, and Makoto Yoshida. *Lesson Study: A Japanese Approach to Improving Mathematics Teaching and Learning*. New York: Routledge, 2009. Print

⁴⁵ Implementation by JICA include the Philippines and Zambia.

⁴⁶ *LESSON STUDY SCALING UP PEER-TO-PEER LEARNING FOR TEACHERS IN ZAMBIA*. Washington D.C.: Brookings Institution, 2016, p. 7.

⁴⁷ *LESSON STUDY SCALING UP PEER-TO-PEER LEARNING FOR TEACHERS IN ZAMBIA*. Washington D.C.: Brookings Institution, 2016, p. 14.

quality of vocational training is included in the Harambee Prosperity Plan (HPP) under the nine targets for social progression. Accordingly, “Lesson Study” can be incorporated into the efforts of HPP. With close coordination with the Japan International Cooperation Agency (JICA), “Lesson Study” will tailor the best training program for Namibians.

Without clear guidance from an experienced external organization (such as in the case of Zambia and JICA), Namibian teachers might not have the incentive or the know-how to proceed with “Lesson Study”. It is also a gradual, time consuming implementation process which requires multiple experimental phases to take place before getting successful outcomes. Namibian teachers may see this program as an additional burden, but with time as they start to see tangible results from the “Lesson Study”, it will gradually change the mind set of teachers nationally and motivate further progression.⁴⁸

3.3.2 Assist NTA in collecting career information of graduates from VTCs as well as feedback on programmes for future improvement

The Namibian Training Authority (NTA) currently lacks compiled data on the career paths and feedback of graduates of the various training centres.⁴⁹ Without such compilation of data, there is no way to improve or to get a better picture of the effectiveness of the training programmes offered.

Obtaining information on the career paths of students from VET training centres will enable the NTA to get a better understanding of the labour market. The NTA would gain better insight into which industries the training programs are proven to be effective, and where improvements should be made. In addition, feedback from students will also help NTA implement policies that would improve graduates’ chances of gaining employment.

Setting up a mechanism to collect data from VET graduates could potentially be time and resource consuming. Students might not submit their data for reasons which include a lack of internet access or simple a lack of motivation to do so. Measures to guarantee the accuracy of the data can also be challenging. Students may not seriously engage in or be fervent in submitting data for future program

⁴⁸ LESSON STUDY SCALING UP PEER-TO-PEER LEARNING FOR TEACHERS IN ZAMBIA. Washington D.C.: Brookings Institution, 2016, p. 18.

⁴⁹ Interview at Namibia Training Authority, 17 March, 2017.

improvements. In order to mitigate this burden it may be of value to incorporate the filling out of such information by students into the actual program.

3.3.3 *Assist the Ministry of Labour and Social Welfare in enhancing its Namibia Integrated Employment Information System by improving accessibility, PR strategies and system infrastructure*

Initiated in 2013, the NIEIS, launched by the Ministry of Labour and Social Welfare, serves as a platform for information on employment opportunities, connecting employers and the Namibian community.⁵⁰ The platform, however, has a number of deficiencies. One issue arises from the difficulty in accessing accurate information on government initiatives regarding employment as well as skills development. Another challenge is gauging the effectiveness of programmes intended to improve skills or levels of employment. More employers need to be aware of the NIEIS system and make use of the platform.⁵¹ The existence of the platform should be widely communicated among the Namibian people and made accessible to those without internet connection. Without widespread communication, the NIEIS is not fully utilised. The website seems to face some technical difficulties as, experience shows, access was not consistently available.

Informed employers would undoubtedly assist with job acceleration through the use of the portal. Currently, students that receive vocational training are left on their own to look for jobs after completion of their respective programmes.⁵² If the platform is transformed into a communication hub thereby providing more information on various government programmes, Namibians could utilize the NIEIS to locate resources and information easily.

Improving the IT infrastructure to boost accessibility, however, can take time and money, particularly in regions outside of Windhoek. It also takes a considerable amount of resources to gather comprehensive information and data on the various government and privately-run programmes. However, refining the NIEIS will definitely improve the connection between the labour market and employers, thus driving employment growth for the Namibian workforce.

⁵⁰ "What Is NIEIS All About." *NIEIS*. Namibia@Work.

⁵¹ According to Namibia@works website, there is a massive imbalance between the number of jobs offered versus the number of applications on the portal (*63 jobs currently online. 56964 resumes currently online (as of 4/18/17)* <http://nieis.namibiaatwork.gov.na/>).

⁵² Interview at Namibia Training Authority, 17 March, 2017.

3.3.4 *Assist NTA to change Namibians' mind set on vocational training*

Vocational training has a social stigma attached where its students are seen as school dropouts.⁵³ Eradicating this stigma is crucial. The government has taken initial steps to overcome this view. Vocational training, as mentioned in HPP, is the “backbone” for economic development, and is highly regarded under the plan.⁵⁴ The NTA has implemented a similar PR campaign to address this concern. On-the-ground research, however, indicates that the negative perception towards VET is still very much prevalent in society. Vocational training needs to appeal to the youth in order for them to acquire the skills that are needed to build Namibia’s human capacity and thus become the gateway to Southern Africa. The current video campaign on YouTube implemented by the NTA does not have the necessary reach towards Namibian youth, especially people without internet access. The Namibian government needs to strengthen its promotional messaging not only through the internet but through more conventional means, such as TV or print campaigns, in order to inspire more people to enrol in vocational training centres.

An improved image of vocational training would usher in more youth to the VET programmes offered. If the Namibian people can see that vocational training will lead to a prosperous future, it will motivate the Namibian community to pursue the training and alleviate the drop-out rates in the training programmes. Improving the image of vocational training is also included in one of the goals of the HPP, under the 9 targets of the social progression category. This means that there is a general consensus on the significance of this effort, which makes it easier for all stakeholders to implement any measures to improve the image of VET.

Finding the right message that would appeal to the people will be challenging; thorough research of societal and cultural factors would be crucial. Changing society’s perceptions take time and any promotional campaign has to be thought maintained as a long-term effort. The government, in association with the NTA, would have to carry out such campaigns vigorously, gather constant feedback and improve its messaging so that it truly resonates with Namibians.

⁵³ Interview at Namibia Training Authority, 17 March 2017.

⁵⁴ *Harambee Prosperity Plan*. Rep. Windhoek: Office of the President of Namibia, 2016, p. 45.

4. INTERNATIONAL RELATIONS

4.1 *Introduction*

Presently, the Ministry of International Relations and Cooperation has under its auspices, both a department of Multilateral Affairs and bilateral affairs. The former is responsible for the coordination of relations with regional and international organizations and has been doing so as part of its responsibility and overall mandate of the Ministry of Foreign Affairs in a number of multilateral meetings. The main purpose of these meeting has been to improve Namibia's position on regional, continental and world issues that affect the nation's national interests. The department of Bilateral Affairs is focused on building as many strategic partnerships as feasible and to support the priority areas of the Namibian government as outlined in the NDP4: high and sustained economic growth, increased income equality and employment creation. So while the current departments of bilateral and multilateral affairs deal with a web of political support linkages that give access to trade, investment, transfer of technology and many other valuable inputs, like tourism inflow, the office of International Relations and Cooperation would have the mandate to specifically focus on the development of Namibia's logistic hub. Among the top strategic priorities, Namibia should create an office for International Relations and Cooperation - Logistics Cluster (IRCLC) whose specific mission would be to formulate, coordinate, implement and manage Namibia's policies and international relations programmes and promote Namibia's national interest and values specifically, in relation to enhancing Namibia's position as a logistics hub and gateway to Southern Africa. This office would differ in scope from the current office of International Relations and Cooperation.

Recommendations

- **Enhance bilateral and multilateral interactions that protect and promote Namibian national interests in line with the NDP4**
- **Promote bilateral and multilateral agreements in order to give Namibia a secure foothold in the International system**
- **Promote Namibia’s policy objectives by conducting and coordinating Namibia’s international relations**
- **Establish a monitoring unit that will keep track and advise the Namibian government on international developments and policy and domestic related matters**
- **Create pertinent ministries that will protect Namibia’s sovereignty and territorial integrity in tandem with the Ministry of Foreign Affairs and Ministry of Defence.**
- **Contribute to the formulation of international law and promote the enforcement of the laws upon legislative approval**
- **Establish international relations by promoting regional and global integration, strengthening international partnerships for development, and contributing to regional and global relationships**

4.2 *How Regional cooperation can help establish Namibia as a logistics Centre*

Namibia needs to promote greater economic self-reliance through the work of the IRC. This would complement their vision 2030. Even though bilateral relations with South Africa – especially in finance, trade, communication, investment, fisheries, mining, and tourism – are of special importance, South Africa continues to exercise a great deal of pressure on Namibia through restrictive commercial practices, as exemplified by scholars like Clerck.⁵⁵ Namibia’s geographical position, her ports, basic infrastructure, relative freedom from congestion and a belief that it is easier to do business through the port of Walvis-bay than through other southern African ports, gives Namibia an opportunity to take over the gateway role. This is echoed by scholars who have done studies on Namibia’s potential and challenges.⁵⁶

⁵⁵ Clerck, G. (2008). “Industrial relation in Namibia since independence: Between neoliberalism and neo-corporatism?”, *Employee Relations*, 30 (4), p. 355-371

⁵⁶ Savage, C.J., Fransman, L. and Jenkins, A.K. (2012). “Logistics in Namibia: Issues and challenges”, Windhoek: Polytechnic of Namibia.

Namibia has established corridors [Trans-Kunene, Trans-Kalahari, Trans-Oranje, and the Walvis-Bay-Ndola-Lubumbashi (Trans-Caprivi)] that provide links to countries including: South Africa, Botswana, Zambia, Angola, and the DRC. The Walvis-bay Corridor Group (WBCG) was established in the year 2000 to engage in business development activities - thereby increasing cargo for ports and corridors linked to it, and to engage in the facilitation of corridor and infrastructure development. The group's key function is to facilitate trade via the corridors and their success is indicated by the volume of goods moving along the corridors, which grew 33% between 2005 and 2009.⁵⁷ Developing an advanced logistics cluster in Namibia could provide much needed services for corporations, thus encouraging investment for infrastructure improvement, enabling industrial skills capacity building and stimulating trade. By doing this, it could enhance the location's capabilities and potentially support Namibia's aspirations to make the gateway concept a reality.

4.3 *Current status of International cooperation in Namibia*

Regional relations of a bilateral and multilateral nature are of paramount importance in Namibia. Namibia's government regional development plan (NDP_4) specifically cites logistics as one of the four "economic priorities"⁵⁸. This also aligns with the proposed SADC Transport Sector Plan, part of the regional infrastructure development master plan, which focuses on four areas: improving access to the transport corridors value chain; reducing transportation costs; improving competitiveness and providing secure and safe transport services.

On 1 April 1990, Namibia became the tenth member of the Southern African Development Coordination Conference (SADCC; renamed the Southern African Development Community, SADC, in August 1992). Namibia went on to join the Common Market of Southern and Eastern Africa (COMESA), but was forced to withdraw in 2005 due to financial constraints,⁵⁹ the Southern African Customs Union (SACU) and the Common Monetary Area (CMA).

⁵⁷ World Bank (2005). "A Time to Choose: Caribbean Development in the 21st Century." Washington DC: World Bank.

⁵⁸ National Planning Commission. (2012). "Namibia's Fourth National Development Plan, NDP 4", Republic of Namibia, National Planning Commission: Windhoek.

⁵⁹ http://www.rowlandbrown-namibia.com/data/?wpfb_dl=319.

Namibia has also entered into various bilateral agreements with its neighbours.⁶⁰ It is important to look at what they are in order to identify gaps that the IRCLC can address.⁶¹

4.4 Challenges and how the IRCLC can overcome this gap

There is a challenge in cooperation of a railway head between Angola and Namibia. While Namibia built a railway head up till Oshikango, Angola, instead of meeting up with the Namibian railway head, built a parallel railhead up to Santa Clara. This is in violation of their existing agreement and leaves a gap between the two rail heads. The IRCLC would be in a position to facilitate meetings between government officials of the SADC region to minimize the barriers caused by the lack of cooperation between Angola and Namibia in regards to the railheads.

Multilaterally, currently, Namibia is a member state of the United Nations (UN), the African Union (AU), the South African Development Community (SADC) and the Commonwealth of Nations and these can be used to create partnerships that do not conflict with the current bilateral partnerships.

Currently, Namibia is not a member of Common Market for Eastern and Southern Africa (COMESA), and is therefore missing out on potential benefits in this regard. The increasing degree of integration of COMESA made it increasingly difficult to be both part of COMESA and SACU. COMESA became an FTA in 2000. Membership in the COMESA FTA required a reduction in tariffs and custom duties. As a member of SACU, Namibia could not implement these tariff reductions because South Africa, not a member of

⁶⁰ Pisani, Andre Du. "State, Society and Democracy: A Reader in Namibian Politics." *African Studies Review: Namibian Foreign Policy: Transformation and Emerging Global Orders (1989-1999)* 45.1 (2002): 297-312. Print.

⁶¹ These include a bilateral monetary agreement with South Africa (April 1990); an agreement between Namibia and Botswana on cooperation in culture and education (July 1990); a protocol of understanding between Namibia and Botswana on defence and security (July 1990); an agreement on a Namibia/Zambia joint permanent commission of cooperation (August 1990); an agreement between Namibia and Zambia regarding the supply of electric power (August 1990); a general agreement of cooperation as well as a joint commission of cooperation between Namibia and Angola (September 1990); a joint water committee with Botswana (November 1990); a memorandum of agreement for the supply of water between Namibia and South Africa (November 1990); and an agreement for the establishment of a joint commission of cooperation between Namibia and Tanzania (April 1991). In addition to these bilateral agreements, Namibia has ratified various SADC Protocols on Trade, Education and Training, Energy and the Combating of Drugs. Namibia is member of multiple trade integration bodies. Besides being a member of the World Trade Organization (WTO), the country is currently a member of the Cotonou Agreement with the European Union, the Southern African Development Community (SADC) with 12 other members, and the Southern African Customs Union (SACU) with Botswana, Lesotho, South Africa, and Swaziland.

COMESA, had the sole responsibility to set tariffs for SACU. The IRCLC would signal a larger market which will help to stimulate trade in services. The first beneficiary is likely to be the financial sector, which will be able to lend to larger industrialists seeking to benefit from economies of scale.

Coordinating and harmonizing national policies and strategies is more manageable in smaller groups. An IRCLC office that focuses specifically on these relationships will allow Namibia to increase its level of competition slowly while giving her domestic industries time to adjust. This ensures that issues that cause deadlock in multilateral negotiations are resolved by the political and diplomatic process at the regional level. Therefore, a dedicated IRCLC office is expected to result in faster development towards overall integration as its focus on these regional blocs is bound to expand until they finally converge to form expansive multilateral agreements in a global free trade arena.

This office would be able to avoid conflicting trade regimes. Firstly, it is not possible for a country to fall under two external tariff structures that are not perfectly aligned. Customs officials would have to deal with different tariff reduction rates, rules of origin, trade documentation, and definitions and could not do so where they conflict. The increasing range of requirements would create a multiplication in customs procedures and paperwork and, potentially, outright conflict. Due to these obstacles membership in two customs unions is a violation of the SACU agreement.

Multiple memberships stretch negotiation capacities to their limit, and in the case of developing countries, prevents them from actively participating in all proceedings at the WTO. The IRCLC would be able to take on this burden and free the government to tackle other more pressing issues.

The conflicts between the rules governing various regional trade blocs tends to complicate the goals of integration and leads to counterproductive competition among countries and institutions, which slows down the regional bodies' effectiveness. Some countries that belong to multiple regional trade blocs show little eagerness to sign and implement certain protocols as these may conflict with the practices, concerns and interests of some or all of the regional blocs. The IRCLC would be able to sort through the various agreements with its team of lawyers and form a process of complementarity across networks.

Differing bilateral relationships also encourage forum shopping, e.g. a German company likes the British BIT better than the German one, so it incorporates a British subsidiary and invests as a British company to take advantage of better terms.

A country belonging to more than one regional economic community faces multiple financial obligations. This can be a serious impact for Namibia, but one that the IRCLC would be able to tackle.

4.5 Conclusion

Transport corridors can accomplish much more than linking point A to point B. With the economic corridor concept, Africa's transport corridors can facilitate regional integration and trade, particularly in catchment regions. Planners can achieve this by carefully coordinating the social, economic and physical development of the corridors and their surroundings. Strategic planning tools are essential to this process, as is close cooperation among the countries concerned, which should harmonize their policies and their social and economic strategies and address other common issues.



5. FOREIGN DIRECT INVESTMENT: POLICY CONSIDERATIONS

5.1 Introduction

Namibia obtains most of its foreign direct investment from its natural resources sector (oil, uranium, diamonds, copper, zinc). As of 2015, the main countries investing in Namibia were respectively South Africa, the UK, the US, and Germany. The political stability of the country, under a strong democratic dominance of the South West Africa People's Organization since its independence, contributes to foreign investors' trust. The steady flow of foreign investments also contributes to monetary stability of the country.⁶²

For several years, within its liberal view of the economy, the government itself had actively supported the creation of partnerships between local and foreign companies to favor investment. The mining sector presents a perfect example of this attitude: the state-owned enterprise Espangelo Mining has been created under this model and currently holds exclusive rights for future mining exploitation. However, since 2014 the government started to tighten its control in certain sectors – such as natural resources- to strengthen the national economy. This, together with the consistent problem of low education levels and lack of skilled workers will potentially hamper foreign investments in the near future.⁶³

On the other hand, the Namibian government has proposed and already launched very significant infrastructure developments across the country, such as the modernization and enlargement of Walvis Bay and new cross-border railroads and mines. The Namibian Stock Exchange (NSX) had a strong performance, with an annualized return of almost 3% and a total return of 32% in the last 10 years and an annualized return of 5% in the last five.⁶⁴

⁶² Santander, "Trade Portal", <https://en.portal.santandertrade.com/establish-overseas/namibia/investing-3>, last update November 2016.

⁶³ U.S. Department of State, "2015 Investment Climate Statement – Namibia", <https://www.state.gov/e/eb/rls/othr/ics/2015/241676.htm>, no last update disclosed

⁶³ Frontera, "News", <https://fronteranews.com/news/africa/how-to-invest-in-namibia/>, no last update disclosed.

⁶⁴ Frontera, "News", <https://fronteranews.com/news/africa/how-to-invest-in-namibia/>, no last update disclosed.

Namibia has also dropped in the World Bank Ease of Doing Business Index, from 88th in 2015 to 108st in 2017, mainly due to reported difficulties in licensing and business creation. This came unexpected, after a strong FDI increase from 2014 (USD 4.7 billion) to the USD 13.8 billion of 2015.⁶⁵ In 2016, the data seem to confirm a positive trend, even if still far from the record Q4 of 2015. It is also worth noting that China is collaborating in the new Walvis Bay Port project.⁶⁶

Recommendations

- **Adapt immigration rules to temporally attract talents**
- **Strengthen one-stop-shop for investors with the help of young Namibians**
- **Focus marketing campaign and financial support on underpenetrated sectors/small FDI**
- **Develop new attractive opportunities for investors, such as a global call centre model**
- **Skills development as the only driver of long term FDI and sustainable development**

5.2 *Adapt immigration rules to temporally attract talents*

According to many expert interviews, Namibia is on the right path to grow. However, this same growth can be exponentially accelerated if new projects and developments are co-lead or advised by international experts. An organic learning on complex topics such as infrastructure development might take decades, and the current influx of foreign talents is too small to help. Indeed, the current visa process is lengthy and cumbersome, the backlog on applications is considerable and increasing⁶⁷ and the short visa span granted is not ideal for project development (especially given that renewals are rarely granted).

Namibia should adopt an easy-to-obtain 5 year visa for experts in selected fields (e.g., infrastructure developments, education, tourism) linked to specific projects and to the obligation of boosting skills-building for locals – for example, at least 3 Namibians should work in close

⁶⁵ Santander, “Trade Portal”, <https://en.portal.santandertrade.com/establish-overseas/namibia/investing-3>.

⁶⁶ Santander, “Trade Portal”, <https://en.portal.santandertrade.com/establish-overseas/namibia/investing-3>.

⁶⁷ Expert interview.

contact with an expert. A dedicated team in the immigration ministry should be appointed to review the applications for this new visa, to close the waiting time.

5.3 *Strengthen one-stop-shop for investors with the help of young Namibians*

Despite its valuable support, the Namibia Investment Centre has ample room for improvement particularly, in facilitating FDI in Namibia. One concern is that private and public entities have to push international tenders through the Namibian diplomatic network because the NIC does not have the resources/ capacity to perform the task.

Accordingly, while re-designing internal processes or allocating more of the budget would be ideal, an alternative fast and streamlined approach is through the creation of a team of young, motivated Namibians within the NIC, specifically tasked with supporting and following up on requests for information and assistance from small and medium investors. Already applied in Estonia, this model has proven very effective in stimulating FDI. This can be achieved by training young talented Namibians to take on this responsibility, which is on par with the aforementioned job creation initiatives and alleviate any budgetary restraints. In addition, it opens up opportunities for the young graduates to enter the job market – the churn rate will be high (with employees potentially being hired by the same investors they help) and consequently, new job openings will be created.

5.4 *Focus marketing campaign and financial support on underpenetrated sectors/ small FDI*

Recently, there has been a sizable influx of FDI in Namibia (e.g. from China)⁶⁸ and potential investments are still in the pipeline. However, many experts also agreed on the fact that there is a significant potential to attract medium and small size FDI, currently under the radar of many institutions.

We are of the view that together with the development of a taskforce of young Namibians dedicated to this typology of FDI, it is necessary to start marketing Namibia as the land of

⁶⁸ <https://www.newera.com.na/2016/03/10/chinese-investment-exceeds-n60-billion-mark/>.

opportunities for small investors from neighboring regions – especially South Africa. Together with stressing the untapped opportunities for investment (e.g., infrastructure, tourism, etc.) financial facilitations, such as tax breaks on profits, must be provided for small to medium size investments.

5.5 *Develop new attractive opportunities for investors, such as a global call centre model*

Namibia is bursting with opportunities, but they seem to be concentrated in a few, consolidating sectors – again, the best examples are infrastructure and natural resources. These sectors are often extremely capital intensive, and already saturated in terms of employment.

It is therefore, necessary to create new and diverse initiatives to bring attention and interest into Namibia particularly, on the financial markets. For example, Namibia has all the potential to become a hub for global call centre outsourcing. As an English-speaking country, located in prime time zone, Namibia is aptly suited to take advantage of the North American, European, African and Asian markets. Namibia has the strategic positioning and capability to exploit these factors which serves as a hidden weapon in steering investment towards itself.

5.6 *Skills development as the only driver of long term FDI and sustainable development*

The logistics hub vision, and the potential growth it can bring to Namibia, is hardly sustainable in the long term. No country can become a regional leader in a given sector, if its human capital does not master the necessary skills. Off course, much has been done and much more will need to be done to reform the education system in Namibia – however, the question arises as to whether this enough?

It is necessary to quickly develop training courses focused on those key skills that can become bottlenecks for the development of the country. A perfect example would be the ability to manage and operate the machinery used to develop the ports. Training courses of this nature should be implemented immediately. It may be of value to consider providing this training alongside secondary education schooling (i.e. high school) if not part of the core curriculum then

at least as an extra-curricular activity. It could also be made an additional tertiary education course that yields some form of certification. This would ultimately speed up the training process while helping young Namibians to find early job security.



6. REFORMING NAMIBIA'S FOREIGN INVESTMENT LAWS - REFORM OF THE NAMIBIAN INVESTMENT PROTECTION ACT NO.199 OF 2016

6.1 Introduction

The Namibian Minister of Finance⁶⁹, in the 2017/2018 budget statement, noted that “*the Namibian economy is emerging from a perfect storm.*”⁷⁰ This was stated in the context of the country’s preceding years slow economic growth, weakened progression in commodity prices and uncertainty in the geopolitical environment. Furthermore, Namibia in 2016 also experienced heightened challenges in relation to liquidity and anticipated cash flows.⁷¹

As a result, Namibia is about to confront uncertain and fragile times,⁷² and therefore, it is of primary importance that the country develops “*policies to improve domestic resilience, economic and market diversification, regional integration and national competitiveness.*”⁷³ Economic diversification is vital to the country’s long term economic growth and can be achieved by building on the Namibian Government’s long term developmental planning objectives aimed at creating a balanced economy.⁷⁴

A streamlined approach which advances, as oppose to inhibits or hinders, growth is an essential step towards realizing Namibia’s potential of becoming the *Gateway to Southern Africa*. One such approach is to direct efforts towards the enhancement of Namibia’s investment climate, which includes a comprehensive review of the Namibian Investment Protection Act (“the Act”).⁷⁵ The Act should stand as a symbol to investors, domestic and foreign alike, that Namibia is a nation where responsible business can be conducted. The Act,

⁶⁹ MP, Calle Schlettwein

⁷⁰ Republic of Namibia, Budget Statement for the 2017/2018 Financial Year, <http://www.mof.gov.na/documents/27827/345303/Budget+Statement+2017.pdf/9310da77-51f1-4e76-8d2a-f37c987af344>.

⁷¹ Republic of Namibia, Budget Statement for the 2017/2018 Financial Year, p. 3.

⁷² Republic of Namibia, Budget Statement for the 2017/2018 Financial Year.

⁷³ Republic of Namibia, Budget Statement for the 2017/2018 Financial Year, p. 15.

⁷⁴ Harambee Prosperity Plan and NDP4 Report.

⁷⁵ No. 199 of 2016.

like all investment acts, is not only a legal instrument but also a powerful PR tool which is a concept too often overlooked.⁷⁶

It is against this backdrop that Namibia should develop proactive diversification strategies, which create a sustained, job intensive and inclusive economy. The country should gear government policies towards trade liberalization, modern investment regulations (based on generally accepted international practices) and priority projects with wider economic impact. Namibia should also engage in high profile publicity efforts aimed at informing the international community about its progress.⁷⁷ In pursuing the aims of these strategies, Namibia should leverage on its natural resources, geographical location and market size to establish sound infrastructure and an attractive investment climate, as well as building a skilled labour force. A strong legal framework and robust law reform process is also a crucial and indispensable component in the development of the economy to ensure reliability and assurance that all investors seek.⁷⁸

A major catalyst in the achievement of these diversification objectives will be largely dependent on Namibia's ability to obtain constant and increased domestic and foreign investment. Foreign direct investment (FDI) should be of particular importance to Namibia as it contributes to productivity and income growth beyond that of domestic investment,⁷⁹ as well as permits the country to repay its Eurobonds⁸⁰.

⁷⁶ OECD Report, *Foreign Direct Investment for Development: Maximizing Benefits, Minimizing Costs* (2002).

⁷⁷ OECD Report, *Foreign Direct Investment for Development: Maximizing Benefits, Minimizing Costs* (2002).

⁷⁸ The World Bank Group, *Investment Climate*,
<http://www.worldbank.org/en/topic/competitiveness/brief/investment-climate>.

⁷⁹ OECD Report, *Foreign Direct Investment for Development: Maximizing Benefits, Minimizing Costs* (2002) p. 9.

⁸⁰ U,S \$500 million Eurobond (2012);US \$750 million (2015).

The benefits of increased FDI will not accrue automatically across all sectors of the Namibian economy. However, FDI has the potential to trigger technology spill overs, assist with human capital formation, contribute to international trade integration, create a more competitive business environment and enhance enterprise development.⁸¹ This all will contribute to Namibia's economic growth and will alleviate the high rate of underemployment.

As a means to facilitate investment, Namibia recently enacted the Namibian Investment Protection Act ("the Act"),⁸² which repeals the previous Foreign Investment Act.⁸³ There have been many concerns raised in relation to this Act⁸⁴. The Minister of Finance in the 2017/2018 budget statement acknowledged these concerns and announced that they are being addressed.⁸⁵ This review of the Namibia Investment Protection Act

What did Singapore do right?

Singapore is an attractive model of reference when considering an optimal environment for foreign direct investment. In 2016, Singapore, despite being a small country, rose to the spot of 10th most attractive destination in the world for foreign direct investment according to A.T. Kearney's (A.T.) FDI Confidence Index. This is accredited to its open and integrated economy and friendly attitude towards foreign investors. Singapore has established itself as a global financial hub with a dynamic economy, stable political environment, effective governance and educated population. The index highlights that Singapore's domestic market size, cost of labour, regulatory transparency and lack of corruption are the major considerations when deciding whether to invest in the country. According to the World Bank Doing Business 2016 report, Singapore is consistently ranked as one of the easiest places to do business.

This can also be linked to Singapore's legal framework, in terms of which foreign businesses are treated on equal footing with local investors. Notwithstanding this, Singapore does retain state sovereignty in particular sectors namely, telecommunications, broadcasting, legal services and news media². Notably, the country also offers tax concessions where a foreign investor registers with the Economic Development Board and there are also no provisions forcing foreign investors to transfer ownership to local interests.³

1. The 2016 A.T. Kearney Foreign Direct Investment Confidence Index: FDI on the Rebound (2016) available at <https://www.atkearney.com/research-studies/foreign-direct-investment-confidence-index/2016> at 19-20
2. The 2016 A.T. Kearney Foreign Direct Investment Confidence Index: FDI on the Rebound (2016) available at <https://www.atkearney.com/research-studies/foreign-direct-investment-confidence-index/2016> at 19-20
3. The 2016 A.T. Kearney Foreign Direct Investment Confidence Index: FDI on the Rebound (2016) available at <https://www.atkearney.com/research-studies/foreign-direct-investment-confidence-index/2016> at 19-20

⁸¹ OECD Report, *Foreign Direct Investment for Development: Maximizing Benefits, Minimizing Costs* (2002), p. 5.

⁸² No. 199 of 2016.

⁸³ No. 27 of 1990.

⁸⁴ Interviews.

⁸⁵ Republic of Namibia, Budget Statement for the 2017/2018 Financial Year, p. 9.

will build upon the concerns of the Namibian community and provide Namibia with an opportunity to develop a sound legal and policy framework to ensure that the country is able to improve its investment climate and conditions.

Recommendations

- **Repeal the Namibian Investment Protection Act No. 199 of 2016; or**
- **Amend the contentious/harmful provisions of the Namibian Investment Protection Act No.199 of 2016 in accordance with the comments annexed to this report.**

6.2 *What is the current investment climate in Namibia?*

Namibia obtains a considerable amount of its FDI from South Africa, China, Australia and Canada. The Namibian government has undertaken to *'strengthen macroeconomic fundamentals as a basis to long-term fiscal sustainability and the sustained funding interventions to grow the economy.'*⁸⁶

The government, in pursuit of its objectives, has embarked upon numerous initiatives to realign public revenue to expenditure and development priorities. The government has also expressed its optimistic medium term outlook for fiscal and economic policy forecasts in Namibia.⁸⁷

Despite these efforts, access to FDI has been a challenge for Namibia. As highlighted in the Namibian Eurobond Prospectus, *"Foreign direct investment, which comprises equity capital, re-invested earnings and other capital inflows, has historically been relatively low for a country of Namibia's size."*⁸⁸ In fact, there has been a reduction in investments in equity capital and a decrease in profit margins of foreign enterprises operating in Namibia.⁸⁹

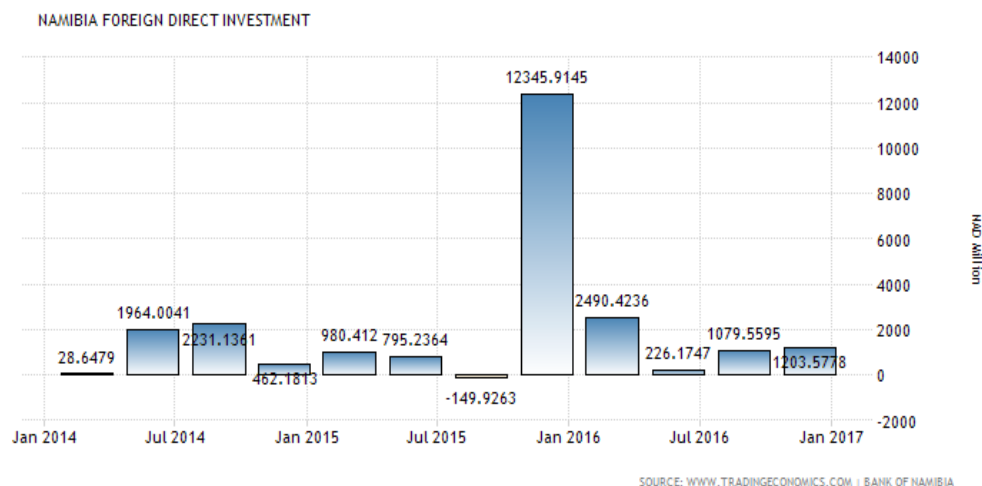
⁸⁶ Republic of Namibia, Budget Statement for the 2017/2018 Financial Year, p. 35.

⁸⁷ Republic of Namibia, Budget Statement for the 2017/2018 Financial Year, p. 35.

⁸⁸ Republic of Namibia, Eurobond Prospectus (2015) at 10.

⁸⁹ Republic of Namibia, Eurobond Prospectus (2015) at 81.

The following chart sets out the relevant information regarding FDI into Namibia for the periods indicated:-



Namibia’s FDI grew from its all-time low of -1535.08 Million NAD in the fourth quarter of 2011 to 1203.5778 NAD Million in the fourth quarter of 2016. Despite this, “*Namibia’s FDI amounted to N\$851 million during the second quarter of 2015 (a decrease from N\$2.0 billion during the second quarter of 2014).*”⁹⁰ The above chart indicates that Namibia’s growth drastically declined from 12,345.9145 Million NAD in the fourth quarter of 2015 to 1,203.5778 Million NAD in 2016.

6.3 What are the challenges that Namibia faces in terms of FDI?

Foreign investors looking to invest in Namibia will naturally consider the potential risks associated with their investment. Where investors perceive any obstacles to FDI, they may have powerful incentives to adopt a wait and see attitude.⁹¹ This means that if investors risk perceptions are heightened, they will require greater inducement to invest in Namibia.⁹² The

⁹⁰ Republic of Namibia, Eurobond Prospectus (2015) p. 10.

⁹¹ OECD Report, *Foreign Direct Investment for Development: Maximizing Benefits, Minimizing Costs* (2002) p. 8.

⁹² OECD Report, *Foreign Direct Investment for Development: Maximizing Benefits, Minimizing Costs* (2002) p. 8.

following risks factors are prevalent in Namibia:-

- Namibia has for the most part relied on its mining sector to sustain its economy which is vulnerable to adverse commodity price fluctuations and subject to high capital and labour costs.⁹³
- The rate of underemployment and unemployment, deficiencies in infrastructure, shortages in skilled labour and the challenging business environment, directly inhibit the country's economic growth and diversification strategies.⁹⁴
- Namibia, as a member of the South African Customs Union (SACU), which provides for "*common external and excise tariffs throughout South Africa, Botswana, Lesotho, Namibia and Swaziland*"⁹⁵ conducts a large portion of its trade with SACU members. As a result, Namibia has become extremely reliant on the SACU revenue which accounts for a large portion of its total revenue. In terms of this relationship, there is a Common Revenue Pool (CRP) in terms of which tariffs are pooled and paid out to each member country based on an agreed tariff. This is detrimental to Namibia in so far as the SACU revenue is extremely volatile which may result in a lack of confidence in the Namibian domestic market.⁹⁶ The uncertainty and disagreement in relation to the CRP formula could also result in the termination in the SACU arrangement, leaving Namibia at a revenue loss, increased deficit and slowed economic growth.⁹⁷
- Another risk factor, not totally unrelated to the aforementioned SACU risks, includes the fact that the Namibian dollar is closely linked to the South African rand on a one to one basis and the South African rand is also the legal tender in

⁹³ Republic of Namibia, Eurobond Prospectus (2015) p. 8.

⁹⁴ Republic of Namibia, Eurobond Prospectus (2015) p. 9.

⁹⁵ Republic of Namibia, Eurobond Prospectus (2015) p. 10.

⁹⁶ Republic of Namibia, Eurobond Prospectus (2015) p. 10.

⁹⁷ Republic of Namibia, Eurobond Prospectus (2015) p. 10.

Namibia.⁹⁸ This means that Namibia is largely dependent on the South African monetary policy with its own associated risks.

- Namibia places stringent requirements on ownership on communal land and in terms of the Communal Land Reform Act 5 of 2002, foreign nationals are restricted from owning agricultural and commercial land. This effectively impacts on investment into and industrial growth on commercial land.⁹⁹
- Namibia has been declining in the World Bank's ease of doing business rankings and moved from its (already unattractive) rank 151 (out of 189) in 2015, for the 2014 financial year,¹⁰⁰ to 165 in 2016, for the 2015 financial year¹⁰¹. Namibia then took a further dip in the rankings to rank 172 in 2017, for the 2016 financial year.¹⁰² This heightens investors risk perceptions in so far as business conditions are not conducive to their global businesses and in fact becoming even less so.
- Namibia has not managed to effectively brand itself on an international scale and the country falls under the radar when compared to its neighboring counterparts.

6.4 *What are the possible drawbacks of increased FDI into Namibia?*

It should be noted that, in our view, any drawbacks of increased investment into Namibia should be weighed in relation to potential benefits and, moreover can, in any event, be mitigated. The possible drawbacks and mitigation strategies include the following:

⁹⁸ Republic of Namibia, Eurobond Prospectus (2015) p. 58.

⁹⁹ Republic of Namibia, Eurobond Prospectus (2015) p. 13.

¹⁰⁰ World Bank Flagship Report, Doing Business 2015: Going Beyond Efficiency, 12th Edition (2014) p. 4-

¹⁰¹ World Bank Flagship Report, Doing Business 2016: Measuring Regulatory Quality and Efficiency, 13th Edition (2015) p. 5.

¹⁰² World Bank Flagship Report, Doing Business 2017: Equal Opportunity for All, 14th Edition (2016) p. 7.

- There is a chance that increased FDI into Namibia could have the effect of potentially “crowding out” domestic investment.¹⁰³ That said, even if this is the case, the net effect would still be beneficial as there is less domestic funds available in the country to sustain local business ventures.
- Namibia may not be able to reap the benefits of increased FDI at the same level as developed nations until there is a higher standard of education and technology and nevertheless, not until it becomes less reliant on the SACU revenue. There is an argument that increased FDI would, as a result, preclude domestic businesses from utilizing the business opportunities. However, to counter this argument, it’s suggested that where there is increased foreign participation in financial markets and infrastructure, more opportunities for domestic participation will follow.
- Another concern that could arise is that that the allowance of foreign enterprises to engage with domestic businesses could deplete foreign reserves.
- Foreign presence in Namibia may hurt competition. However, this is only the case where the “competition law framework in Namibia is weak or weakly enforced.”¹⁰⁴ Additionally, it is suggested that increased foreign enterprises in Namibia will positively impact on domestic competition thereby leading to “higher productivity, lower prices and more efficient resource allocation¹⁰⁵.”

¹⁰³ OECD Report, *Foreign Direct Investment for Development: Maximizing Benefits, Minimizing Costs* (2002) p. 9

¹⁰⁴ OECD Report, *Foreign Direct Investment for Development: Maximizing Benefits, Minimizing Costs* (2002) p. 16-

¹⁰⁵ OECD Report, *Foreign Direct Investment for Development: Maximizing Benefits, Minimizing Costs* (2002) p. 16.

6.5 Challenges faced by the enactment of the Namibia Investment Protection Act

The Namibian Eurobond prospectus states that “*Namibia is an open economy and foreign investment is encouraged by the Government.*”¹⁰⁶ This statement conflicts with the investment obligations contained in the Act, which was enacted after the issuance of the Eurobonds. The major concern relates to whether the Act, as presently drafted, promotes and protects foreign investors and, in reality, facilitates an ‘open’ economy or whether in fact, it does the opposite.

Investors looking towards Namibia will not only consider the profitability and value of their potential investment, but will also consider any regulatory changes and constraints that will affect their investment. A cursory glance of the Act by an impartial outside investor would, unfortunately, give the impression that Namibia is in fact ‘closed’ for business.¹⁰⁷ While it has been communicated¹⁰⁸ that the Act was drafted with the intention to promote investment opportunities, it will likely have the opposite effect and Namibia needs to remain cautious of legislative frameworks that will impede the country’s economic growth.

What makes Malta so great?

Malta is an exemplary example of an attractive foreign direct investment framework. Malta happens to be one of the smallest countries in the world that is leveraging on its advantage of being aptly placed geographically with an acute ability to access both the Mediterranean and North African markets to facilitate foreign direct investment. Malta managed to successfully diversify its economy by switching from a labour intensive based economy to a know-how economy. As a result, it adapted to the international business market, through high productivity, a skilled workforce, strong infrastructure and a modern telecommunications sector, making it ideal to foreign investors. Moreover, Malta has a stable political environment, with competitive labour costs. The government has adopted a pro-foreign investment approach with added fiscal and investment incentives.

Malta has opened its economy up to foreign investors and, “*the government offers generous tax incentives for investments in industrial projects including, preferential taxation rates (5% instead of 35%); tax credits on investments (up to 50% of the amount invested or 50% of the first two years’ salary of new jobs created); reduced tax on reinvested profits; incentives for job creation; soft loans for promoters of industrial projects; and indefinite work permits for shareholders with more than 40% shares.*”²

1. Santander Trade Portal, Malta: Foreign Direct Investment, available at <https://en.portal.santandertrade.com/establish-overseas/malta/investing>

2. Santander Trade Portal, Malta: Foreign Direct Investment, available at <https://en.portal.santandertrade.com/establish-overseas/malta/investing>

¹⁰⁶ Republic of Namibia, Eurobond Prospectus (2015) p. 80.

¹⁰⁷ This includes many of the ownership provisions contained in the Act which effectively discourage foreign investors from keeping their returns in the country and expanding their business. The consequent effect being that there are less employment opportunities. Please see comments on the Act attached.

¹⁰⁸ Interview.

A successful investment policy should attract foreign investors and create an enabling environment. It should strive to achieve maximum transparency and institutional predictability. The preamble to the Act has a stated objective aimed at promoting domestic and foreign investment in Namibia. However, there is great uncertainty created in the body of the Act as to whether domestic investment is being favored over, and to the detriment of, foreign funding. In the event that this was intended, it is our view that, a pursuit of this nature would only be practicable if foreign investors were lining up in numbers.

This leads us to our major concern regarding the Namibian Investment Protection Act. The Act appears to have been drafted upon the underlying assumption that Namibia has sufficient private (domestic) investment, so as to preclude foreign investors from even considering Namibia as a potential investment candidate. If Namibia was in fact in a position to do this, economic growth and diversification would not be of concern. The spillover effect of this would result in Namibia being less reliant on foreign imports from South Africa, as well as on the SACU revenue, and consequentially, electricity and water supply strategies and projects would gain traction. It follows that employment rates would surge and Namibia would reach a greater level of economic and political stability.

Accordingly, it is our submission that the Act, enacted in August 2016, closes off the economy to any outside influence in the market and does not benefit Namibia, but instead, effectively harms and hinders the nation. We would even go as far as suggesting that the Act essentially serves as a “lawyer’s full employment Act.” The ambiguity and careless draftsmanship creates loopholes for unfavorable interpretation which effectively deters foreign investors from doing businesses in Namibia¹⁰⁹, especially those who have other choices and who are not familiar with Namibia.

¹⁰⁹ This is evidenced by the ambiguity in the definitions of “business activity” and the careless use of the word “any”. There is also no clarity as to what an expansion is and what distinguishes a major expansion from a minor expansion. Please see attached the comments on the Act.

6.6 *Review of the Namibian Investment Protection Act*

Appendix B contains our comments on the Act. This should not be seen as a comprehensive review. This review focuses more on areas that need strengthening rather than identifying issues that have been handled well. However, from this focused and illustrative perspective, it is recommended that the Act, which is critical to the financial and economic health of Namibia, be reconsidered.¹¹⁰ The Namibian government should either repeal the Act in its entirety or, alternatively, embark on a comprehensive review of its provisions towards a more liberal legal framework that meets the stated goals of the law and that becomes a symbol of Namibia's readiness to be a place where all can do business.



¹¹⁰ Oil: Uganda's Opportunity for Prosperity (2012) p. 112.

7. STRENGTHENING NAMIBIA'S ANTI-CORRUPTION REGIME

7.1 Introduction

A successful logistics hub cannot exist without a strong legal and institutional framework that promotes and facilitates public trust and confidence. Such a hub needs to attract many different parties. International capital is mobile. If parties do not have a high degree of confidence in the institutions supporting the hub, they will simply invest their capital somewhere else.

Corruption damages businesses, industries, institutions, and impairs social cohesion.¹¹¹ It undermines the rule of law and erodes justice. Establishing strong, transparent and accountable institutions will enhance investment and competition and promote public sector integrity, governance efficiency and entrepreneurship.¹¹² Implementing measures to deal with corruption will also prevent unexplained and undocumented forfeiture of money and hence will encourage foreign direct investment in Namibia. To ensure this, Namibia needs good governance and a credible and comprehensive anti-corruption framework. As Head of the Anti-Corruption Commission (ACC) Paulus Noa stated, “*We cannot accelerate Namibia’s economic growth and development if we do not tackle corruption head on.*”¹¹³ The Government, in the Harambee Prosperity Plan (*HPP*), recognizes that effective governance is a pre-condition toward the achievement of its sustainable development objectives.¹¹⁴

Namibia performs better in international corruption rankings than most of its peers in sub-Saharan Africa.¹¹⁵ However, as a stable middle-income country, Namibia should aim for an

¹¹¹ Saying no to Bribery and Corruption – A Guide for New Zealand Businesses,

<https://www.justice.govt.nz/assets/Documents/Publications/Ministry-of-Justice-Anti-Corruption-Guide.pdf>.

¹¹² OECD, Issue Paper on Corruption and Economic Growth, available at <https://www.oecd.org/g20/topics/anti-corruption/Issue-Paper-Corruption-and-Economic-Growth.pdf>.

¹¹³ ACC, National Anti-Corruption Strategy and Action Plan 2016-2019, p. 7.

¹¹⁴ Harambee Prosperity Plan, p. 7.

¹¹⁵ By its very nature as a secretive act corruption is difficult to measure, and any study that attempts to compare relative levels of corruption in different countries should be treated cautiously.

international rather than regional standard and compete with other logistics hubs and economic centres with similar conditions. Namibia is currently ranked fifth (5th) among sub-Saharan African countries, but only 53rd out of 176 countries in the *Transparency International's Corruption Perception Index*.¹¹⁶ To become a gateway to southern Africa and attract investments from across the globe, Namibia needs to look beyond Africa and become one of the highest-ranked nations globally. This is achievable. Namibia has the potential to perform on the same level as other small countries that are known for their strong legal system and reliable institutions such as New Zealand¹¹⁷ and Singapore¹¹⁸.

Through the development of a strong anti-corruption framework, Namibia would also be investing in the people and be taking proactive measures to address the concerns of the youth to ensure that they have a prosperous future ahead of them. Moreover, a reputation as a country with a strong and fair legal regime attracts not only tourists but also enhances international relations. It is well-established through global surveys and studies¹¹⁹ that a strong anti-corruption regime and strong rule of law correlate with development, economic growth and investments.

Accordingly, the highest anti-corruption standards are required for Namibia to realize its goal of becoming a successful logistics hub. Namibia should turn its already strong institutions and political stability into an even stronger, namely internationally recognized, anti-corruption framework.

¹¹⁶ Transparency International, Corruption Perception Index 2016, (2017), accessible at http://www.transparency.org/news/feature/corruption_perceptions_index_2016.

¹¹⁷ Rank 2 in Transparency International, Corruption Perception Index 2016.

¹¹⁸ Rank 7 in Transparency International, Corruption Perception Index 2016.

¹¹⁹ See studies of OECD, <https://www.oecd.org/g20/topics/anti-corruption/Issue-Paper-Corruption-and-Economic-Growth.pdf>; and IMF, <http://www.imf.org/external/pubs/cat/longres.aspx?sk=43888>.

Recommendations

- **Amend the Anti-Corruption Act in accordance with the draft legislation annexed to this report.**
- **Revise the Whistleblower Protection Bill in accordance with the comments in this report.**
- **Revise the Public Procurement Act in accordance with the comments in this report. Once enacted, credible and strong implementation and enforcement is needed.**
- **Increase the budget and size of the staff of the Anti-Corruption Commission, the Office of the Prosecutor-General and the Judiciary.**
- **Form an alliance between the Anti-Corruption Commission, the Ombudsman, civil society, local authorities and the media to educate the Namibian people and officials and mobilize them in the fight against corruption. Namibia should form national working groups and advisory groups. Existing platforms should ensure extensive public participation;**
- **Ensure fair and equal investigations and prosecutions of all cases. The prosecuting and investigating bodies should refrain from making public comments on the quality of evidence or lack of resources in pending investigations or prosecutions of high-profile cases.**
- **Enable anti-corruption public interest litigation by creating a public interest standing framework and supporting effective access to information by working with civil society and the private sector.**

7.2 *What is Namibia doing in the fight against corruption?*

The Namibian Government has expressed a clear desire to eliminate corruption in Namibia and an understanding of its importance. The Government, in the HPP, acknowledged the paramount importance of accountability and transparency, stating that the “lack of

accountability may lead to increased levels of corruption in a country with attendant negative consequences for economic growth and development.”¹²⁰ When it comes to policy, Vision 2030 aims to eliminate corruption and the National Development Plan 4 provides for the government to be “fully committed to addressing corruption at all levels.”¹²¹ A technical working committee published the National Anti-Corruption Strategy and Action Plan 2016-2019 (NACSAP) as the result of a consultative process including public hearings; discussions with specific stakeholders, experts and academics; an investigation into international best practice; a literature study as well as a study of all relevant national laws and international treaties and conventions.¹²² Implementation of the NACSAP is a goal of the HPP in the following areas:

- Increasing the level of political accountability;
- Preventing corruption in government offices, ministries, agencies and state-owned enterprises;
- Strengthening efforts to deter corruption;
- Conducting extensive anti-corruption education;
- Preventing corruption in the private sector; and
- engaging civil society and the media in combating corruption.¹²³

Moreover, the ACC was recently reformed through an amendment to the Anti-Corruption Act¹²⁴ (ACA). These reforms included appointment of a Permanent Secretary, who is responsible for the efficient management and administration of the ACC.¹²⁵

However, many of the anti-corruption strategies lack coordination and a sound implementation plan, as well as a comprehensive and equitable approach to deal with conflicts of interest and

¹²⁰ HPP, p. 12.

¹²¹ Namibia’s Fourth National Development Plan, 2016/17, http://www.npc.gov.na/?wpfb_dl=37.

¹²² ACC, National Anti-Corruption Strategy and Action Plan 2016-2019, p. 4.

¹²³ ACC, National Anti-Corruption Strategy and Action Plan 2016-2019.

¹²⁴ Anti-Corruption Act, 2003 (Act No. 8 of 2003).

¹²⁵ Anti-Corruption Amendment Act 2016, Government Gazette of the Republic of Namibia, No. 6156, 25 October 2016, p. 3.

declarations of assets by public servants.¹²⁶ This could impair the international perception of Namibia as a world-class logistics centre.

Namibia declined on Transparency International's 2016 Corruption Perception Index by one point from 53rd to 52nd and, at the same time, dropped a number of places on the international rankings from 45th to 53rd.¹²⁷ The drop in rank can partly be explained by the addition of the Caribbean Nations that were not included in the ranking in 2015. Nevertheless, it is a setback, in that there was no improvement in the ranking, in achieving the goal of pillar one of the HPP (effective governance and service delivery) to be the least corrupt country in Africa by 2020.¹²⁸ Another goal under HPP's effective governance pillars is to increase Namibia's score on the Ibrahim Index of African Governance sub-index for accountability to 90 points by 2020,¹²⁹ but Namibia dropped under to only 60.4 points in 2015.¹³⁰

The remainder of this section sets out some proposed actions and reforms that will help become not just an African leader, but a global leader, in the fight against corruption.

7.3 *Legal Reforms*

7.3.1 *The Anti-Corruption Act*

Above all, a revised Anti-Corruption Act is needed as a strong symbol of the will to enhance and broaden the ACC's mandate to ensure a comprehensive and effective fight against corruption, making Namibia an international champion in good governance that attracts foreign investment and business. A draft for an amended Anti-Corruption Act can be found in Appendix A.

Namibia has shown progress and efforts for legislative reform in recent years. The Anti-Corruption Act itself was amended in 2016, introducing the role of the Permanent Secretary to

¹²⁶ IPPR/Hanns Seidel Foundation, Namibia and the United Nations Convention against Corruption (UNCAC), October 2016, p. 5.

¹²⁷ Transparency International, Corruption Perception Index 2016, (2017), accessible at http://www.transparency.org/news/feature/corruption_perceptions_index_2016.

¹²⁸ HPP, p. 17.

¹²⁹ HPP, p. 17.

¹³⁰ Ibrahim Index of African Governance, available at <http://iiag.online/>.

be responsible for the efficient management and administration of the ACC.¹³¹ In general, the legal framework for anti-corruption in Namibia is relatively strong – however, changes are needed if it is to compete with countries such as Singapore, Hong-Kong and New Zealand to provided logistics services as the Gateway to Southern Africa.

Enforcing the law is challenging enough. Without a solid legal basis, an effective and credible fight against corruption becomes practically impossible. A strong legal framework will strengthen Namibia’s anti-corruption efforts. It will also ensure Namibia’s compliance with the international agreements it has ratified such as the United Nations Convention against Corruption (UNCAC), the SADC Protocol against Corruption and the African Union Convention on Preventing and Combating Corruption. Under UNCAC, a review mechanism of implementation was established to assess every country’s implementation of and compliance with UNCAC. In 2015, Namibian institutions were assessed in the first phase of the mechanism under the auspices of the United Nations Office of Drugs and Crime (UNODC), comprising of representatives of the Ethiopian and Canadian governments and UNODC officials, which delivered a final report.¹³² The report identifies illustrative gaps in the legal framework that Namibia should address and has provided recommendations/suggestions.

Our suggested amendments add crimes such as the acceptance of or solicitation for a bribe by foreign public officials and embezzlement committed by the private sector, as well as corruption in employment. This will fill gaps in the ACA and fulfil the requirements of UNCAC. Our proposed amendments also include a provision regarding illicit enrichment. Combined with an effective financial disclosure regime, criminalizing illicit enrichment has come to be used as an effective key tool to combat corruption, especially when obtaining

¹³¹ Anti-Corruption Amendment Act, 2016 (No. 10 in 2016).

¹³² Available at

https://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/2016_01_29_Namibia_Final_Country_Report_.pdf.

evidence is one of the main obstacles in the fight.¹³³ It is recommended by Art. 20 UNCAC. Illicit Enrichment legislation has been criticized by some as a violation of human rights such as the presumption of innocence, the right to silence and the principle of legality.¹³⁴ However, the European Court of Human Rights decided that such provisions reversing presumptions can be according to the presumption of innocence if certain standards are taken into account.¹³⁵ Our suggested language carefully changes the evidential burden while maintaining the protection of important rights of criminal defendants.

The amendments also envision changes in the wording so that discretion is reduced. In particular, it increases the rule of law when it comes to the decision to take the case to court by reducing the discretion of the Prosecutor-General and empowering the ACC to conduct criminal proceedings. This will enhance public confidence that prosecution (and non-prosecution) decisions are free from political influence. This will also likely increase the number of prosecutions and convictions.

The amendments also add a new section that provides for the freezing of assets and the forfeiture of proceeds of corruption, bringing the ACA in line with the POCA. Regulating the freezing of assets in the ACC itself also stresses the significance of the crime of corruption and hence strengthens deterrence, which is in and of itself a goal. The section on the protection of informers and information is also amended broadly, bringing it in line with laws that are internationally considered strong such as the Singapore Prevention of Corruption Act and the Hong Kong Prevention of Bribery Ordinance.¹³⁶ Namibia's stable government and institutions allow and ask for a legislative basis in the fight against corruption that aims for the highest

¹³³ Linda Muzile et al., „On the take: Criminalizing Illicit Enrichment to Fight Corruption,“ Stolen Asset Recovery Initiative (The World Bank, 2012), p. 7, https://star.worldbank.org/star/sites/star/files/on_the_take-_criminalizing_illicit_enrichment_to_fight_corruption.pdf.

¹³⁴ Jeffrey R. Boles, „Criminalizing the Problem of Unexplained Wealth: Illicit Enrichment Offenses and Human Rights Violations,“ p. 869, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2588488.

¹³⁵ *Salabiaku v. France*, European Court of Human Rights, 1988; those circumstances are (a) the primary responsibility for proving matters of criminal substance against the accused rests with the prosecution and (b) the presumptions are rebuttable.

¹³⁶ U4 Anti-Corruption Resource Centre/ Transparency International: International good practice in anti-corruption legislation, February 2010.

international standards and is in compliance with international agreements such as UNCAC.

7.3.2 *The Whistleblower Protection Bill*

Namibia has taken a significant step in the fight against corruption by creating a Whistleblower Protection Bill, which is currently before Parliament.¹³⁷ A solid whistleblower protection system can change the climate for non-tolerance of corruption and be the fundamental tool of exposing more wrongdoing.¹³⁸ It can prevent scandals erupting and at the same time deter further corruption and will therefore attract more parties to Namibia as a logistics hub.¹³⁹ However, it is also important to convince private and public employees that they will be protected when they disclose corruption, which has to be contextualized with Namibia's small population and a culture where "everyone knows everyone."¹⁴⁰ Creating a culture where whistleblowers are celebrated rather than stigmatized is therefore of utmost importance.¹⁴¹ A strong whistleblower protection system moreover shows Namibia's commitment to UNCAC, particularly Articles 32, 33 and 37, and fulfils one of the most important promises of the HPP, which was to enact a Whistleblower Protection Act by September 2016.¹⁴²

The tabled Bill provides for the establishment of a Whistleblower Protection Office and a Whistleblower Protection Advisory Committee.¹⁴³ The Bill is commendable in offering a wide range of actions constituting improper conduct as well as different options for making disclosure.¹⁴⁴ It is moreover wide in that it is applicable to non-state actors and covers a

¹³⁷ B. 2-2017, Parliament of the Republic of Namibia, available at http://www.parliament.na/index.php?option=com_phocadownload&view=category&id=162:ills-2017&Itemid=1269#.

¹³⁸ Transparency International, Whistleblowing in Europe, Legal Protections for Whistleblowers in the EU, 2013, p. 5, at https://issuu.com/transparencyinternational/docs/2013_whistleblowingineurope_en.

¹³⁹ See Whistleblower protection – how serious are governments to address corruption, Spotlights on the SDGs, available at www.2030spotlight.org.

¹⁴⁰ Interviews.

¹⁴¹ Fighting Corruption in 2017: A Game-Plan, Insight Magazine, January 2017, p. 26.

¹⁴² HPP p. 18.

¹⁴³ B. 2-2017, Parliament of the Republic of Namibia.

¹⁴⁴ IPPR Comment on Whistleblower Protection Bill, http://ippr.org.na/wp-content/uploads/2017/02/IPPR_Comment_Whistleblower_Protection_Bill.pdf.

comprehensive list of actions that a whistleblower should be protected from.¹⁴⁵ However, there are a number of critical points that should be considered in revising the Bill:

First, there are concerns about the grounds on which whistleblower protection can be revoked.¹⁴⁶ One of these grounds is “the disclosure of improper conduct principally involves questioning the merits of government policy, including the policy of a public body.”¹⁴⁷ Hence, if the conduct reported by the whistleblower touches any kind of government policy, he or she is in danger of not benefitting from protection. It therefore contradicts the message that should be sent by the law - that all levels of government are accountable. Instead, it gives the impression of executive immunity and a lack of will to fight corruption on the government level. This will discourage people from reporting and may damage credibility in the fight against corruption. It is furthermore unconstitutional, violating the whistleblower’s rights to freedom of expression and thought (Art. 21 (1a & b) of the Constitution) and the right to peacefully participate in political activity (Art. 17 (1) of the Constitution).¹⁴⁸

Another concern is section 30 (5a) of the Bill which provides for excessive criminal sanctions for false reporting. This can deter potential whistleblowers from reporting out of fear and puts

¹⁴⁵ IPPR Comment on Whistleblower Protection Bill.

¹⁴⁵ ACC, National Anti-Corruption Strategy and Action Plan 2016-2019, p. 4.

¹⁴⁶ Interviews.

¹⁴⁷ B. 2-2017, Parliament of the Republic of Namibia, Section 52 (1)(d).

¹⁴⁸ Action Namibia Coalition, MPs urged to refer Whistleblower Protection Bill to Standing Committee, March 2017, http://ippr.org.na/wp-content/uploads/2017/03/ACTION_media_statement-Whistleblowers.pdf.

additional pressure on top of the stress that is already related to reporting.¹⁴⁹

Lastly, the independence of the bodies created by the Bill should be ensured through the establishment of an independent panel to recommend the Commissioner and through introducing a clause stressing the independence of the office, similar to how the Office of the Ombudsman is protected in Article 89 (3) of the Constitution.¹⁵⁰ It is also recommendable to include non-state actors in the Whistleblower Advisory Committee.¹⁵¹

In general, one has to contextualize the Whistleblower Protection regime with the reality of a very small population and a huge administrative apparatus where in many cases it will be obvious who reported an incident. In corruption cases, the ACA already provides for witness and informer protection. However, there should be a mechanism that establishes communication between the ACC and whistleblowers, and that might even provide for mitigated penalties in cases of collaboration of potential whistleblowers and witnesses with the ACC and the Office of the Prosecutor General.¹⁵² An effective whistleblower protection regime that encourages reporting instead of deterring it ensures independent review and accountability of the executive and will be a significant step forward to a credible and world-class fight against corruption.

¹⁴⁹ IPPR Comment on Whistleblower Protection Bill, http://ippr.org.na/wp-content/uploads/2017/02/IPPR_Comment_Whistleblower_Protection_Bill.pdf

¹⁵⁰ Action Namibia Coalition, MPs urged to refer Whistleblower Protection Bill to Standing Committee, March 2017.

¹⁵¹ Action Namibia Coalition, MPs urged to refer Whistleblower Protection Bill to Standing Committee, March 2017.

¹⁵² UNODC, Country Review Report of the Republic of Namibia, 2015, https://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/2016_01_29_Namibia_Final_Country_Report_.pdf.

7.3.3

The Public Procurement Act

There is a general perception in Namibia that the tender system at all levels of government is susceptible to corruption.¹⁵³ In recent years, public perception in Namibia has come to view business people as the most corrupt in the country.¹⁵⁴ The public procurement process was painted by the media as “fraught with conflict of interest, delays, favouritism, abuse of office and outright corruption.”¹⁵⁵ Many corruption-scandals in Namibia have been tender-related.¹⁵⁶ This conflicts with the idea of business coming to Namibia seeking a sound legal framework that ensures doing business with a good conscience and security to rely on good governance. Perception that Namibia is reliable and, internationally recognized as a reputable, country is of the utmost importance to attract foreign business and for Namibia to become a world-class logistics hub.¹⁵⁷ Badly managed public procurement is, moreover, detrimental to local businessman and industry, which miss out on opportunities, and allows misallocation of resources, inadequate infrastructure and inefficient services.¹⁵⁸

A new Public Procurement Act that came into effect on April 1, 2017 replacing the existing Tender Board Act is aimed to bring Namibia forward in becoming an international leader in the fight against corruption.¹⁵⁹ According to the HPP, the Act will restore confidence in public procurement and will be a “[n]ecessary weapon in the war against corruption”¹⁶⁰ The Act centralizes the procurement function and will apply to all entities, including government ministries, departments and agencies, regional and local authorities and state-owned

¹⁵³ GAN Business Anti-Corruption Portal, <http://www.business-anti-corruption.com/country-profiles/namibia>.

¹⁵⁴ Tijirera, E. (2015) Namibians see increased corruption; business executives now top list of “most corrupt”, Afrobarometer Dispatch No. 7.

¹⁵⁵ Tijirera, E. (2011) Public Procurement in Namibia. The roles of codes of conduct in reducing corruption, IPPR Anti-Corruption Research Programme.

¹⁵⁶ Fighting Corruption in 2017: A Game-Plan, Insight Magazine, January 2017, p. 26.

¹⁵⁷ Kaspar, L and A. Puddephat (2012) Benefits of transparency in public procurement for SME’s, Global Partners & Associates.

¹⁵⁸ Kaspar, L and A. Puddephat (2012) Benefits of transparency in public procurement for SME’s, Global Partners & Associates.

¹⁵⁹ Act. No. 15 of 2015, Brought into force with effect from 1 April by GN 46/2017 (GG6255).

¹⁶⁰ Harambee Prosperity Plan, p. 7.

enterprises (*SOEs*), as well as other state-funded entities.¹⁶¹ If strictly enforced, this will make an effective tool for national economic development and rebuilding society's trust in the system. However, the enactment and implementation of the Public Procurement Act was significantly behind the timeline set out in the HPP, which may increase doubts about the political will for implementation. Moreover, the Act has been criticized for falling within the supervisory and administrative scope of the Ministry of Finance and therefore not being independent from the government and SWAPO.¹⁶² There are also concerns regarding the independence of the review panel being appointed by the finance minister as well as regarding the fact that some requirements of the UNCITRAL Model Law and UNCAC, such as "standstill" provisions and public hearings, are not met.¹⁶³

A good public procurement policy is an essential tool for the fight against corruption. Considering how many corruption-cases are tender-related and the huge amount of money at stake, an effective and credibly-enforced system of public procurement would significantly prevent illicit dealings.¹⁶⁴ Art. 8 of UNCAC calls for the implementation of codes of conduct for public officials.¹⁶⁵ The Public Procurement Act under Section 7 (4) allows the Minister to refer any matter of non-compliance with the Act to refer "to the Namibian Police, Anti-Corruption Commission or any other component authority for investigation, when it thinks appropriate, and must inform the public entity concerned." Again, less ministerial discretion, meaning an obligation to refer any matter of non-compliance to the Anti-Corruption Commission, can strengthen the systematic enforcement of the Act.

Moreover, Art. 54 (1) (d) establishes that the bidding process can be cancelled in cases where collusion among the bidders has been established. And Part 10 (Procurement Integrity) of the Act provides for fines and prison term in cases of misconduct of staff members, public entities, bidders and suppliers such as not avoiding conflict of interests and engaging in corrupt or

¹⁶¹ Institute for Public Policy Research (IPPR), Frederico Links, "The Public Procurement Bill: A lot of good, some significant bad, but certainly not ugly," (Special Briefing Report No. 9, 2015), http://www.ippr.org.na/sites/default/files/Special_Briefing_no_9.pdf, p.6.

¹⁶² Institute for Public Policy Research (IPPR), Frederico Links, "The Public Procurement Bill: A lot of good, some significant bad, but certainly not ugly," (Special Briefing Report No. 9, 2015), p.5.

¹⁶³ Institute for Public Policy Research (IPPR), Frederico Links, "The Public Procurement Bill: A lot of good, some significant bad, but certainly not ugly," (Special Briefing Report No. 9, 2015), p.7.

¹⁶⁴ Fighting Corruption in 2017: A Game-Plan, Insight Magazine, January 2017, p. 26.

¹⁶⁵ Guidebook on anti-corruption in public procurement and the management of public finances (September 2013).

fraudulent action, and those might even face suspension, debarment and disqualification. Since debarment from public contracts is an effective tool in the fight against corruption, it is advisable to enhance the existing blacklist to be more descriptive and comprehensive as well as publicly available and even strengthen penalties, fines and imprisonment provisions to deter from corrupt activities in public procurement processes.¹⁶⁶

Another important aspect for effective implementation of the Act is to adhere to the required data and information management provisions¹⁶⁷ to establish a solid set of accurate data. Moreover, transparency and accountability standards in the Public Procurement Act don't meet UNCAC standards by failing to include the public in the envisaged transparency.¹⁶⁸ However, the e-procurement provided in the Act can bring more transparency to the process and make it more objective by a clear technical process. The implementing of e-procurement is therefore of highest importance.

Lastly, although the disclosure of conflict of interest provisions in the act are commendable, they are too narrowly defined when it comes to "close relatives"¹⁶⁹ of the relevant staff member and too vague when it comes to the exception for "conflict of interest to be of trivial nature or consequences",¹⁷⁰ still leaving room for nepotism, favouritism and discretion.

All in all, the Public Procurement Act, although lacking especially in public transparency, is an improvement for good governance and a solid step in the fight against corruption. Again, reliable and prompt implementation and enforcement is needed to ensure these effects.

¹⁶⁶ Links, F. and C. Daniels (2011) The Tender Board- Need for root and branch reform, IPPR Anti-Corruption Research Programme.

¹⁶⁷ E.g. Art. 7 (1)(j)(k); Art. 23 (1), (2)(3), Art. 24 (1)(2)(3); Art. 25 (4)(5).

¹⁶⁸ Institute for Public Policy Research (IPPR), Frederico Links, "The Public Procurement Bill: A lot of good, some significant bad, but certainly not ugly," (Special Briefing Report No. 9, 2015).
< http://www.ippr.org.na/sites/default/files/Special_Briefing_no_9.pdf> p.13.

¹⁶⁹ Art. 66 (2)(b).

¹⁷⁰ Art. 76 (1)(b).

7.4 *What does a strong multi-sectoral alliance against corruption look like?*

A general perception as a trustworthy and reliable anti-corruption system will be a great international advantage for Namibia. Distrust in the anti-corruption system, on the other hand, would hinder Namibia's establishment as a middle income country, and would prevent its potential to be ranked among world-class administrative and logistic hubs in international transparency and anti-corruption rankings.¹⁷¹

A first step to enhance the national and international trust in the system is education and awareness-raising in all parts of society.¹⁷² The ACC mandate includes education and awareness-raising.¹⁷³ Ideally, civic education would be a subject in school, as has been proven successful in Hong Kong and the US.¹⁷⁴ Other states known for their strong anti-corruption such as New Zealand also involve the private sector and all organizations to conduct regular anti-corruption training. Technology advancement could broaden the audience of training if free online anti-corruption trainings are developed and provided.¹⁷⁵ All for-profit and non-profit organizations should conduct regular risk-assessments and involve leadership in corruption-compliance.¹⁷⁶

Education and awareness-raising is best pursued by a strong multi-sectoral alliance that reaches out to the public on all levels and all over the country. Accordingly, the NACSAP demands a strong network of "all components of society ranging from individuals, family, community, NGOs, media, public sector, private sector, political leaders and religious

¹⁷¹ E.g. afrobarometer, available at http://afrobarometer.org/sites/default/files/publications/Summary%20of%20results/nam_r6_sor_en.pdf.

¹⁷² See e.g. UNCAC Art. 13.

¹⁷³ ACA, Section 3 (f)(iii).

¹⁷⁴ Heather Marquette, Civic Education for Combating Corruption: Prospects for Donor-Funded Strategies, Paper presented to the European Consortium for Political Research (ECPR) Joint Session Workshop on „The International Anti-Corruption Movement“, Nicosia, Cyprus, April 2006, <https://ecpr.eu/Filestore/PaperProposal/d6508851-d79b-44e0-afb8-75c7c5ad32b9.pdf>.

¹⁷⁵ See anti-corruption guide of the government of New Zealand, <https://www.justice.govt.nz/assets/Documents/Publications/Ministry-of-Justice-Anti-Corruption-Guide.pdf>.

¹⁷⁶ See anti-corruption guide of the government of New Zealand, <https://www.justice.govt.nz/assets/Documents/Publications/Ministry-of-Justice-Anti-Corruption-Guide.pdf>.

leaders.”¹⁷⁷ The anti-corruption education strategy includes training courses for public servants, organizing anti-corruption debates on national, regional and local level, introducing the anti-corruption theme in the civic life skills in school and training programmes for school teachers, a communication strategy via print, electronic and social media as well as joint programmes with NGOs.¹⁷⁸ But the implementation strategy is not clear and already behind in the timeline set out in the Plan. The implementation and coordination of the NACSAP will be conducted by the National Anti-Corruption Steering Committee (NACSC),¹⁷⁹ consisting of various stakeholders from government, non-government organizations, the private sector and the media. It is therefore a commendable step towards a multi-stakeholder platform and broader participation. As of the time of the writing, the NACSC has however only held an introductory meeting and does not provide a web page or any other platform for public consultation, which would be highly advisable. We recommend a fast and well-structured implementation of the NACSC’s work that includes public consultation on every level. The NACSC should pursue an expansive engagement approach, involving the private sector, public offices like the Office of the Ombudsman, and the Financial Intelligence Centre, and Civil Society, including churches and media.

The NACSAP provides for civic education, trainings, programmes, public awareness campaigns and similar best practices. For an effective and comprehensive implementation of these commendable plans, we suggest the use of a multi-stakeholder platform combining all actions in the NACSAP in one framework. The Commission’s relationship to the public is a critical factor for success. The highly successful Hong Kong Independent Commission against Corruption has established formal arrangements whereby public consultation in policy-making is ensured.¹⁸⁰ If various stakeholders become involved in the prevention process and their own institutions, they will be mobilised for the fight against corruption.¹⁸¹ A more permanent

¹⁷⁷ National Anti-Corruption Strategy and Action Plan 2016-2019, p. 7.

¹⁷⁸ National Anti-Corruption Strategy and Action Plan 2016-2019, p. 24, 25.

¹⁷⁹ National Anti-Corruption Strategy and Action Plan 2016-2019, p. 28.

¹⁸⁰ Jeremy Pope, Namibia’s Anti-Corruption Bill: An Anti-Corruption Commission cannot fight corruption on its own, IPPR Opinion No. 5, November 2001, p. 4.

¹⁸¹ Jeremy Pope, Namibia’s Anti-Corruption Bill: An Anti-Corruption Commission cannot fight corruption on its own, IPPR Opinion No. 5, November 2001, at 4.

structure with regular meetings would make the NACSC's work more coherent and efficient.

7.5 *How can Namibia ensure equitable and objective treatment of all corruption cases?*

Being perceived as an international champion in the combat against corruption can be a significant advantage when it comes to attracting foreign investment and business. Foreign investors avoid corruption because it both creates inefficiency and a negative image.¹⁸² It has been recognized that to achieve such a perception, the prosecution of corruption cases must be objective and transparent, and all cases must be treated equally and fairly. The HPP expressly states that its implementation will focus on accountability and be “linked to the overall effectiveness of the government.”¹⁸³ It also acknowledges that there is the general perception that accountability doesn't permeate through all levels of government.¹⁸⁴ International champions such as Singapore have recognized that a rigorous enforcement of anti-corruption measures on all levels is essential to achieve and maintain the status of a world-class logistics hub.¹⁸⁵

But equitable and objective treatment of all cases means that the prosecuting and investigating bodies should treat all cases with the same diligence—be it petty corruption or grand corruption.¹⁸⁶

¹⁸² Habib/Zurawicki, Corruption and Foreign Direct Investment, *Journal of International Business Studies*, Vol. 33, No. 2 (2nd Qtr., 2002), p. 291.

¹⁸³ HPP P. 59.

¹⁸⁴ HPP, p. 16.

¹⁸⁵ See Singapore's former Prime Minister Lee Kuan Yew: “The moment key leaders are less than incorruptible, less than stern in demanding high standards, from that moment the structure of administrative integrity will weaken, and eventually crumble. Singapore can survive only if Ministers and senior officers are incorruptible and efficient [...] Only when we uphold the integrity of the administration can the economy work in a way which enables Singaporeans to clearly see the nexus between hard work and high rewards,” found in Koh Teck Hin, *Corruption Control in Singapore*, http://www.unafei.or.jp/english/pdf/RS_No83/No83_17VE_Koh1.pdf.

¹⁸⁶ Grand corruption refers to the corruption of heads of states, ministries, and top officials dealing with large amounts of money and assets. It includes lawmakers seeking bribes of funds for political and personal gain in lieu of providing support or favour to the briber on the expand of public benefits, often resulting in loss of natural resource revenue. Personal enrichment through misappropriation or siphoning of national wealth and public coffers, resources, and misuse of public moneys is also often included in the definition as well as state capture, reverse state capture, administrative corruption, nepotism, embezzlement, patronage, cronyism etc., Radon & Associates, *Natural Resource Revenue Loss: How to plug Leakages and Prevent the Resource Curse*, June 2015, p. 3.

Both petty and grand corruption is detrimental for Namibia's international perception on its way to become a world class logistics hub. Because there have been few examples of high government officials being prosecuted for corruption,¹⁸⁷ this could create the perception among both the Namibian people and the international community that the system is unfair, with only some of those who engage in corruption facing any consequences. This is why it is important to send further signals on all levels by treating all cases the same, be they petty cases or high-profile cases. It also will show that it is in the capacity of the ACC to take on these kinds of cases. Especially when the other recommendations of this report are complied with, equal treatment of all cases is feasible.

Moreover, pursuing all cases, high-profile cases and smaller cases, would send the message to the people of Namibia that the fight against corruption is taken seriously and accountability applies to everyone. This has symbolic value and impact. It would build the trust of the society in the ACC and the anti-corruption system. To finalize this intent, it must be ensured that there are convictions, enforcement, and that bail conditions and penalties are enforced.

7.6 *How can transparency support equal accountability?*

The objective treatment of cases is supported by the suggestion of this report's appendix to include illicit enrichment legislation in the Anti-Corruption Act.¹⁸⁸ This provision would reverse the burden of proof in suspicious circumstances and hence facilitate more effective investigation and prosecution of all cases. Instead of having to find evidence to prove the underlying crime—which is often difficult—prosecuting bodies can simply prove that the official's wealth exceeds what he or she should reasonably possess, and it is then up to the official to explain how that wealth was acquired. To enforce this legislation, an effective system of financial disclosure is needed.¹⁸⁹ A recommendable gesture to lead by example and demonstrate commitment was President Geingob's declaration of his and his family's

¹⁸⁷ Such as the case of Namibian Defence Force Major-General Thomas Hamunye, who was charged by the ACC for fraud, corruptly using his office or position for gratification, and attempting to defeat or obstruct the course of justice. After failing to appear in court in November 2016, a warrant of arrest has been issued and the case will be held on August 1, 2017, corruption Tracker, Insight Magazine, November/December 2016, p. 25.

¹⁸⁸ See this report p. 7, Appendix Section 54.

¹⁸⁹ Linda Muzila et al., „On the Take: Criminalizing Illicit Enrichment to Fight Corruption,“ 42.

assets.¹⁹⁰ This gesture was applauded and generated calls for other politicians to follow suit.¹⁹¹ President Geingob also suggested an introduction of lifestyle audits to detect corruption.¹⁹² Such a system of transparency would ensure equal treatment of all corruption cases and hence send the right image of Namibia as a leader in combatting corruption.¹⁹³ This perception would be even stronger if an effective system of asset disclosure, following the President's example, is introduced and enforced.¹⁹⁴

Moreover, there is also a need for comprehensive legislation regarding conflict of interest issues. Current coverage of conflict of interest is scattered over provisions in Constitution of Namibia, 1990 and Public Office-Bearers Commission Act, 2005, the Public Service Act, 1995 and the Powers, Privileges and Immunities of Parliament Act, 1996.¹⁹⁵ Consolidated legislation would help promoting greater transparency and hence facilitate fair and equitable prosecutions, bringing Namibia towards a world class rating in combatting corruption.

¹⁹⁰ President Hage G. Geingob, "Declaration of Personal Assets By His Excellency Dr Hage G. Geingob And Madam Monica Geingos President And First Lady Of The Republic Of Namibia", (May 20 2015), accessible <<http://www.gov.na/documents/10181/22710/DECLARATION+OF+PERSONAL+ASSETS+BY+HIS+EXCELLENCE+DR+HAGE+G.+GEINGOB+AND+MADAM+MONICA+GEINGOS+PRESIDENT+AND+FIRST+LADY+OF+THE+REPUBLIC+OF+NAMIBIA/0cada7a5-e38a-44ab-9b80-33777fb5fd84>>.

¹⁹¹ Finance Minister Calle Schlettweins's asset declaration in July 2016 could be another model for others to follow. However, that has proved to be a much more difficult task as the National Assembly is trying to create a comprehensive system for asset declaration that is acceptable to the parliamentarians, Theresia Tjihenua and Ndanki Kahiurika, "Pressurise ministers to declare assets," *The Namibian* (21 May 2015), <http://www.namibian.com.na/index.php?id=137135&page=archive-read>.

¹⁹² Shinove Immanuel, "Geingob Promises Lifestyle Audit," *The Namibian*, September 16, 2016, <http://www.namibian.com.na/155715/archive-read/Geingob-promises-officials-lifestyle-audit>.

¹⁹³ Such audits are already successfully implemented in other states such as South Africa, SARS, "Report a Suspicious Activity," 2016 includes "a person is living beyond his obvious financial means" a an activity to report, <http://www.sars.gov.za/TargTaxCrime/ReportCrime/Pages/Report-a-suspicious-activity.aspx>.

¹⁹⁴ A UN study has shown that 77 percent of countries having criminalized illicit enrichment also had asset disclosure systems in place, Linda Muzila et al., "On the Take: Criminalizing Illicit Enrichment to Fight Corruption," 42. The existing efforts have however not been come very far in Namibia. After finally passing the asset disclosure requirements at the end of 2015, the MPs decided to split the register in two, of which only one is publicly available. The non-public register contains the assets of spouses and dependents, and MPs income from other sources than their wages and benefits derived from their work at parliament, their property investments and board memberships, *Time to Strengthen Financial Regulations*, *Insight Magazine*, June 2016, p. 28.

¹⁹⁵ Transparency International, "FAQs on corruption" (2015), http://www.transparency.org/whoweare/organisation/faqs_on_corruption.

7.7 *How can public interest litigation support the fight against corruption?*

Anti-corruption legal actions brought by private citizens and civil society organizations have become an increasingly effective tool in the fight against corruption in many jurisdictions in recent years, advancing sustainable development and trust by international investors.¹⁹⁶ Not only can victims of corruption sue for compensation, restitution, or other relief from corrupt government officials and private parties, private parties might even seek judicial imposition of criminal penalties on corrupt actors or file suits challenging the legality of government decisions that were allegedly the product of corruption. Sometimes, private parties can even try to enforce official proceedings against corrupt actors.¹⁹⁷

Public interest litigation has become a powerful tool for anti-corruption activism as well as in many countries¹⁹⁸ and could be a tool to ensure action against high-profile corruption in Namibia as well.

A current legal barrier to such proceedings in Namibia is the doctrine of standing, which requires the individual bringing a claim to have a direct, substantial, current and actual interest in the subject matter and outcome of the proceeding.¹⁹⁹ Since lawsuits challenging corruption or failure to act against corruption often prove difficult for private parties to demonstrate a direct connection between the unlawful conduct and an injury of the private party, standing is a significant barrier to public interest litigation for this purpose. We therefore recommend that

¹⁹⁶ Matthew C. Stephenson, *Standing Doctrine and Anticorruption Litigation: A Survey*, Open Society Foundation, January 2016, at 1, <https://www.opensocietyfoundations.org/sites/default/files/legal-remedies-2-20160202.pdf>.

¹⁹⁷ Matthew C. Stephenson, *Standing Doctrine and Anticorruption Litigation: A Survey*, Open Society Foundation, January 2016, p. 1.

¹⁹⁸ see Matthew C. Stephenson, *Standing Doctrine and Anticorruption Litigation: A Survey*, Open Society Foundation, January 2016; In India, a growing public interest litigation movement against grand corruption has inter alia led to Supreme Court orders to systematically reform institutions to reduce, among other things, the necessity of judicial oversight of the criminal prosecution of alleged acts of corruption, Arghya Sengupta, *Anti-Corruption Litigation in the Supreme Court of India*, Open Society Foundation, March 2016, p. 2, <https://www.opensocietyfoundations.org/sites/default/files/legal-remedies-2-sengupta-20160202.pdf>.

¹⁹⁹ Exceptions have been recognized by the courts in cases where the individual couldn't make the application himself because he or she was in detention or vulnerable to reprisals or where the member of a group that is protected by a certain law brings a suit regarding that law. The Constitutional articles 25(2) and 18 grant standing to "aggrieved persons" without defining what "aggrieved person" means. Since courts have also not clarified the issue yet, the question of standing remains uncertain under common law. Namibia doesn't recognize the concept of class actions, representative standing, organisational standing or public interest standing, Zoila Hinson & Dianne Hubbard, *Locus Standi: Standing to Bring a Legal Action*, Legal Assistance Centre 2012, p. i, http://www.lac.org.na/projects/grap/Pdf/access2justice2_locus_standi.pdf.

Namibia clarify and strengthens the concept of legal standing in public interest cases. The judiciary should develop clear rules for constitutional common law standing. Statutory law reform should define the meaning of “aggrieved” and introduce representative standing to litigate on behalf of another whose rights have been violated, as well as public interest standing to challenge illegal government action. Class actions could also be introduced to enhance litigation and simplify proceedings by consolidating a number of claims, issues and defences together.²⁰⁰

There should be no fear of a flood of cases coming into Namibia’s already overloaded institutions and courts. Experience from countries with public interest standing shows that normal costs of litigation serve as a deterrent to prevent superfluous actions.²⁰¹ Moreover, procedural mechanisms can control litigation, and the introduction of class actions could actually be used to consolidate cases with common issues.²⁰²

Providing the legal framework for public interest litigation will enable Namibian civil society, corporations and other private parties to challenge corruption or failure to address corruption sufficiently. It will therefore create another avenue to fight corruption for private parties, apart from cooperating with the public sector or using media campaigns to generate political pressure. It also sends another signal that Namibia has transparent and reliable institutions and a strong rule of law. Moreover, it is in line with the UNCAC requirement that every state member should “take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage.”²⁰³ Public Interest Litigation would be in service of all the Namibians that don’t have access to courts due to a lack of resources, legal education, distance and a general distrust of government institutions.

²⁰⁰ Zoila Hinson & Dianne Hubbard, *Locus Standi: Standing to Bring a Legal Action*, Legal Assistance Centre 2012, p. vii.

²⁰¹ Zoila Hinson & Dianne Hubbard, *Locus Standi: Standing to Bring a Legal Action*, Legal Assistance Centre 2012, p. vi.

²⁰² Another danger of enabling judicial policy-making is a possible violation of the separation of powers doctrine. This can however be prevented by framing judicial powers in substantive law and limiting the rights and reliefs the court can recognize.

²⁰³ UNCAC Art. 35.

7.8 *Why do the Institutions need more resources?*

7.8.1 *The Anti-Corruption Commission*

The ACC, established by the ACA in 2003, is the heart of Namibia's anti-corruption framework. It is a statutory agency whose primary responsibility is to combat and prevent corruption in Namibia, as well as educate the public on the crime of corruption and Namibia's anti-corruption regime.²⁰⁴ The Commission currently has 96 staff members and also established three regional offices in Oshakati, Otjiwarongo and Swakopmund to cater for all nearby regions.²⁰⁵

Despite this, the ACC only has 30 investigators working on about 400 reported cases per year.²⁰⁶ Since the Commission commenced its mandate in 2006, more than 5,955 cases have been registered. By the end of 2016, only 509 cases were referred to the Prosecutor-General for prosecution. Other cases have been referred to administrative authorities with various recommendations.²⁰⁷ The ACC explains the delay between cases being reported and being referred for prosecution with the lack of traceable evidence.²⁰⁸

Apart from the lack of prosecutions for corruption cases, the ACC has produced some positive outcomes in recent years: cases of tax evasion that were reported to the ACC after investigations were referred to the Revenue Authority for action under the State Finance Act.²⁰⁹ Fraud cases involving the public and private sector such as abuse of office for private gain, embezzlement or misappropriation of public funds were also reported and investigated under the Financial Intelligence Act (FICA)²¹⁰ and the Prevention of Organized Crime Act (POCA).²¹¹ In these cases, the ACC asked the Prosecutor-General to preserve the assets,

²⁰⁴ See report 2016, p. 33; Anti-Corruption Commission, "About" (2015), <<http://www.accnamibia.org/about>>.

²⁰⁵ Remarks by Paulus Noa, Director General of Anti-Corruption Commission on the commemoration of the international anti-corruption day, 9 December 2016.

²⁰⁶ Interview with ACC.

²⁰⁷ Remarks by Paulus Noa, Director General of Anti-Corruption Commission on the commemoration of the international anti-corruption day, 9 December 2016.

²⁰⁸ Remarks by Paulus Noa, Director General of Anti-Corruption Commission on the commemoration of the international anti-corruption day, 9 December 2016.

²⁰⁹ State Finance Act, 1991 (Act No. 31 of 1991).

²¹⁰ Financial Intelligence Act 2013 (Act. No. 13 of 2013).

²¹¹ Prevention of Organized Crime Act, 2004 (Act No. 29 of 2004).

leading to a forfeiture of the assets and a recovery of millions of dollars which is today in the Criminal Assets Recovery Fund established under the POCA.²¹²

However, the POCA is not aligned with the Anti-Corruption Act, and does *inter alia* not include ACC officers in its definition of “authorised members of the police”.²¹³ A consistent and clear legal regime would enhance the effectiveness of this tool. The action proposed in the NACSAP to enable mutual legal assistance between states to identify, freeze and trace proceeds of crime and the recovery of assets²¹⁴ is also of the utmost importance, should be extended to other investigative bodies and have a set timeline and implementation strategy.

There are concerns about a lack of resources, capacity and expertise to effectively conduct investigations and prosecutions.²¹⁵ This deficit should not prevent the ACC from going after all cases that have been brought to its attention.²¹⁶ It is of great importance that the law is enforced objectively to the public, and that national and international perception mirrors a fair and equitable treatment of every case. Tackling the lack of resources, staff and coordination is going to be a crucial step for the ACC to fulfil its mandate. Apart from the pressing capacity concerns, the ACC also needs the latest technology and training on how to use this technology and investigative techniques, such as to carry out forensic analyses.²¹⁷ For example, investigations concerning quotas require an immense expense of intelligence when the ACC has to look at and compare different companies. The budget was however only increased by N\$ 5 Mio. for the 2017/2018, financial year. This will result in continued inefficiency, decline in prosecutions and lack of public confidence in the ACC. A significant increase of financial resources and increased employment to the office of the ACC would, on the other hand, confirm the political will to prioritize the fight against corruption, ensure that all reported and investigated cases of corruption are prosecuted equally and promote institutional accountability. In addition, it would facilitate the development of further domestic branches

²¹² Remarks by Paulus Noa, Director General of Anti-Corruption Commission on the commemoration of the international anti-corruption day, 9 December 2016.

²¹³ National Anti-Corruption Strategy and Action Plan 2016-2019, p. 23.

²¹⁴ National Anti-Corruption Strategy and Action Plan 2016-2019, p. 23.

²¹⁵ Interview ACC.

²¹⁶ Civil society, lawyers and journalists have questioned these arguments to be excuses for a lack of political will, especially when it comes to going after the “big fish”, in interviews.

²¹⁷ Namibian Sun, ACC budget too small, April 2017, available at <https://www.namibiansun.com/news/acc-budget-too-small/>.

thereby enhancing communication and increased access to the ACC.

7.8.2 *The Office of the Prosecutor General*

In Namibia, the Office of the Prosecutor-General has the authority to determine which corruption cases are assigned to court for criminal proceedings. The Office of the Prosecutor General finalizes the proceedings after the ACC refers a case to her.²¹⁸ The Attorney General's Office, which exercises the final responsibility for the Office of the Prosecutor-General,²¹⁹ has received additional resources of N\$ 40.0 million²²⁰. However, a financial gap remains to ensure effective prosecutions, especially when it comes to skilled labour. The Office of the Prosecutor General needs skilled labour with expertise in finances and the law concerning corruption. Training and third party expertise is therefore required.²²¹ Accordingly, there needs to be a reallocation of financial resources to the Office of the Prosecutor General.

7.9 *Judicial System*

Namibia's courts are widely considered to be independent and free from government interference.²²² In 2016, Namibia established a new Office of the Judiciary which is administratively and financially independent from the Ministry of Justice.²²³

The budget of the judiciary is however still determined by the Treasury and therefore, not entirely independent from the executive. Court proceedings are slow due to a lack of resources

²¹⁸ Section 31 ACA.

²¹⁹ Art. 87 (a) Constitution Namibia

²²⁰ Budget Statement for the 2017/2018 financial year, presented by Calle Schlettwein, MP, Minister of Finance.

²²¹ Interviews.

²²² US Department of State, Investment Climate Statements 2016,

<https://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm#wrapper>; Interview first Lady, Judge Angula, Claus/Wolf.

²²³ The Office of the Judiciary has however been criticized because most of the staff and judiciary which were appointed by the Ministry of Justice before the reform remain in the new Office of the Judiciary. This means that most current members were appointed in times where the Office of the Judiciary was more dependent on the Ministry of Justice and therefore might be less impartial to deal with cases regarding government officials, see Interviews.

and inadequate staffing.²²⁴ An increase in financial resources and employees is crucial to maintain a high standard of independence in the Namibian judiciary. A more efficient judiciary will also be an asset to attract foreign investment because it makes enforcement of commercial contracts easier and more predictable, and accordingly internationally acceptable.

If corruption cases are handled efficiently and vigorously, this will send a clear signal that the rule of law is applied and works as a deterrent. If there is no significant investment in the judicial system, procedures such as appointing a defence counsel and technical challenges will keep taking very long.²²⁵ An improvement would be the appointment of research assistants for judicial officers, which will speed up the finalization of cases, and the introduction of an e-justice system.²²⁶

In general, the entire investigative, procedural and judicial process needs an increase in financial and staff resources to accelerate prosecutions, go after all cases and suspects equally and send the signal that the fight against corruption at all levels is taken seriously.

7.10 Conclusion

Namibia is on the right track in tackling corruption as one of the main challenges for sustainable development and becoming a major logistic and administrative hub. With its stable institutions and solid position in Southern Africa, Namibia has the window of opportunity to position itself among international champions such as Singapore, Hong Kong and New Zealand. It has to be cautious that it won't become complacent and that it continually works to prevent and address the threat of corruption through a top-level commitment to a culture of zero tolerance.

Namibia if it is to achieve its potential has no choice but to be pro-active and be a leader, a pace-setter, and a model in the fight against corruption. Revised, world-class, legislation will

²²⁴ US Department of State, Investment Climate Statements 2016,

<https://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm#wrapper>; Interview with Judge.

²²⁵ There are also concerns about a lack of a skilled workforce and the fact that many judges are going to retire in the next few years, leaving a generational gap, see interviews.

²²⁶ Address by Hon. Peters S. Shivute, Chief Justice of the Republic of Namibia, at the opening of the 2017 Legal Year, Supreme Court of Namibia, Windhoek, 8 February 2017.

be an important signal and step towards achieving that aim. Moreover, enforcement and prosecutions on all levels must be ensured through an increase of financial resources and staff.

8. REFORMING NAMIBIA'S ARBITRATION LAW

8.1 Introduction

Arbitration has become the “market standard” in international contracts.²²⁷ By one estimate, 90% of international contracts now include an arbitration clause.²²⁸ One reason arbitration is so popular is that it creates the perception that contracting parties can be assured of having an efficient, effective, and impartial means of enforcing contractual rights and settling contractual disputes.

As explained below, there are now a well-established set of international norms about arbitration law. In the eyes of the international business community, compliance with these norms signals a nation’s commitment to the rule of law and the enforceability of contracts—and its hospitality to foreign investment. Not complying sends the opposite message. We recommend that Namibia “catch up” with these international norms, and exceed them, to send a strong signal that it is receptive to foreign investment and serious about enforcing international commercial agreements. We also see the potential for Namibia to create a regional “arbitration hub” to build Namibia’s range of administrative and logistical services.

Recommendations

- **Namibia should formally join the New York Convention on Recognition and Enforcement of Arbitration Awards**
- **Namibia should modernize its arbitration law**
- **Namibia can position itself as the premiere arbitration center for Southern Africa**

²²⁷ PricewaterhouseCoopers & Queen Mary University of London, Press Release, *International Arbitration: Corporate Attitudes and Practices* (2006).

²²⁸ Klaus Peter Berger, *International Economic Arbitration*, 8 & n. 62 (1993) (citing Albert Jan van den Berg et al., *Arbitragerecht*, 134 (1988)); see also Christopher R. Drahozal & Richard W. Naimark, *Towards a Science of International Arbitration: Collected Empirical Research*, 59 (2005) (finding that 88.2% of a small sample of transnational joint venture contracts include arbitration clauses). Citations provided by <http://www.metrocorpocounsel.com/articles/11783/alternative-dispute-resolution-international-business-transactions>.

8.2 *What is the New York Convention?*

The *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, commonly known as the New York Convention, is an international agreement in which member states (1) commit to respect the choice of contracting parties to arbitrate their disputes, and (2) agree to enforce the results of such arbitrations. Allowing parties to have their disputes decided by a truly international body rather than by the domestic courts of any one nation has become an important stimulus for foreign investment and trade because it enhances confidence that disputes will be decided impartially and thereby minimizes any “country risk” perceived by a foreign investor or trading partner.

Each subscribing country to the Convention agrees:

To enforce in its national courts any arbitration award that is made in accordance with the procedures and standards set out in the New York Convention

That national courts will not interfere with an arbitration except

To assist in the conduct of the arbitration (for example, requiring the attendance of a witness or the production of documents for use in the arbitration)

Where the Convention expressly gives a national court the power to act

To enforce parties’ agreements to arbitrate by staying any legal action that is taken in the courts in violation of a party’s agreement to arbitrate

8.3 *Why should Namibia subscribe to the New York Convention?*

Kofi Annan, former U.N. Secretary-General, explained the importance of the New York Convention in promoting international trade and the rule of law as follows:

Let me turn now to the subject of today's discussions, the New York Convention. This landmark instrument has many virtues. It has nourished respect for binding commitments, whether they have been entered into by private parties or governments. It has inspired confidence in the rule of law. And it has helped ensure fair

treatment when disputes arise over contractual rights and obligations. *As you know, international trade thrives on the rule of law: without it parties are often reluctant to enter into cross-border commercial transactions or make international investments.*

For all these reasons, the Convention is one of the most successful treaties in the area of commercial law, adhered to by 117 States, including the major trading nations. It has served as a model for many subsequent international legislative texts on arbitration. And it proved to the world, as early as the 1950s, that the United Nations could be a constructive, leading force in matters affecting relations among States and among commercial actors on the world scene.

Still, a number of States are yet to become parties to the Convention. As a result, *entities investing or doing business in those States lack the legal certainty afforded by the Convention, and businesses cannot be confident that commercial obligations can be enforced.* This increases the level of risk, meaning that additional security may be required, that negotiations are likely to be more complex and protracted, and that transaction costs will rise. Such risks can adversely affect international trade.²²⁹

These observations remain as true today as they were when Secretary-General Annan spoke them at a gathering to celebrate on the Convention's 40th anniversary in 1998—perhaps more so, as more nations have joined the Convention and membership is increasingly regarded as a commitment to the rule of law and as a signal that a country has a stable legal system that will

²²⁹ Kofi Annan, "Opening address commemorating the successful conclusion of the 1958 United Nations Conference on International Commercial Arbitration" (10 June 1998) in *Enforcing Arbitration Awards under the New York Convention: Experience and Prospects*, p. 2: <https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/NYCDay-e.pdf>. (emphasis added).

be hospitable to foreign investment and trade.

In addition, accession to the Convention is encouraged by the SADC Protocol on Finance and Investment.²³⁰

8.4 *Commercial Parties see the Convention as an important signal*

When a party contracts with a party or government from a New York Convention signatory country and includes an arbitration clause in its contracts, it knows that contractual and related commercial disputes will not be subject to litigation in domestic courts. And because the arbitration agreements allow commercial parties to choose their “judges” and designate the rules of law that will be applied to resolve their disputes, they can feel confident that they will get a fair hearing of their issues uninfluenced by the national biases or prejudices of any particular nation’s courts.

Not being a member of the Convention puts Namibia at a competitive disadvantage in attracting foreign investment and trade. It is unrealistic to conceive of Namibia as a global logistics hub without being part of the Convention. Shippers, carriers, insurers, and many other logistics-related industries often rely on arbitration clauses in their commercial agreements, and would likely regard Namibia as a less desirable base of operations or place to do business if they do not have confidence that arbitration clauses will be enforced and arbitration awards will be recognized by Namibian courts.²³¹

8.5 *Convention also provides legal benefits to Namibians*

Not only would becoming a party to the New York Convention make Namibia a more attractive place to invest, it would also enhance the ability of Namibians and the Namibian

²³⁰ See Annex 1, Article 21.

²³¹ See, for example, the risk factors listed in the Prospectus for Namibia’s 5.250 per cent. notes due 2025, which include the following: “Namibian courts may not recognise the choice of English law as the law governing the Notes” and “A claimant may not be able to enforce a court judgment against certain assets of Namibia in certain jurisdictions”. http://www.ise.ie/debt_documents/Prospectus%20-%20Standalone_0f0c518d-8f34-46d6-bf21-705970ffb033.pdf

Government to enforce the legal commitments made by foreigners with whom they do business. This is because the Courts of other countries may or may not recognize and enforce a judgment of a Namibian Court—and there are often technical and procedural requirements to doing so that are difficult and expensive to meet. Arbitration Awards made under the New York Convention, on the other hand, do not suffer from these difficulties. It will typically be much easier to enforce an arbitration award in a foreign court than a Namibian Court judgment.²³² This is important, because the ability to obtain legal redress under a contract is meaningless if it cannot be enforced where the defaulting party has its assets. And just the threat of a viable legal remedy can be an important deterrent to a party that is contemplating a contractual default.

8.6 *What is the current status of the New York Convention in Namibia?*

According to the information published by the United Nations Commission on International Trade Law²³³ (UNCITRAL), Namibia is not currently a signatory to the New York Convention. Regardless of whether this is factually or legally correct, the international community, and particularly risk-averse investors, are likely to put stock in UNCITRAL’s view and conclude, based on UNCITRAL’s information, that Namibia is not a Convention country. This appears to be, for example, the view of the U.S. State Department, which advises that the Convention is “not applicable” in Namibia.²³⁴

South Africa acceded to the New York Convention in 1976. According to UNCITRAL, South Africa did not indicate in its instrument of accession whether or not the Convention would or would not apply in the then-territory of South West Africa.²³⁵ While it is certainly debatable that the New York Convention may already be in force in Namibia by virtue of the

²³² Unless, of course, there is some reciprocal enforcement of judgment treaty and/or legislation in place that provides for recognition of Namibian judgments. The advantage of the Convention is that Namibia would not have to separately negotiate such treaties with the countries where its judgments might be enforced—although acceding to the convention would not prevent Namibia from doing so.

²³³ http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html

²³⁴ see <https://www.state.gov/e/eb/rls/othr/ics/2015/241676.htm>

²³⁵ And the South African RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS ACT 40 OF 1977 does not explicitly say that it applies to the Territory of South-West Africa, as the general arbitration statute did, arguably creating the inference that the Convention was not intended to apply in the Territory.

constitutional succession clause,²³⁶ what is important from Namibia's perspective is that, if the Convention is in force in Namibia, this has not been clearly signaled to the international community. Most international lawyers, and most investors, would look no further than the information maintained by UNCITRAL to determine whether or not Namibia is a signatory (as, apparently, has the U.S. Department of State). Namibia's name does not appear on UNCITRAL's list of signatories and so they are likely to conclude that Namibia is not. To remove all doubt, Namibia should register a formal instrument of accession with UNCITRAL. This process is dealt with in Article IX of the Convention, and simply requires "the deposit of an instrument of accession with the Secretary-General of the United Nations." It is also typical for adopting nations to enact some domestic legislation giving effect to the Convention. We discuss this issue below in the context of modernizing Namibia's domestic arbitration law.

We suggest that Namibia not limit the application of the Convention to arbitration awards made outside its borders, as South Africa has done.²³⁷ This could undermine the objectives of the Convention, as international arbitrations can take place between a domestic (in this case Namibian) party and a foreign party inside Namibia and can still be "international." Limiting the application of the Convention in this way is contrary to the basic purpose of the Convention—to remove from the domestic courts the substance of disputes between international parties. It also creates a disincentive for international parties to agree to arbitrate in Namibia²³⁸, thereby depriving Namibians of high-quality (and often high-paying) legal work as well as the administrative and logistical support spinoff benefits that would come from conducting arbitrations in Namibia.

Note that Article X of the Convention would allow Namibia to stipulate that it would only apply to arbitration awards made in the territory of another state that has also acceded to the Convention. We do not recommend that Namibia limit its accession in this way. If Namibia

²³⁶ For an argument that the South African Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977, RSA GG 5504, may be in force in Namibia, see, for example, <http://www.lac.org.na/namlex/Arbitr.pdf>.

²³⁷ ACT 40 OF 1977, s.1.

²³⁸ Technically, to make Namibia the "place of arbitration", discussed below.

is serious about a commitment to arbitration, it should be willing to enforce arbitration awards that comply with the norms of the Convention, regardless of where they are made.

8.7 *Reform of Domestic Arbitration Law*

We understand that Namibia's current domestic arbitration statute, which would govern arbitrations between Namibian parties (including a Namibian subsidiary of a foreign investor), is the South African Arbitration Act 42 of 1965. This statute is out of step with international arbitration norms in a number of respects. For example:

The Court is given broad and unfettered discretion to override arbitration agreements, which is inconsistent with the most basic principles of international arbitration that parties should be held to their agreement to arbitrate. (s.3)

There are no explicit limitations on the court's discretionary power to refuse to stay a legal action that is the subject of an arbitration agreement. (s. 6)

The Act allows the parties, the Court, or the arbitrators to refer questions of law to the court for decision, which is inconsistent with the principle of international arbitration that the arbitrators, not the court, shall decide all questions of substantive law at issue. (s. 20)

In 1985, UNCITRAL promulgated a Model Law on arbitration, which was later adopted by General Assembly resolution. This Model Law was amended pursuant to another UNCITRAL proclamation in 2006, also adopted by the General Assembly. The full text of the amended Model Law appears at Appendix D. The Model Law provides explicit guidance to Courts on when and how intervention in an arbitration is permitted, empowers the Court to assist in the conduct of an arbitration, and limits the reasons for which the Court may refuse to require the parties to arbitrate their dispute. It also mirrors the New York Convention provisions on recognition and enforcement of arbitration awards.

We recommend that in order to provide a modern arbitration law that complies with international norms and expectations and fits comfortably with the New York Convention, Namibia enact the amended Model Law as a domestic statute.

At Appendix C is a form of statute from Alberta, Canada, in which the entirety of the New York Convention and Model Law were enacted, without amendment, as domestic statutes. While this is certainly not the only means of enacting the Model Law, it is a clear, simple, and effective way of doing so and we recommend that Namibia follow this procedure.

8.8 *Creation of Namibia as “the” Arbitration Centre in Southern Africa*

Many international commercial agreements choose a "neutral" location as the "place" of arbitration. The significance of the place of arbitration (sometimes called the seat of the arbitration) is that it is the jurisdiction whose courts have primary jurisdiction over the conduct of the arbitration process. For example, if a court proceeding is necessary to appoint or remove an arbitrator, or to make an application to set aside a final arbitral award on some ground, that would be done at the seat of the arbitration.

The place of arbitration does not need to be connected in any way to the underlying transaction, contract, or the parties to that contract. In fact, in many cases parties will choose a place of arbitration with no connection at all—because it is perceived as more neutral, or because the jurisdiction has expertise in arbitration or is regarded as willing to uphold arbitration agreements.

Designating a jurisdiction as the place of arbitration has two effects on the local arbitration bar of that place over time:

1. It tends to create opinion work for local lawyers, as international parties seek advice on the consequences of naming a jurisdiction as the seat of the arbitration and seek information about its arbitration laws.
2. The number of court applications connected with international arbitrations increases as arbitrations are commenced and court assistance or intervention is required.

As these two effects happen, a third thing can occur: parties can seek to appoint arbitrators resident at or familiar with the law of the place of the arbitration.

Just as Namibia could create a logistics hub for insurance, banking and other financial transactions, it could create an arbitration centre to serve the needs of contracting parties. An arbitration centre is a permanent institution that is independent of a government, but sometimes operates with the explicit or a tacit approval of government.²³⁹ It performs various functions, including setting rules and standards for the conduct of arbitrations, appointing arbitrators, maintaining a list of affiliated arbitrators, and training. Prominent arbitration centres in the international arbitration world include the London Court of International Arbitration, the American Arbitration Association, and the International Chamber of Commerce.

International parties may sometimes choose to specify one of these arbitration centres as the administering institution even where an investment is made outside of Europe or North America. It would be potentially useful to parties investing in, for example, South Africa, Angola, or some other southern African nation to have a "neutral" arbitration institution, outside of the home jurisdiction of any one of the parties to the contract, but still geographically closer to the place of the transaction than London, Paris or New York. There is no reason why Namibia could not become that chosen place. In Asian investment, Singapore has filled that role, and the prominence of the Singapore Arbitration Centre has spawned a whole industry of highly paid, well-trained lawyers and administrative staff connected with international arbitration proceedings in Singapore whose subject matter is not otherwise connected to Singapore. Similarly, it is now common for investment contracts in the Middle East to provide for arbitration in Dubai, which has become another prominent regional arbitration centre.

Africa currently has no internationally-recognized arbitration centre. Given Namibia's various attributes that we have discussed elsewhere in this report, there is no reason that Namibia could not become the equivalent of Singapore or Dubai with respect to arbitration clauses in Southern African investment contracts. This would also be an excellent fit with some of the other logistical and administrative roles that we see Namibia playing as part of a potential role

²³⁹ For an example from Canada, see the British Columbia International Commercial Arbitration Centre: <http://bcicac.com/>.

as the Global Gateway to Southern Africa.



9. IMPROVING NAMIBIA'S FISHERIES LICENCING PROCESS

9.1 Introduction

The key to realizing Namibia's long term vision for achieving sustained economic growth is to establish an environment for doing business where accountability, transparency and good governance²⁴⁰ are paramount. This is especially important when the government is granting a right, license or permit, each of which relies, to some degree, on discretionary authority. Increased transparency and accountability lends credibility to the allocation process and reduces any perceived or actual risk of corruption in Namibia. This not only gives potential investors confidence to bring business to the country, but also allows citizens to hold corporations and government bodies responsible.

This section sets forth recommendations for improving the allocation process of the grant of fishing rights, quotas and licenses. While there is a focus on the fisheries sector and, accordingly recommendations for that sector, the guiding concepts underlying the recommendations can be applied to the licensing processes for other sectors. The broader aim of this section is to lay down the principles that government ministries and agencies can apply to create an environment for doing business that is attractive to investors, is free of corruption, and enables good governance.

Recommendations

- **Set criteria for granting rights, licenses and quotas should which are clear, objective and (to the maximum extent feasible) non-discretionary**
- **Strengthen requirements for the disclosure of beneficial ownership**
- **Increase transparency/publication of information**

²⁴⁰ *Harambee Prosperity Plan*. Rep. Windhoek: Office of the President of Namibia, 2016. Print. Page 45.

9.2 *The criteria for granting rights, licenses and quotas should be clear, objective and (to the maximum extent feasible) non-discretionary.*

The process for allocating fisheries rights, licenses and quotas is set out in Section 33(4) of the Marine Resources Act, 2000²⁴¹ (Marine Act)²⁴². Section 33(4) of the Marine Act contains a list of criteria for granting fisheries right. These criteria are repeated in the Policy Statement (Guidelines) for the Granting of Rights to Harvest Marine Resources and the Allocation of Fishing Quotas²⁴³ ('Policy Statement'). The Minister may also have regard to, or consider, the criteria under Section 33(4) of the Marine Act when allocating quotas. In addition, the Policy Statement sets out that ambiguously the "aim of allocating quota is to ensure fairness and equitable distribution taking into account the extent of onshore investments together with employment in the sector". Licenses for fishing vessels are only valid if the licensee also holds a right and a quota²⁴⁴. The Minister may refuse to grant an application for a license upon the occurrence of any of the events under Section 40(4) of the Marine Act.

This report does not aim to discuss the criteria themselves, but provides recommendations for how the criteria should be applied. Our main finding is that both the Marine Act and the Policy Statement are ambiguous, grant "excessive" ministerial discretion, and fail to provide any real guidance as to how that discretion ought to be exercised. There is a need for providing increased clarity and uniformity in the allocation process.

Discretion takes several forms in the Marine Act. For instance, the Minister 'may' but is not required to take into account the criteria set out in the Marine Act. This means that the Minister could choose to ignore Section 33(4) of the Marine Act altogether, leading to decision-making based on considerations that may not necessarily be in the public interest. Relatedly, there is a risk that the Minister may cherry pick which criteria to apply, while choosing to ignore other equally relevant criteria. This creates a risk

²⁴¹ Act 27 of 2000. Note that there is also a separate exploratory right to harvest marine resources and the process for allocation of this right is set out in Section 34 of the Marine Act, however for the purposes of this report we are only concerned with the right granted under Section 33(4).

²⁴² For an overview of the legal framework for the fisheries sector see capstone report 2016.

²⁴³ Published July 2009.

²⁴⁴ Section 40(2) of the Marine Act.

that two applicants having substantially the same qualifications may be judged on different criteria, leading to conflicting decisions.

Lack of clarity in the licensing framework reduces investor confidence in the country as it symbolizes how investors are to be treated. Whenever there is too much discretion in how a license will be awarded there is a perceived risk that such discretion will be exercised in a manner that is arbitrary and corrupt. And perception can become reality²⁴⁵. The fear is that licenses will be awarded on the basis of political connections and not on the basis of qualification of the applicants. Excessive discretion also creates very real pressure points for corrupt behavior²⁴⁶ leading to a higher risk that corruption will take place.

We recommend that the application of the criteria in Section 33(4) of the Marine Act should be mandatory rather than discretionary, and the Minister must have regard to these criteria when allocating rights and quotas.

Any additional considerations for allocation of quotas, such as “extent of onshore investments” and “employment” that are contained in the Policy Statement should be included in the Marine Act. Refusal to grant a license should be mandatory if one of the events under Section 40(4) of the Marine Act occurs.

Namibia should specify minimum threshold requirements that an applicant must meet in order to qualify for a right. These minimum threshold requirements should include, for example, the minimum technical and financial capability necessary to operate a commercial fishing business. If rights and licenses are granted to applicants that don't have the requisite technical and financial capability, then they are likely to be transferred²⁴⁷, creating another pressure point for corruption.

²⁴⁵ Transparency International releases an annual corruption perceptions index which is available on their website. For the latest index see Web. 22 July 2017.

<https://www.transparency.org/news/feature/corruption_perceptions_index_2016>.

²⁴⁶ Radon & Associates, Natural Resource Revenue Loss: How to plug Leakages and Prevent the Resource Curse, June 2015.

²⁴⁷ Rights may be transferred under Section 42 of the Marine Act with the approval of the Minister.

9.3 *Strengthen requirement for the disclosure of beneficial ownership*

Concealment of beneficial ownership has been linked to numerous problems²⁴⁸. Complicated company structures and chains of corporate ownership which obscure and conceal the ultimate beneficial owners of a company can facilitate illegal flows of money, provide a cover for corruption and nepotism, and allow corporations to escape liability. Concealment of beneficial ownership can lead to loss of revenue²⁴⁹ for a country for several different reasons.

Firstly, it allows corporations to avoid tax liability by concealing revenues and assets through shell companies and non-transparent chains of ownership. Shell companies and complicated ownership structures are also used to take advantage of tax havens. In the context of the fishing industry in Namibia, lack of disclosure of ultimate beneficial ownership has sometimes resulted in companies that are ultimately foreign owned using obscure company structures to take advantage of tax benefits²⁵⁰ intended to benefit only Namibian citizens²⁵¹.

Secondly, it creates an enabling environment for corruption and nepotism²⁵². If the ultimate beneficial owner of a company remains secret, then it is easier for corrupt officials to award licenses based on political, social, or familial connections. This often means that the companies which are awarded licenses are not the most skilled or efficient, and the country suffers because it fails to develop

²⁴⁸ "Beneficial Ownership - Extractive Industries Transparency Initiative." *Visit the Main Page*. July 2017; Radon, Jenik, and Mahima Achuthan. "Beneficial Ownership Disclosure: The Cure for the Panama Paper Ills." *Columbia Journal of International Affairs* 70.2 (2017): p. 85-108;

²⁴⁹ Radon & Associates, Natural Resource Revenue Loss: How to plug Leakages and Prevent the Resource Curse, June 2015; Jenik, and Mahima Achuthan. "Beneficial Ownership Disclosure: The Cure for the Panama Paper Ills." *Columbia Journal of International Affairs* 70.2 (2017): p. 85-108.

²⁵⁰ Jenik, and Mahima Achuthan. "Beneficial Ownership Disclosure: The Cure for the Panama Paper Ills." *Columbia Journal of International Affairs* 70.2 (2017): 85-108; Vermeulen, Erik P. M. "Beneficial Ownership and Control." *Papers - OECD ILibrary*. OECD Publishing, 18 Jan. 2013, http://www.oecd-ilibrary.org/governance/beneficial-ownership-and-control_5k4dkhwckbzy-en.

²⁵¹ Melber, Henning. "Of Big Fish & Small Fry: The Fishing Industry in Namibia." *Review of African Political Economy* 30.95 (2003): 142-49; Standing, André. "Corruption and Commercial Fisheries in Africa." *U4 Anti-Corruption Resource Centre*, Dec. 2008.

²⁵² "World Bank Puppet Masters - How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It - November-2011.", <https://www.scribd.com/document/207586329/World-Bank-Puppet-Masters-How-the-Corrupt-Use-Legal-Structures-to-Hide-Stolen-Assets-and-What-to-Do-About-It-November-2011>.

partnerships with the most qualified companies or secure good business deals²⁵³. This also affects investor confidence in the country²⁵⁴: investors who believe they won't be awarded licenses on the basis of their competence and other qualifications unless they resort to illicit means will be hesitant to invest in the country.

Finally, it allows criminal activities and particularly illegal money laundering²⁵⁵ to take place. Shell companies and corporate vehicles incorporated across multiple jurisdictions help to conceal where assets originally came from and legitimize them. They also serve to hide the identity of criminals operating behind layers of corporate interests. Disclosure of beneficial ownership can assist enforcement agencies to identify individuals who may be involved in or have information regarding an illicit activity²⁵⁶.

We recommend that full beneficial ownership disclosure should be a required element of the application for grant of fishing rights and licenses²⁵⁷.

Corporate entities applying for fishing rights and licenses should disclose their ownership all the way up to the ultimate beneficial owner.

The ultimate beneficial owner should either be an individual or a publicly listed entity. In the case of publicly listed entities, the corporations should further disclose the stock exchange on which the entity

²⁵³ "Disclosing Beneficial Ownership Information in the Natural Resource Sector." *Open Government Partnership*. <http://www.opengovpartnership.org/sites/default/files/FIN%20OGP%20Issue%20Brief%20BO%20Disc.pdf>.

²⁵⁴ Vermeulen, Erik P. M. "Beneficial Ownership and Control." *Papers - OECD ILibrary*. OECD Publishing, 18 Jan. 2013, http://www.oecd-ilibrary.org/governance/beneficial-ownership-and-control_5k4dkhwckbzbv-en.

²⁵⁵ "Guidance on Transparency and Beneficial Ownership." *Financial Action Task Force*. July 2017.

<http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-transparency-beneficial-ownership.pdf>.

²⁵⁶ "Guidance on Transparency and Beneficial Ownership." *Financial Action Task Force*, 2017, <http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-transparency-beneficial-ownership.pdf>.

²⁵⁷ Section 33(4)(c) of the Marine Act already requires the Minister to have regard to "the extent to which the beneficial control of the company vests in Namibian citizens". Our recommendation seeks to strengthen this by requiring upfront disclosure of beneficial ownership from the applicants, and by including conflict of interest provisions.

is listed, as well as any significant ownership, e.g. ownership individually or as an affiliated group of more than 5% of the outstanding shares²⁵⁸.

Where the ultimate owner is a public official, or a close relative of a public official, they should be required to separately disclose their ownership interest in the corporate entity. To avoid conflict of interest, corruption and cronyism in the grant of licenses, we recommend that public officials should be prohibited from receiving rights and licenses²⁵⁹.

Particular attention should be paid to the definition of beneficial ownership. The definition should include not just equity interest but also percentage of share in the profits and degree of control. An illustrate example of statutory language that captures the concept of beneficial ownership is as follows:

“Beneficial Owner” means each of the following:

- (i) A natural person who directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, has Significant Ownership in the legal entity;
- (ii) A natural person having significant control to manage or direct the legal entity, including an executive officer, senior manager or any other person who regularly performs such functions;
- (iii) A trustee of a trust that has Significant Ownership in the legal entity;
- (iv) A public listed company that has Significant Ownership in the legal entity, provided that the public listed company must disclose the stock exchange on which it is listed and identify and natural person or private company having ____ percent or more of the equity interest in the public listed company;

“Significant Ownership” means ____ percent or more of the equity interests or ____ percent share in the profits of a legal entity.

²⁵⁸ In the US for example if any beneficial owner acquires over 5% of the voting shares in a company registered under Section 12 of the Securities Exchange Act of 1934, it must disclose its beneficial ownership by filing Form 13D.

²⁵⁹ See Section 7 of the Minerals (Prospecting and Mining) Act (Act 33 of 1992). See also Radon & Associates, Natural Resource Revenue Loss: How to plug Leakages and Prevent the Resource Curse, June 2015.

The penalty for incomplete or false disclosure of beneficial ownership should be an automatic voidance of the right, license and quota, for the simple reason that such disclosure is factual and within the knowledge of the party having to make the disclosure. Such voidance should be mandatory and not left to the discretion of the Minister. This will also have a strong deterrence effect, and accordingly encourage compliance.

Ultimately disclosure of beneficial ownership should be incorporated into the reporting requirements of companies. Namibia has already taken a first step in this regard²⁶⁰, and we recommend that Namibia should now require disclosure all the way up to the ultimate owner(s).

9.4 *Increasing transparency/ publishing of information*

Transparency is an essential complement to the first two recommendations as it is necessary for ensuring accountability and increasing investor confidence. Unless the decision-making process for granting rights, quotas and licenses is transparent or open and easily accessible to the public, the media and civil society actors within Namibia will not be able to hold ministers and corporations accountable. Lack of transparency engenders mistrust. Similarly, unless beneficial ownership is fully disclosed, it will be impossible for journalists, civil society and government agencies to trace and investigate instances of corruption or false disclosure.

Increasing transparency and access to information will make public officials and corporate entities directly accountable to the people of Namibia. Namibians will be able to put pressure on public officials to perform their duties strictly in compliance with the law and exercise their discretion in the interest of the public. The government will have to take action against any public officials accused of corruption, and public officials will find it difficult to hide or disguise corrupt behavior. Transparency also allows investors to evaluate risks with more certainty, making Namibia a more attractive location than other countries where there is a lack of information and therefore more uncertainty.

²⁶⁰ See Section 4 of the Financial Intelligence Act (Act 13 of 2012) which requires disclosure of beneficial ownership. The new form CM23 which is required to be filed by companies as part of their annual return requires disclosure of one level of beneficial ownership. However, disclosure is not required all the way up to the ultimate owner.

The application for grant of rights, quotas and licenses should be made publicly available. In case there is any commercially confidential information, such as a trade secret or patented information, then that may be redacted. However, all other data, including information regarding financial and technical qualification and the business plan for increasing employment, development and value addition in Namibia, must be disclosed.

The Minister's decision to grant or refusal to grant a license to an applicant should be disclosed in detail. This should include the reasons for the Minister's decision as well as any conditions attached to the right, license or quota allocation.

The data that undergirds the determination of Total Allowable Catch should be disclosed to allow NGO's and environmental organizations to ensure that fish is harvested sustainably.

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APPENDIX A REVISIONS TO ANTI-CORRUPTION ACT

Appendix Anti-Corruption

The body of the Report sets out some key issues for consideration in the context of the fight against corruption in Namibia. As discussed therein, certain provisions of the Anti-Corruption Act (ACA) need to be amended to address the concerns raised. This Appendix proposes amendments to certain provisions of the ACA as illustrative of what needs to be addressed and the proposed amendments are not intended to be exhaustive. A full word-by-word review of the ACA is in order.

In formulating the proposed amendments, emphasis has been given to identifying provisions that could result in undue influence on the government and therefore result in corruption. Therefore, increased transparency is recommended as well as a reduction or a limitation of administrative discretion.²⁶¹ Further, amendments to fulfil Namibia's compliance with UNCAC are proposed. The amendments also enhance the Anti-Corruption Commission's (ACC) investigative and prosecution powers and introduce a system of asset forfeiture in the ACA as well as an advanced protection of informers, witnesses and victims.

A successful internationally accepted logistics hub is built upon, and therefore requires, a strong legal and institutional framework that promotes and facilitates public trust and confidence.²⁶² Namibia performs better in international corruption rankings than most of its peers in sub-Saharan Africa.²⁶³ However, as a stable middle-income country, Namibia should aim for an international rather than regional standard and compete with other logistics hubs and economic centres with similar conditions. Namibia is currently ranked fifth (5th) among sub-Saharan African countries, but only 53rd out of 176 countries in the Transparency

²⁶¹ Radon & Associates, *Natural Resource Revenue Loss: How to plug Leakages and Prevent the Resource Curse*, June 2015, p. 31.

²⁶² The following language is identical with parts of the report since it introduces the same considerations.

²⁶³ By its very nature as a secretive act corruption is difficult to measure, and any study that attempts to compare relative levels of corruption in different countries should be treated cautiously.

International's Corruption Perception Index.²⁶⁴ To become a gateway to southern Africa and attract investments from across the globe, Namibia should look beyond Africa. It has the potential to perform on the same level as other small countries that are known for their strong legal system and reliable institutions such as New Zealand²⁶⁵ and Singapore.²⁶⁶

It is well-established through global surveys and studies²⁶⁷ that a strong anti-corruption regime, and strong rule of law correlate with development, economic growth and investments. As Head of the ACC Paulus Noa stated, "We cannot accelerate Namibia's economic growth and development if we do not tackle corruption head on."²⁶⁸ The Government, in the Harambee Prosperity Plan (HPP), recognizes that effective governance is a pre-condition towards the achievement of its sustainable development objectives.²⁶⁹

A revised ACA is needed as a strong symbol for the will to enhance and broaden the ACC's mandate and ensure a comprehensive and effective fight against corruption. The legal framework for anti-corruption in Namibia is relatively strong – however not strong enough to compare it to countries like Singapore, Hong-Kong or New Zealand, although it has the conditions to reach for and achieve that goal.

Notwithstanding the challenge to enforce the law, a solid legal basis is the prerequisite for an effective and credible fight against corruption. A strong legal framework also ensures Namibia's compliance with the international agreements it has ratified such as the United Nations Convention against Corruption (UNCAC), the SADC Protocol against Corruption and the African Union Convention on Preventing and Combating Corruption. A final report²⁷⁰ under the UNCAC Review Mechanism of implementation identifies gaps in the legal framework that Namibia should address and these are taken into account for this proposal.

²⁶⁴ Transparency International, Corruption Perception Index 2016, (2017), accessible at http://www.transparency.org/news/feature/corruption_perceptions_index_2016.

²⁶⁵ Rank 2 in Transparency International, Corruption Perception Index 2016.

²⁶⁶ Rank 7 in Transparency International, Corruption Perception Index 2016.

²⁶⁷ See studies of OECD, <https://www.oecd.org/g20/topics/anti-corruption/Issue-Paper-Corruption-and-Economic-Growth.pdf>; and IMF, <http://www.imf.org/external/pubs/cat/longres.aspx?sk=43888>.

²⁶⁸ ACC, National Anti-Corruption Strategy and Action Plan 2016-2019, p. 7.

²⁶⁹ Harambee Prosperity Plan, p. 7.

²⁷⁰ https://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/2016_01_29_Namibia_Final_Country_Report_.pdf.

Our suggested amendments add certain crimes to be an offence under the ACA such as the acceptance of or solicitation for a bribe by foreign public officials, illicit enrichment and embezzlement committed by the private sector, as well as corruption in employment, to fill gaps in the ACA and fulfil requirements by UNCAC. They also envision a change in the wording so that discretion, which can be a source of corruption, is reduced. In particular, it increases the rule of law when it comes to the decision to take the case to court by reducing the discretion of the Prosecutor-General and empowering the ACC to conduct the criminal proceedings as well to advance the number of prosecutions and convictions. The amendments also add a new section that provides for the freezing of assets and the forfeiture of proceeds of corruption, bringing the ACA in line with the Prevention of Organized Crime Act and at the same time stressing the significance of the crime of corruption and hence strengthen deterrence. The section on the protection of informers and information is also amended broadly, bringing it in line with laws that are internationally considered strong such as the Singapore Prevention of Corruption Act and the Hong Kong Prevention of Bribery Ordinance.²⁷¹ Namibia's stable government and institutions allow and ask for a legislative basis in the fight against corruption that aims for the highest international standards and is in compliance with international agreements such as UNCAC.

The legal reform of the ACA will be supported by the revision of the Whistleblower Protection Bill and the Public Procurement Act.²⁷² To reach its full potential, it moreover has to be complemented with a significant increase of the ACC's, the Prosecutor-General's, and the Judiciary's budget. An increased budget, combined with the new investigation and asset forfeiture provisions, can make a huge difference in the ACC's work. Moreover, the provisions regarding illicit enrichment and the disclosure of property of public officials can support a new policy of investigating and prosecuting all cases equally²⁷³ by lightening the

²⁷¹ U4 Anti-Corruption Resource Centre/ Transparency International: International good practice in anti-corruption legislation, February 2010.

²⁷² See Capstone 2017 Report.

²⁷³ Namely „high profile cases“, and „the big fish“.

burden of evidence that has been used effectively to combat corruption in many countries.²⁷⁴ The reduction of discretion and an additional power of the ACC to conduct criminal proceedings without the Prosecutor-General further push forward these cases and hence deter corruption and reinstall trust in Namibia's Anti-Corruption system. The enhanced fight against corruption should be framed by a stronger inclusion of the public through a multi-stakeholder framework and a legal reform that allows for anti-corruption public interest litigation.

It is important to highlight that the proposed amendments are not intended to be exhaustive and are only indicative and illustrative of the changes that need to be made to the ACA. An independent and holistic review, including by international advisors, process should be adopted to review the entire framework for combating corruption in Namibia.



²⁷⁴ Linda Muzile et al., „On the take: Criminalizing Illicit Enrichment to Fight Corruption,“ Stolen Asset Recovery Initiative (The World Bank, 2012), p. 7, https://star.worldbank.org/star/sites/star/files/on_the_take-_criminalizing_illicit_enrichment_to_fight_corruption.pdf.

Revised Anti-Corruption Act

BE IT ENACTED by the Parliament of the Republic of Namibia as follows:

CHAPTER 1

PRELIMINARY Definitions

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

“authorised officer” means –

- (a) the Director;
- (b) the Deputy Director;
- (c) an investigating officer appointed under section 13: or
- (d) a special investigator appointed under section 14;

“Commission” means the Anti-Corruption Commission established by section 2;

“corrupt practice” means any conduct contemplated in Chapter 4;

“Director” means the Director of the Commission appointed under section 4, and includes a person temporarily acting as Director under this Act;

“Deputy Director” means the Deputy Director of the Commission appointed under section 4.

“public **body**” means. -

- (a) any ministry, office or agency of government;
- (b) any regional council or local authority council; or
- (c) any corporation, board, council, institution or other body, whether incorporate or unincorporated, or any functionary -
 - (i) exercising any power or performing any duty in terms of the

Comment [A1]: The Definition of „Public Body“ and „Public Officer“ will be used throughout the Act and is therefore moved to the beginning of the Act

Namibian Constitution; or

(ii) exercising a public power or performing a public function in terms of any law or the common law;

“Public officer” means a person who is a member, an officer, an employee or a servant of a public body, and includes -

(a) a staff member of the public service, including the police force, prisons service and defence force, or of a regional council or a local authority council;

(b) a member of the National Assembly, the National Council, a regional council or a local authority council;

(c) a judge of the Supreme Court or the High Court or any other member of the judicial authority;

(e) any person receiving any remuneration from public funds;

(f) if the public body is a corporation, the person who is incorporated as such.

The use of the word “shall” or “must” in any sentence shall be understood to impose an obligatory or mandatory obligation on the person or agency affected that must be complied with, in respect of which there is no discretion, and if no time period is set forth for such compliance, it shall be within a reasonable period of time, which in no event shall be later than 30 days after the occurrence of the issue or matter in question.

CHAPTER 2

ANTI-CORRUPTION COMMISSION

Establishment of Anti-Corruption Commission

2. (1) There is established an independent and impartial body known as

the Anti-Corruption Commission with such powers, functions and duties as are provided for in this Act or any other law.

(2) The Commission consists of –

(a) a Director;

(b) a Deputy Director; and

(c) other staff members.

(3) The Commission is an agency in the Public Service as contemplated in the Public Service Act, 1995 (Act No. 13 of 1995).

(4) The Public Service Act, 1995 applies to the Commission, the Director, the Deputy Director and the other staff members of the Commission, except to the extent as provided otherwise by this Act or as is inconsistent with this Act.

Functions of the Commission

3. The functions of the Commission are –

(a) to receive or initiate and investigate allegations of corrupt practices;

(b) to consider whether investigation is needed in relation to an allegation and, if so, whether the investigation must be carried out by the Commission or whether the matter should be referred to any other appropriate authority for investigation or action;

(c) to consult, co-operate and exchange information with appropriate bodies or authorities, including authorities or bodies of other countries that are authorised to conduct inquiries or investigations in relation to corrupt practices;

(d) to assemble evidence obtained in the course of its functions and to furnish –

- (i) to any appropriate authority contemplated in paragraph (c); or
 - (ii) to the prosecuting authority or any other suitable authority of another country, upon a formal request, evidence which may be admissible in the prosecution of a person for a criminal offence or which may otherwise be relevant to the functions of that authority;
- (e) to investigate any conduct of a person employed by a public body or private body which in the opinion of the Commission may be connected with or conducive to corrupt practices, and to report thereon to an appropriate authority within the public body or private body;
- (f) to take measures for the prevention of corruption in public bodies and private bodies, including measures for -
- (i) examining the practices, systems and procedures of public bodies and private bodies to facilitate the discovery of corrupt practices and securing the revision of practices, systems or procedures which may be prone or conducive to corrupt practices;
 - (ii) advising public bodies and private bodies on ways of preventing corrupt practices and on changes of practices, systems and procedures compatible with the effective performance of their duties and which are necessary to reduce the likelihood of the occurrence of corrupt practices;
 - (iii) educating the public and disseminating information on the evil and dangers of corruption, including through the publication and distribution of brochures and pamphlets or the holding of public conferences;
 - (iv) enlisting and fostering public confidence and support in combating corruption;
- (h) to establish and maintain a system of –

Comment [A2]: Such a system of cooperation is required by Art. 39 UNCAC and has been incorporated in recent laws that have been considered in line with UNCAC, such as the Tanzania Prevention and Combating of Corruption Act. So far, such a cooperation seems to be only ad hoc in Namibia

- (i) cooperation with the private sector, and in particular, financial institutions on matters relating to the commission of offences under this Act; and
- (ii) encouraging the private sector to report to the Commission the commission of an offence under this Act.

(i) to disseminate information to the public about the functions of the Commission;

(j) to do anything else that the Commission is required or authorised to do under this Act or any other law or which is necessary or expedient to do for achieving the purpose of this Act.

Appointment of Director and Deputy Director

4. (1) The National Assembly appoints the Director and Deputy Director upon nomination by the President and upon consultation with the National Anti-Corruption Steering Committee.

(2) Notwithstanding the provisions of the Public Service Act, 1995 (Act No. 13 of 1995), the President may nominate for appointment as Director or Deputy Director any person who –

- (a) is of good character and of high integrity; and
- (b) possesses knowledge or experience relevant to the functions of the Commission.

Disqualified persons

5. A person is not eligible to be appointed as Director or Deputy Director who –

- (a) is not a Namibian citizen;
- (b) is or has been in the last two years a member of the National Assembly

Comment [A3]: The appointment of the Director and Deputy Director should be subject to a system of checks and balances to ensure independence. The newly established National Anti-Corruption Steering Committee, especially when working upon broad public consultation, is a fitting body to make the appointment process more transparent and establish more independence from the executive.

Comment [A4]: The additional requirement of two years between the appointment as Director or Deputy Director and being Member of the National Assembly or National Council ensures more independence and the separation of powers

or National Council;

(c) is or has been in the last two years a member of a regional council or a local authority council;

(d) is an unrehabilitated insolvent; or

(e) has been convicted of –

(i) theft, fraud, forgery or uttering a forged document, perjury or any other offence involving dishonesty; or

(ii) any other offence for which a sentence of imprisonment without the option of a fine has been imposed, excluding an offence of a political nature committed before the date of Namibia's independence.

Authority card

6. (1) Upon their appointment the Director and the Deputy Director must each be issued with an authority card, signed by the President.

(2) An authority card issued under subsection (1) is *prima facie* evidence of the appointment of the person concerned.

(3) The Director and Deputy Director must display the authority card to any person in relation to whom they seek to exercise any power or perform any function or duty under this Act.

Term of office and conditions of service of Director and Deputy Director

7. (1) The Director and Deputy Director are appointed on a full-time basis for five years and may be reappointed upon expiry of their term of office.

(2) The conditions of service of the Director and Deputy Director are determined by the President with the confirmation of the National

Assembly.

- (3) The Director and Deputy Director may not -
- (a) engage in the day to day management of any business or occupation;
 - (b) take part in the management of the affairs of any political party; or
 - (c) be a salaried employee of any person or organisation.
- (4) The provisions of the Public Service Act, 1995 (Act No. 13 of 1995) in relation to requirements for appointment, tenure of office, conditions of service suspension and dismissal from office do not apply to the Director and Deputy Director in so far as they are inconsistent with the provisions of this Act.
- (5) Not later than one month after their appointment, and thereafter once a year within 90 days after December 31 of each year, the Director and Deputy Director must each furnish to the Prime Minister a statement setting forth a complete and accurate statement of all of their assets and liabilities, including the nature and extent of any interest (including ownership, profit sharing, and voting), whether direct or indirect, which they may have in any business or occupation or in any company, close corporation or other entity. Failure to do shall result in immediate suspension.

Comment [A5]: There should be a firm timeframe to ensure regular asset declarations will be conducted.

Vacation of office of Director or Deputy Director

8. The office of the Director or Deputy Director becomes vacant if -
- (a) he or she resigns from office by written notice to the President;
 - (b) he or she becomes subject to a disqualification referred to in section 5; or
 - (c) his or her appointment is terminated under section 9.

Termination of appointment of Director or Deputy Director

9. (1) The appointment of the Director or Deputy Director shall be

Comment [A6]: See Section 1

terminated if he or she -

- (a) has failed to comply with a condition of his or her appointment;
- (b) is unable to perform the functions of his or her office by reason of mental or physical infirmity;
- (c) fails to perform efficiently the duties of his or her office; or
- (d) has been guilty of misconduct.

(2) If the question of termination of the appointment of the Director or the Deputy Director arises, the President must notify the Chief Justice who, after consultation with the Judicial Service Commission established under Article 85 of the Namibian Constitution, must within 30 days appoint a board to inquire into the matter and submit a report and recommendations to the President.

(3) The board must consist of -

(a) a chairperson, being a person who -

(i) held office as judge of the Supreme Court or the High Court of Namibia; or

(ii) is qualified to be appointed as judge of the Supreme Court or the High Court of Namibia; and

(b) two other members who are impartial, independent, of good character and integrity.

Comment [A7]: Impartiality is another important feature that the board members should possess to ensure a fair and independent process

(4) If the question of termination of the appointment of the Director or Deputy Director is referred to the board, the President may suspend the Director or Deputy Director, as the case may be, from exercising the functions of his or her office pending inquiry by the board, but the suspension lapses if the board recommends to the President that the appointment should not be terminated.

(5) The board must inquire into the matter in accordance with such rules as the board may make conforming to the rules of natural justice.

(6) The board must within 30 days after conclusion of the inquiry submit its report and recommendations to the President.

(7) If the President, on receipt of the board's report and recommendations, finds that the Director or Deputy Director, as the case may be, shall be removed from office, the President must communicate that finding and the reasons therefor by message to the National Assembly within 14 days after the finding if the National Assembly is then in session or, if the National Assembly is not then in session, within 14 days after its next session starts.

Comment [A8]: Reduce discretion by replacing „Should“ by „shall“

(8) The President must remove the Director or Deputy Director from office upon adoption by the National Assembly of a resolution calling for that person's removal from office.

Acting Director

10. (1) If the office of the Director is vacant or the Director is absent from duty or unable for any reason to perform the functions of his or her office the Deputy Director must act as Director, but the President may appoint another person to act temporarily as Director.

(2) If the offices of both the Director and Deputy Director are vacant or if both the Director and Deputy Director are absent or unable for any reason to perform the functions of their offices, the President must appoint another person with appropriate knowledge or experience to act as Director during such vacancy or temporary absence.

(3) A person acting as Director in terms of subsection (1) or (2) shall not act for a period of more than six months.

Comment [A9]: Reduce discretion by replacing „may“ by „shall“

(4) A person appointed as acting Director while the office of the Director is vacant is entitled to the salary attached to that office for the period that he

or she so acts.

Duties of Director and Deputy Director

11. (1) The Director is the head of the Commission and is responsible for the direction and control of the Commission.

(2) The Deputy Director performs the functions conferred by this Act on the Deputy Director or as may be assigned to him or her by the Director.

Appointment of other staff members of the Commission

12. (1) The Permanent Secretary and other staff members of the Commission referred to in section 2(2)(c) as may be required for the proper performance of the functions of the Commission are appointed subject to the Public Service Act, 1995 (Act No. 13 of 1995).

(2) The Permanent Secretary, despite any other powers conferred or functions imposed upon him or her by any other law, but subject to this Act and the control and directions of the Director-General, is accountable for the efficient management and administration of the Commission.

(3) The Commission shall employ such number of staff as is necessary for efficient performance of the functions of the Commission.

Investigating officers

13. (1) Among the staff members referred to in section 12 the Director must appoint persons to be investigating officers for the purposes of this Act.

(2) An investigating officer -

(a) has such powers, functions and duties as may be provided for by this Act or as may be delegated or assigned to the investigating officer by the Director; and

Comment [A10]: A lack in staff is one of the major challenges the ACC faces in combatting corruption. By incorporating the requirement to have an adequate number of staff in the law such as the Tanzania Act did, it increases the pressure on the government to raise the ACC's budget.

(b) must exercise such powers, perform such functions and discharge such duties in compliance with the directions or instructions as may be specified orally or in writing by the Director, the Deputy Director or any other staff member of the Commission superior to him or her in rank.

(3) An authority card must be issued to every staff member appointed as investigating officer in terms of subsection (1), which -

(a) must be signed by the Director; and

(b) is *prima facie* evidence of the appointment of the person concerned.

(4) An investigating officer must display his or her authority card to any person in relation to whom he or she may seek to exercise any power or perform any function or duty under this Act.

Special investigators

14. (1) The Director, with the concurrence of the Prime Minister, shall appoint a person who has expert knowledge in a particular field to be a special investigator to investigate an allegation of corrupt practice, or any aspect thereof, specified -

Comment [A11]: See Section 1

(a) in the instrument appointing the special investigator; or

(b) in a written notice given to the special investigator by the Director.

(2) A special investigator is appointed on a temporary basis as agreed between the Director and the person and must perform his or her functions -

(a) subject to the control and direction of the Director; and

(b) on the terms and conditions as the Director and the special investigator may agree.

(3) An authority card must be issued to a person appointed as special investigator in terms of subsection (1), which -

- (a) must be signed by the Director; and
- (b) is *prima facie* evidence of the appointment of the person concerned.

(4) A special investigator must display his or her authority card to any person in relation to whom he or she may seek to exercise any power or perform any function or duty under this Act.

Administrative orders

15. The Director shall issue administrative orders, not inconsistent with this Act or the Public Service Act, 1995 (Act No. 13 of 1995), on the general control, training, duties and responsibilities of staff members of the Commission, and for such other matters as may be necessary or expedient for the good administration of the Commission or the prevention of the abuse of power or neglect of duty, and generally for ensuring the efficient and effective functioning of the Commission.

Comment [A12]: See section 1

Comment [A13]: Reduce discretion by replacing „may“ by „shall“

Annual report

16. (1) The Director must submit to the Prime Minister, not later than 31 March of each year, a report on the activities of the Commission during the previous year.

(2) The Prime Minister must submit the report of the Director to the National Assembly within 30 days after receipt thereof or, if the National Assembly is not then in session, within 30 days after commencement of its first ensuing session.

CHAPTER 3

INVESTIGATION OF CORRUPT PRACTICES

Notification to Commission of corrupt practice

17. (1) Any person may furnish to the Commission information in connection with any matter which that person suspects on

reasonable grounds concerns or may concern a corrupt practice.

(2) Information referred to in subsection (1) may be furnished to the Commission orally or in writing, and if orally the informant's statement must be reduced to writing and signed by the informant.

(3) The Director may require from an informant to furnish, in such form as the Director thinks fit, any further information as may be required for purposes of the functions of the Commission.

Receipt and examination of allegations

18. (1) The Commission must -

(a) receive information furnished to it by any person who alleges that another person has or is engaged, or is about to engage, in a corrupt practice; and

(b) examine each alleged corrupt practice and decide whether or not an investigation in relation to the allegation is warranted on reasonable grounds.

(2) When deciding whether an investigation into an alleged corrupt practice is warranted, the Commission **must** consider -

(a) the seriousness of the conduct or involvement to which the allegation relates;

(b) whether or not the allegation is frivolous or vexatious or is made in good faith;

(c) whether or not the conduct or involvement to which the allegation relates is or has been the subject of investigation or other action by any other appropriate authority for the purposes of any other law;

(3) If the Commission decides that an investigation in relation to the allegation is warranted on reasonable grounds, it must decide whether the

Comment [A14]: Reduce discretion by replacing „may“ by „must“

investigation should be carried out by the Commission or whether the allegation should be referred to another appropriate authority for investigation or action.

(4) The Commission must investigate –

(a) any alleged or suspected offence under this Act

(b) any alleged or suspected offence of blackmail committed by a public officer by or through the misuse of his office

(c) any alleged or suspected conspiracy to commit an offence under this Act

(d) any alleged or suspected conspiracy (by 2 or more persons including a public officer) to commit an offence of blackmail by or through the misuse of his or her office

(e) any conduct of a public officer which, in the opinion of the Commissioner is connected with or conducive to corrupt practices

Comment [A15]: Reduce discretion of the ACC by making it mandatory to investigate any alleged or suspected offences under this Act.

(5) For the purposes of performing the functions under this section the Commission may -

(a) make such preliminary inquiry as it considers necessary; and

(b) consult any other appropriate authority.

Notification of decision to informant

19. The Commission must in writing inform a person who has made an allegation in terms of section 17 of any decision made by the Commission under section 18 that further action in relation to the allegation for the purposes of this Act is not warranted on reasonable grounds, and if the matter is referred to another appropriate authority for further action, inform that person accordingly.

Initiating or assuming investigation of a complaint

20. (1) Investigation of a complaint or allegation of a corrupt practice may be initiated by the Commission of its own motion or on information furnished to the Commission in terms of section 17.

(2) The Commission may -

(a) assume the responsibility for any investigation into an alleged corrupt practice commenced or to be commenced by the police, and the police must comply with any requirement of the Commission in that regard;

(b) carry out an investigation into an alleged corrupt practice notwithstanding that any other authority, other than the police, is entrusted with a corresponding power or duty of investigation under, and for the purposes of, any other law.

Investigation by Commission

21. (1) For the performance of the functions of the Commission under this Act an authorised officer may conduct any investigation which the Commission is empowered to undertake in terms of this Act or any other law.

(2) Upon initiating or receiving a complaint which in the opinion of the Director warrants investigation on reasonable grounds, the Director must cause the complaint to be investigated as quickly as practicable.

(3) At any time during an investigation, the Director may designate one or more other authorised officers to assist the authorised officer conducting the investigation.

(4) A person questioned by an authorised officer conducting an investigation must answer each question truthfully and to the best of that person's ability, but a person is not obliged to answer any question if the answer is self-incriminating.

(5) At any time during an investigation the Director may summon any person who is believed to be able to furnish any information on the subject of the investigation, or to have possession or control of any book, document or article that has a bearing on that subject to appear before the Director, or any other authorised officer designated by the Director, at a specified time and place in order -

(a) to be questioned; or

(b) to deliver or produce such book, document or article.

(6) The Director or other authorised officer before whom a person appears in terms of subsection (5) may -

(a) require that person to furnish the information under oath or on affirmation; and

(b) administer an oath to, or accept an affirmation from, that person.

(7) No self-incriminating answer given or statement made by any person to the Director or other authorised officer in terms of this section is admissible as evidence against that person in criminal proceedings against that person instituted in any court, except in criminal proceedings -

(a) for perjury; or

(b) for an offence referred to in section 29,

and then only to the extent that the answer or statement is relevant to prove the offence charged.

Authority to enter and search under warrant

22. (1) An authorised officer may enter any premises and there -

(a) make such investigation or inquiry; and

(b) seize anything;

which in the opinion of the authorised officer has a bearing on the investigation.

(2) Subject to section 23, premises may be entered in terms of subsection (1) only by virtue of a warrant issued by a judge of the High Court or by a magistrate in whose area of jurisdiction the building or premises are situated.

(3) A warrant referred to in subsection (2) must be applied for by the Director, the Deputy Director or any other authorised officer and must be supported by an affidavit or a solemn declaration by the person making the application, or any other person having knowledge of the facts, stating -

(a) the nature of the investigation being conducted;

(b) the suspicion which gave rise to the investigation; and

(c) the need for a search and seizure in terms of this section for purposes of the investigation.

(4) A judge or a magistrate to whom an application for a warrant is made in terms of subsection (3) may issue a warrant authorising entry and search of the premises concerned if it appears to the judge or magistrate from the information furnished that there are reasonable grounds for believing that -

(a) a corrupt practice has taken place, is taking place or is likely to take place; and

(b) that anything connected with the investigation into that corrupt practice is on or in those premises.

(5) A warrant to enter and search premises may be issued on any day and must specifically -

(a) identify the premises that may be entered and searched; and

(b) authorise an authorised officer mentioned in the warrant to conduct the entry and search of the premises.

(6) A warrant to enter and search premises is valid until one of the following events occurs -

- (a) the warrant is executed;
- (b) the warrant is cancelled by the authority who issued it or, in that person's absence, by a person with similar authority;
- (c) the purpose for issuing it has lapsed; or
- (d) the expiry of one month after the date it was issued.

(7) A warrant to enter and search may be executed only between 6:00 and 18:00, unless the judge or magistrate who issued it on good cause shown authorises that it may be executed at a different time.

(8) Before commencing with the execution of a warrant to enter and search premises, the person authorised by the warrant must -

- (a) if the person in control of the premises is present-
 - (i) identify himself or herself to that person;
 - (ii) hand a copy of the warrant to that person; and
 - (iii) supply that person, at his or her request, with particulars regarding his or her authority to execute the warrant in accordance with the powers conferred by section 24.
- (b) if no person is present, affix a copy of the warrant to a prominent and visible place on the premises.

Authority to enter and search without a warrant

23. (1) Notwithstanding section 22, an authorised officer may without a warrant of entry and search referred to in that section enter and search premises, other than a private dwelling, except if the dwelling is used also for business purposes, for the purpose of attaching and removing, if

necessary, any book, document or article, if -

(a) the occupier of the premises or any other person in control of the premises consents to the entry, search, seizure and removal of the book, document or article concerned; or

(b) the authorised officer on reasonable grounds believes -

(i) that a warrant of entry and search will be issued if application therefor were made under section 22; and

(ii) that the delay in obtaining a warrant would defeat the object of the entry and search.

(2) Immediately before entering and searching premises in terms of this section, the person exercising the power must, if the person in control of the premises is present -

(a) identify himself or herself to that person; and

(b) supply that person, at his or her request, with particulars regarding -

(i) his or her authority to enter and search the premises without a warrant; and

(ii) the powers conferred by section 24.

(3) An entry and search without a warrant may be carried out between 6:00 and 18:00, unless doing it at another time is justifiable and necessary in the circumstances.

Powers to enter and search

24. (1) A person who is authorised under section 22 or 23 to enter and search premises may -

(a) enter the premises;

- (b) search the premises;
 - (c) search any person on the premises if there are reasonable grounds for believing that the person has personal possession of any book, document or article that has a bearing on the investigation;
 - (d) examine any book, document or article that is on or in those premises that has a bearing on the investigation;
 - (e) request information about any book, document or article from the owner or other person in control of the premises or from any person who has control of the book, document or article, or from any other person who may have the information;
 - (f) take extracts from, or make copies of, any book or document that is on or in the premises that has a bearing on the investigation;
 - (g) in the presence of a person in charge of, or employed at, the premises, use any computer system on the premises, or require the assistance of any such person to use that computer system, to -
 - (i) search any data contained in or available to that computer system;
 - (ii) reproduce any record from that data; and
 - (iii) seize any output from that computer for examination and copying;and
 - (h) attach and, if necessary, remove from the premises for examination and safekeeping anything that has a bearing on the investigation.
- (2) Notwithstanding paragraph (g) of subsection (1), if a person contemplated in that paragraph is not present or not able to give the assistance required by the authorized officer, the authorised officer may proceed to use the computer system if in the circumstances of the case any delay may prejudice the purpose for which the search is carried out.

(3) A person conducting an entry and search of premises under this Act may be accompanied and assisted by any other authorised officer or a police officer, or by any other person authorised by the Director for that purpose.

Conduct of entry and search

25. (1) A person who enters and searches any premises under section 22 or 23 must exercise those powers with strict regard for decency and order, and with regard for each person's right to dignity, freedom, security and privacy.

(2) The search of a person under section 24(1)(c) may be conducted only by a person of the same gender as the person to be searched.

(3) A person who enters and searches premises under section 22 or 23 must, before questioning any person -

(a) advise that person of the right to be assisted by a legal practitioner; and

(b) allow that person to exercise that right.

(4) A person who removes anything from premises being searched must -

(a) issue a receipt for it to the owner or other person in control of the premises; and

(b) return it as soon as practicable after achieving the purpose for which it was removed.

(5) If the owner or person in control of any book, document or article refuses to allow the authorised officer conducting a search to inspect that book, document or article on the ground that it contains privileged information, the authorised officer may request the registrar or sheriff of the High Court, or the messenger of the magistrate's court of the area of jurisdiction where the premises are situated, to attach and remove the article or document for safe custody until a competent court determines whether or

not the information is privileged.

(6) An authorised officer or a police officer who accompanies and assists an authorised officer who conducts an entry and search of premises under section 22 or 23, may overcome resistance to the entry and search by using such force as is reasonably required, including breaking out a door or a window of the premises or any container or receptacle on the premises.

(7) Before using force as contemplated in subsection (6) to gain access to any premises, the authorised officer or police officer must audibly demand admission and must announce the purpose of the entry, except if the circumstances are such that immediate entry must be gained to prevent concealment, loss or destruction of anything on or in the premises.

Power to obtain information concerning assets

26. (1) If, in the course of an investigation into an alleged corrupt practice, the Director is satisfied that it could assist or expedite the investigation, the Director **must**, by notice in writing, require -

Comment [A16]: Reduce discretion by replacing „may“ by „must“

(a) any suspected person to furnish a statement in writing -

(i) enumerating all movable or immovable property belonging to or possessed by him or her in Namibia or elsewhere or held in trust for him or her in Namibia or elsewhere, and -

(aa) specifying the date on which every such property was acquired;

(bb) explaining whether it was acquired by way of purchase, exchange, gift, bequest, inheritance or by any other cause; and

(cc) specifying the consideration paid or given therefor and the amount or value of the consideration;

(ii) specifying any moneys or other property acquired in Namibia or

elsewhere, or held in or sent out of Namibia, in trust for him or her or on his or her behalf during such period as may be specified in the notice;

(b) any other person with whom the Director believes the suspected person had any financial transaction or other business dealing relating to an alleged corrupt practice to furnish a statement in writing enumerating all movable or immovable property acquired by that person in Namibia and elsewhere at the material time;

(c) any person to furnish, notwithstanding the provisions of any other law to the contrary, any information in that person's possession relating to the affairs of any suspected person and to produce any document or certified true copy of any document relating to such suspected person which is in the possession or under the control of the person required to furnish the information;

(d) the manager or other person in charge of any bank, building society or other financial institution, in addition to furnishing any information specified in paragraph (c), to furnish any information or the originals, or certified true copies of the accounts or the statements of account at the bank, building society or financial institution of any suspected person notwithstanding the provisions of any other law to the contrary.

(2) Notwithstanding any oath or other obligation of secrecy imposed by law or otherwise, a person on whom a notice referred to in subsection (1) is served must, comply with the requirements of that notice within the time specified therein.

(3) A person who without reasonable excuse fails to comply with any requirement of a notice referred to in subsection (1), commits an offence and is liable on conviction to a fine not exceeding N\$50 000 or to imprisonment for a term not exceeding three years or to both such fine and such

imprisonment.

Investigation of accounts at financial institutions

27. (1) The Director or Deputy Director, or an investigating officer or special investigator authorised in writing by the Director or Deputy Director, may require access to and investigate any bank account, share account, purchase account, expense account or any other account, or any safe box in any bank, building society or other financial institution or any banker's books, company books, documents or any information from any other source.

(2) A person in charge of an account or safe box referred to in subsection (1) must, notwithstanding the provisions of any other law to the contrary, comply with a request made by an authorised officer referred to in subsection (1) to disclose any information or produce any book or document, including data stored in electronic form, or anything relating to an account or safe box referred to in that subsection.

(3) A person who without reasonable cause fails to comply with a request of an authorised officer in terms of subsection (2), commits an offence and is liable to a fine of N\$50 000 or to imprisonment for three years or to both such fine and such imprisonment.

(4) The Director or Deputy Director, or an investigating officer or special investigator authorised in writing by the Director or Deputy Director, may require access to and investigate any tax returns or any other information that he or she believes can assist the investigation from the Ministry of Finance.

Powers of arrest

28. (1) An authorised officer may without a warrant arrest any person whom he or she reasonably suspects has committed or is about to commit an

Comment [A17]: Enhance the ACC's investigation powers by widening the documents that can be required, bringing it in line with international standards from Singapore, Hong-Kong etc.

Comment [A18]: Enhance the ACC's investigation powers by widening the documents that can be required to tax documents, bringing it in line with international standards such as Singapore. The best Anti-Corruption Data might come from the Tax authorities, as cases in Brazil and Panama have shown.

offence under this Act.

(2) If during an investigation of a suspected offence under this Act another offence is disclosed, the authorised officer may, without a warrant, arrest a person if he or she reasonably suspects that the person has committed the offence and that such other offence is connected with, or was either directly or indirectly facilitated by, the suspected offence under this Act.

(3) A person arrested must be taken forthwith to a police station to be dealt with in accordance with the Criminal Procedure Act, 1977 (Act No. 51 of 1977).

Offences in relation to functions of the Commission

29. (1) A person commits an offence who -

(a) assaults, resists or obstructs an authorised officer who is exercising a power or performing a duty conferred or imposed on, or delegated or assigned to, the authorised officer by or under this Act;

(b) does anything calculated to improperly influence an authorised officer concerning any matter connected with an investigation;

(c) defames an authorised officer in his or her official capacity;

(d) knowingly provides false information to an authorised officer; or

(e) fails to comply with a lawful direction or requirement of an authorised officer under this Act;

(f) having been summoned to appear before the Director or any other authorized officer in terms of section 21(5) - (i) fails without sufficient cause to appear at the time and place specified or to remain in attendance until excused; or

(ii) attends as required, but -

(aa) refuses to be sworn in or to make an affirmation when requested to do so;

(bb) fails to produce a book document or article as ordered, if it is in the possession or under the control of that person;

(g) falsely pretends that he or she is an authorised officer or has any of the powers of such an officer under this Act, or under any authorization of the Commission issued under this Act;

(h) discloses material information concerning the affairs of any person obtained in carrying out any function in terms of this Act;

(i) in contravention of an order issued under section 52(3), publishes in any manner any information that may reveal the identity or address of an informer or person referred to in that section.

(2) Paragraph (h) of subsection (1) does not apply to information disclosed -

(a) for the purpose of the proper administration or enforcement of this Act;

(b) for the purpose of the administration of justice; or

(c) at the request of an authorised officer.

(3) A person convicted of an offence in terms of subsection (1) or (2) is liable to a fine not exceeding N\$100 000 or to imprisonment for a term not exceeding five years or to both such fine and such imprisonment.

Regulations

30. (1) The Prime Minister may, after consultation with the Director, make regulations -

(a) prescribing a code of conduct for office-bearers and members of the staff of institutions and bodies established by law, including bodies corporate in

which the State, a regional council, a local authority council or any statutory institution or other public body is a shareholder or member or holds a similar interest;

(b) assigning functions to the Commission concerning the giving of advice and assistance in relation to the development and implementation of any code of conduct which any designated authority is required to formulate and implement in terms of any law;

(c) imposing a duty on -

(i) members of the National Assembly and National Council;

(ii) members of regional councils and local authority councils;

(iii) members of the management boards or committees of institutions and bodies referred to in paragraph (a);

(iv) specified categories of staff members of the Public Service, regional councils, local authority councils and institutions and bodies referred to in paragraph (a), to declare, in the manner and to the extent prescribed, their assets, including assets held in trust for them or by other persons on their behalf, and to furnish such information as may be stipulated in relation to those assets;

(d) prescribing the creation and keeping of a register for the recording of assets and information referred to in paragraph (c), and the powers, functions and duties of the Commission or any other authority or person in relation to -

(i) the keeping of that register;

(ii) the receipt or collection of information to be recorded therein;

(iii) the preservation of secrecy in respect of that information; and

(iv) the circumstances when and the conditions on which any such

information may be disclosed; or

(e) any other matter which is reasonably necessary in order to promote the efficiency of the Commission to achieve the purposes of this Act.

(2) A regulation may provide that the contravention of, or failure to comply with, any provision thereof constitutes an offence and prescribe penalties therefor not exceeding a fine of N\$100 000 or imprisonment for a period of five years or both such fine and such imprisonment.

Referral of matter to Prosecutor-General

31. (1) If, upon completion of an investigation by the Commission, there are sufficient indications, as a reasonably prudent person would determine, that a person has committed an offence of corrupt practice under Chapter 4 or any other offence discovered during the investigation, the Director must refer the matter and all relevant information and evidence assembled by the Commission in connection with the matter to the Prosecutor-General.

Comment [A19]: To reduce discretion, replace „It appears to the Director“ by „there are sufficient indications, as a reasonably prudent person would determine“, similar to the German Criminal Procedure Code

(2) If, upon referral of a matter in terms of subsection (1), there is probably cause that a person has committed an offence of corrupt practice the Prosecutor-General should decide to prosecute any person for an offence under this Act, the Prosecutor-General, in consultation with the Director, may delegate authority -

Comment [A20]: Reduce discretion by adding objective requirement of probable cause to the Prosecutor-General's decision, similar to the German Criminal Procedure Code

(a) to conduct criminal proceedings in court in respect of that matter; or

(b) to defend or prosecute any appeal emanating from criminal proceedings in relation to that matter, to any staff member of the Commission, including the Director or Deputy Director, who possesses the required legal qualifications to appear in the courts of Namibia.

(3) A person to whom authority is delegated under subsection (2), exercises the powers under that authority subject to the control and direction

of the Prosecutor-General.

(4) If, upon referral of a matter in terms of subsection (1), the Prosecutor-General decides not to prosecute, the Commission can conduct criminal proceeding in respect of that matter if there is manifest evidence that a person has committed an offence under this Act.

Comment [A21]: Giver power of conduct criminal proceedings to ACC to ensure prosecutions under this Act and reduce discretion of Prosecutor-General. It is helpful to give power to conduct criminal proceedings under this Act to the authority that has the most knowledge and experience in this complex field of criminal offences.

CHAPTER 4

CORRUPT PRACTICES AND PENALTIES

Definitions for this Chapter

32. In this Chapter, unless the context indicates otherwise- “agent” means a person employed by or acting for another in any capacity whatsoever, and includes -

- (a) a trustee of an insolvent estate;
- (b) the assignee of an estate assigned for the benefit or with the consent of creditors;
- (c) the liquidator of a company or other corporate body that is being wound up or dissolved;
- (d) the executor of the estate of a deceased person;
- (e) the legal representative of a minor or a person who is of unsound mind or otherwise under legal disability;
- (f) a public officer or an officer serving in or under any public body;
- (g) a trustee, an administrator or a subcontractor and any person appointed as an agent in terms of any law;

“business” means any activity carried on for the purpose of gain or profit within Namibia or elsewhere, and includes all property derived from or used in or for the purpose of carrying on such activity, and all the rights and liabilities arising from such activity;

“corruptly” means in contravention of or against the provision, intent or purpose of any law, provision, rule, procedure, process, system, policy, practice, directive, order or any other term or condition pertaining to -

- (a) any employment relationship;
- (b) any agreement; or
- (c) the performance of any function in whatever capacity;

“gratification“ includes -

- (a) money or any gift, loan, fee, reward, commission, valuable security or property or interest in property of any description, whether movable or immovable;
- (b) any office, dignity, employment, contract of employment or services and any agreement to give employment or render services in any capacity;
- (c) any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;
- (d) any valuable consideration or benefit of any kind, any discount, commission, rebate, bonus, deduction or percentage;
- (e) any forbearance to demand any money or money’s worth or valuable thing;
- (f) any service or favour, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted, and including the exercise or the forbearance from the exercise of any right or any official power or duty;
- (g) any right or privilege;
- (h) any aid, vote, consent or influence, or any pretended aid, vote, consent

or influence;

(i) any offer, undertaking or promise, whether conditional or unconditional, of any gratification within the meaning of any of the preceding paragraphs;

“principal” includes any employer, any beneficiary under a trust, any trust estate, the estate of a deceased person, any person beneficially interested in the estate of a deceased person, in the case of a person serving in or under a public body, the public body and in the case of a person acting in a representative capacity, the person on whose behalf the representative acts;

“property” means money or any other movable, immovable, corporeal or incorporeal thing, whether situated in Namibia or elsewhere and includes any rights, privileges, claims, securities and any interest therein and all proceeds thereof;

Offence of corruptly accepting gratification

33. A person commits an offence who, directly or indirectly, corruptly solicits or accepts or agrees to accept for the benefit of himself or herself or any other person any gratification as -

- (a) an inducement to do or to omit doing anything;
- (b) a reward for having done or having omitted to do anything.

Offence of corruptly giving gratification

34. A person commits an offence who, directly or indirectly, corruptly offers, gives or agrees to give to any person, whether for the benefit of that person or any other person, any gratification as -

- (a) an inducement to do or to omit doing anything; or
- (b) a reward for having done or having omitted to do anything.

Corruptly accepting gratification by or giving gratification to agent

35. (1) An agent commits an offence who, directly or indirectly, corruptly solicits or accepts or agrees to accept from any person a gratification -

(a) as an inducement to do or to omit doing anything;

(b) as a reward for having done or having omitted to do anything, in relation to the affairs or business of the agent's principal.

(2) A person commits an offence who, directly or indirectly, corruptly offers or gives or agrees to give to an agent, whether for the benefit of the agent or any other person, any gratification as -

(a) an inducement to do or to omit doing anything; or

(b) a reward for having done or having omitted to do anything, in relation to the affairs or business of the agent's principal,

(3) A person commits an offence who -

(a) knowingly gives to an agent; or

(b) being an agent, knowingly uses, any receipt, account or other document in respect of which the agent's principal is interested and which contains any statement which is false or erroneous or defective in any material particular and which to the knowledge of that person or the agent, as the case may be, is intended to mislead the principal or any other person.

(4) If, in any proceedings against an agent for an offence under subsection (1), it is proved that the agent corruptly accepted or obtained or agreed to accept any gratification, having reason to believe or suspect that the gratification was offered or given as an inducement or reward contemplated in that subsection, it is no defence that the agent -

(a) did not have the power, right or opportunity to perform or not to perform any act contemplated in that subsection;

(b) accepted the gratification without intending to perform or not to perform the act in relation to which the gratification was given; or

(c) failed to perform or not to perform the act in relation to which the gratification was given.

(5) If, in any proceedings for an offence under subsection (2), it is proved that the accused corruptly offered or gave or agreed to give any gratification to an agent as an inducement or reward contemplated in that subsection, the accused is guilty of the offence notwithstanding that the agent had no power, right or opportunity to perform or not to perform the act in relation to which the gratification was offered given or agreed to be given.

Corrupt acquisition of private interest by public officer

36. A public officer commits an offence who knowingly and corruptly, and otherwise than as a member of a registered joint stock company consisting of more than 20 persons, acquires or holds, directly or indirectly, a private interest in any contract, agreement or investment emanating from or connected with the public body on or in which he or she serves as a member or as an employee or which is made on account of the public body.

Corruption in relation to tenders

37. A person commits an offence who, directly or indirectly -

(a) gives or offers to give to any person any gratification as an inducement or a reward for, or otherwise on account of, the withdrawal of, or the refraining from the making of, any tender for a contract invited by any public body, private organisation, corporate body or other organisation or institution to perform any work, provide any service, supply any article, material or substance or for doing anything; or

(b) solicits or accepts or agrees to accept for himself or herself or any other person any gratification as an inducement or a reward for or otherwise on account of the withdrawal of, or the refraining from the making of, a tender

for a contract referred to in paragraph (a).

38. The provisions of the Public Procurement Act shall apply in relation to investigations of and institution of proceedings for offences of corruption of procurement of goods, works and services, the letting or hiring of anything or the acquisition or granting of rights for or on behalf of, and the disposal of assets of, public entities.

Comment [A22]: Align the ACA with the Public Procurement Act for better legal coherence and clear standards, similar to provisions in Tanzania's Law

Bribery of public officer

39. A person who offers or gives or agrees, directly or indirectly to give to a public officer, or who, being a public officer, solicits or accepts or agrees to accept, directly or indirectly any gratification as an inducement or a reward for, or otherwise on account of -

Comment [A23]: UNCAC requires to include direct and indirect actions of bribery and other offences. The ACA is not coherent in this matter using it only in some offences.

(a) voting or abstaining from voting at any meeting of a public body in favour of or against any measure, resolution or question relating to the functions of that public body;

(b) performing or abstaining from performing, or aiding in procuring, expediting, delaying, hindering or preventing the performance of, any official act;

(c) aiding in procuring or preventing the passing of any vote or the granting of any contract or advantage in favour of any person; or

(d) showing or forbearing to show any favour or disfavour in his or her capacity as a public officer, commits an offence, whether or not the public officer had the power, right or opportunity so to do.

Corruption of witnesses

40. (1) A person commits an offence who, directly or indirectly, corruptly offers or gives or agrees to give any gratification to any person, whether for the benefit of that person or any other person, with the intent to -

(a) influence the testimony of that person or another person as a witness in a

trial, hearing or other proceedings before any court, judicial officer, committee, commission or any officer authorised by law to hear evidence or take testimony; or

(b) influence that person or another witness to absent himself or herself from such trial, hearing or other proceedings or to withhold true testimony.

(2) A person commits an offence who, directly or indirectly, corruptly solicits or accepts or agrees to accept any gratification, whether for the benefit of himself or herself or any other person, in return -

(a) for testifying in a particular or untruthful manner in a trial, hearing or other proceedings before any court, judicial officer, committee, commission or officer authorised by law to hear evidence or take testimony; or

(b) for not testifying at any such trial, hearing or proceedings.

Bribery of foreign public officials

41. (1) A person commits an offence who, in order to obtain or retain business or an advantage in the course of business, directly or indirectly, corruptly offers or gives or agrees to give any gratification to a foreign public official **himself or another person or entity** -

Comment [A24]: Include indirect gratifications in line with UNCAC

(a) as a reward for an act or omission by the official in connection with the performance of the official's duties or functions; or

(b) as an inducement to use his or her position to influence any act or decision of the foreign state or public international organisation for which the official performs duties or function.

(2) For the purposes of subsection (1) and section 42, "foreign public official" means-

(a) a person holding any legislative, administrative or judicial office at any level or subdivision of government of a foreign state;

(b) any person performing public functions for a foreign state, or any board, commission, corporation or other body or authority performing a duty or function on behalf of the foreign state; or

(c) an official or agent of a public international organisation formed by two or more states or by two or more public international organisations.

42 Corruption of foreign public officials

(1) A foreign public official commits an offence who, directly or indirectly, corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain any gratification -

(a) as a reward for an act or omission by the official in connection with the performance of the official's duties or functions; or

(b) as an inducement to use his or her position to influence any act or decision of the foreign state or public international organisation for which the official performs duties or function.

Comment [A25]: The offence of corruption of foreign public officials is required by UNCAC art. 16.

Bribery in relation to auctions

43. A person commits an offence who, directly or indirectly, corruptly -

(a) offers or gives or agrees to give any gratification to any other person as an inducement to refrain, or as a reward for having refrained, from bidding at any auction; or

(b) solicits or accepts or agrees to accept any gratification as an inducement or a reward of his or her refraining or having refrained from bidding at any auction.

Bribery for giving assistance in relation to contracts

44. (1) A person commits an offence who corruptly offers or gives or agrees to give any gratification to any other person whether for the benefit of that person or any other person, as an inducement or a reward for giving assistance or using influence, or having given assistance or used influence,

in -

(a) the promotion, execution or procuring, or the amendment, suspension or cancellation, of any contract with a public body, private organisation, corporate body or other organisation or institution; or

(b) the payment of the price, consideration or other moneys stipulated or otherwise provided for in any such contract.

(2) A person commits an offence who corruptly solicits or accepts or agrees to accept, whether for the benefit of himself or herself or any other person, any gratification as an inducement or as a reward of his or her giving assistance or using influence, or having given assistance or used influence, in -

(a) the promotion, execution or procuring of any contract with a public body, private organisation, corporate body or other organisation or institution; or

(b) the payment of the price, consideration or other moneys stipulated or otherwise provided for in any such contract.

Corruptly using office or position for gratification

45. (1) A public officer commits an offence who, directly or indirectly, corruptly uses his or her office or position in a public body to obtain any gratification, whether for the benefit of himself or herself or any other person.

(2) For the purposes of subsection (1), proof that a public officer in a public body has made a decision or taken action in relation to any matter in which the public officer, or any relative or associate of his or hers has an interest, whether directly or indirectly, is, in the absence of evidence to the contrary which raises reasonable doubt, sufficient evidence that the public officer has corruptly used his or her office or position in the public body in

order to obtain a gratification.

(3) For the purposes of subsection (2) -

(a) “relative” includes -

(i) a spouse or fiancé, including a partner living with the public officer on a permanent basis as if they were married or with whom the public officer habitually cohabits;

(ii) a child, including a stepchild or fosterchild;

(iii) a parent, including a step-parent or fosterparent;

(iv) an uncle, aunt, or cousin;

(v) a brother or sister of the public officer or of his or her spouse; or

(vi) the spouse of any of the persons mentioned in subparagraphs (ii), (iii), (iv) or (v); and

(b) “associate” includes -

(i) an employee, agent or nominee of the public officer;

(ii) a business partner or any company or other corporate body of which the public officer is a director or is in charge or control of its business or affairs, or in which the public officer, alone or together with any nominee of his or her, has or have a controlling interest;

(iii) a trust controlled and administered by the public officer;

Comment [A26]: Expand the range of family members included in the definition of “relative” to prevent and form of nepotism

Embezzlement and Misappropriation

46. (1) A person in the private sector commits an offence who dishonestly or fraudulently misappropriates or otherwise converts for his or her own use any property entrusted to him or her or under his or her control or allow any other person to do so.

(2) In addition to a penalty imposed under section 56, the court shall order the confiscation of the misappropriated or converted property or an equivalent sum where that property cannot be traced.

(3) Where a court orders confiscation or payment of the amount or money value, or any part of it, of any advantage, or the confiscation of any property, under this Act-

(a) the payment of any sum ordered to be paid or forfeited may be enforced in the same manner and subject to the same process as in the case of payment of a fine;

(b) all moneys forfeited shall be paid into the Treasury and shall form part of the Government revenue;

(c) where any property other than money is forfeited, it shall be disposed of under the Asset Forfeiture Unit; and

(d) any such order shall, for the purpose of any appeal, be deemed to form part of the sentence of the court.

Comment [A27]: Embezzlement and Misappropriation in the private sector is required by Art. 22 UNCAC

Corruption in relation to sporting events

47. (1) A person commits an offence who, directly or indirectly, corruptly -

(a) solicits or accepts or agrees to accept any gratification, whether for the benefit of himself or herself or any other person, as an inducement or a reward of his or her influencing or having influenced the run of play or the outcome of any sport event; or

(b) offers or gives or agrees to give to any other person any gratification as an inducement to influence or as a reward for influencing or having influenced the run of play or the outcome of a sporting event.

Dealing with, using, holding, receiving or concealing gratification in relation to any offence

48. A person commits an offence who, directly or indirectly, whether on behalf of himself or herself or on behalf of any other person -

(a) enters into, or causes to be entered into, any dealing in relation to any property; or

(b) uses or causes to be used, or receives, holds, controls or conceals any property or any part thereof, which was obtained as gratification, or derived from the proceeds of any gratification obtained, in the commission of an offence under this Chapter.

(2) For the purposes of subsection (1), “dealing” includes -

(a) any purchase, sale, loan, charge, mortgage, lien, pledge, transfer, delivery, assignment, subrogation, transmission, gift, trust, settlement, deposit, withdrawal, transfer between accounts or extension of credit;

(b) any agency or grant of power of attorney; or

(c) any act which results in any right, interest, title or privilege, whether present or future or whether vested or contingent, in the whole or in part of any property being conferred on any person.

Corrupt Transactions in employment

49. (1) Any person who offers an advantage to another person as an inducement to or reward for or otherwise on account of such another person’s giving assistance or using influence in or having given assistance or used influence to assist in obtaining employment, promotion or any other matter relating to employment commits an offence.

(2) Any person who solicits or accepts any advantage as an inducement to or reward for or otherwise on account of his giving assistance or using influence in, or having given assistance or used influence to assist in obtaining of employment, promotion or any other matter relating to

employment commits an offence.

Comment [A28]: Introduce the offence of corruption in employment to protect Namibia's employees and grant fair treatment, bringing the ACA In line with good examples like the Tanzania Act

Attempts and conspiracies

50. A person who -

(a) attempts to commit an offence under this Chapter;

(b) conspires with any other person to commit an offence under this Chapter;

or

(c) aids, abets, induces, incites, instigates, instructs, counsels, procures or commands another person to commit an offence under this Chapter, commits an offence and is, on conviction, liable to the punishment prescribed for that offence by this Act.

Comment [A29]: Broadening the offence of attempts and conspiracies to fill gaps in line with the South Africa Act and Art. 27 UNCAC

Fraudulent concealment of offence

51. A person commits an offence who, with intent to defraud or to conceal the commission of an offence under this Chapter or to obstruct an authorised officer in the investigation of any such offence -

(a) destroys alters, mutilates or falsifies any book, document, valuable security, account, computer system, disk, computer printout or other electronic device which belongs to or is in the possession of his or her employer, or has been received by him or her on account of his or her employment, or any entry in such book, document, account or electronic device, or is privy to any such act;

(b) makes or is privy to the making of any false entry in such book, document, account or electronic device; or

(c) omits or is privy to the omission of any information from any such book, document, account or electronic device.

Duty to report corrupt transactions

52. (1) A public officer to whom any gratification is promised, offered, or given in contravention of any provision of this Chapter must, as soon as possible, report such fact, together with the name or any other information relating to the identity of the person or persons concerned to his or her supervisor and to the Commission.

(2) If any gratification has been demanded, solicited, accepted or obtained from any person in contravention of any provision of this Chapter, or if an attempt has been made to demand, solicit, accept or obtain any gratification from any person in contravention of any provision of this Chapter, that person must, as soon as possible, report such fact together with the name or any other information relating to the identity of the other person or persons involved to the Commission.

(3) A person commits an offence who fails to comply with subsection (1) or (2).

Public Officers to give account of property

53 (1) The Director or Deputy Director, or an investigating officer or special investigator authorised in writing by the Director or Deputy Director General may, by notice in writing addressed to any public officer require such public officer to give, within such time and in such manner as may be specified in the notice, a full and true account of all or any class of properties which such public officer or his agent possess or which he or his agent had in possession at any time during which the public officer held any public office, and such officer of the Commission may, by the same or subsequent notice, require such public officer to give a true account of how he acquired such property.

(2) In any prosecution for an offence, any statement or account in writing given by the accused person pursuant to a notice given to him under subsection (1) shall be admissible in evidence.

Comment [A30]: Transparency of the public sector is of the utmost importance. The chance to get account of public officer's properties and use this as evidence in court is crucial to investigate and prosecute "high-profile" cases and ensure accountability for public officer's. The deterrence effect can prevent many forms of public sector corruption. If there is no general asset declaration system for public officials, such as recommended by the OECD (<http://www.oecd.org/corruption/anti-bribery/47489446.pdf>) the opportunity for the ACC to access this information is the minimum standard.

(3) A public officer who fails to comply with the requirement of a notice addressed to him pursuant to this section, or knowingly gives a false account in relation to any property, commits an offence.

(4) In a prosecution for an offence under subsection (3), evidence of the fact that a notice under subsection (1) was given by an officer of the Commission shall be conclusive evidence that such officer of the Commission was authorised as such.

(5) For the purpose of this section-

“agent” means the husband, wife or child of the public officer, any debtor of the public officer, or any other person acting for or on behalf of the public officer, and includes any person in possession or ownership of property, the acquisition of which is or was met wholly or partly by the public officer;

“public officer” includes any person who held a public office at any time during the five years immediately preceding the date on which a notice under subsection (1) is given.

Illicit Enrichment

54 (1) a public officer, being or having been in a public office, commits an offence who –

(a) maintains a standard of living above that which is commensurate with the official income from his or her present or past employment or other means;
or

(b) is in control of pecuniary resources or property disproportionate to the official income from his or her present or past employment or other means, unless he or she proves beyond reasonable doubt to the court as to how he or she was able to maintain such a standard of living or how such pecuniary resources or property came under his or her control.

Comment [A31]: UNCAC encourages states to criminalize illicit enrichment to remove barriers in evidence due to non-transparent money trails and crimes. Moreover, Art. 8 of the African Union Convention on Preventing and Combating Corruption also requires the offence of illicit enrichment. Many countries have unexplained wealth offences for example Hong Kong and Tanzania. Combined with an effective financial disclosure regime, criminalizing illicit enrichment has been used as key tool to combat corruption, especially when obtaining evidence is one of the main obstacles in the fight. It is moreover recommended by Art. 20 UNCAC. Illicit Enrichment legislation has been criticized to violate human rights such as the presumption of innocence, the right to silence and the principle of legality. However, the European Court of Human Rights decided that such provisions reversing presumptions can be according to the presumption of innocence in certain cases. Our suggested language carefully changes the evidential burden and is therefore an important means to bring Namibia to an international leading anti-corruption regime. (See report)

(2) Where in proceedings for an offence under subsection (1) (b) the court proves beyond reasonable doubt that, having regard to the closeness or relationship to the accused and other circumstances, there is reason to believe that any person is or was holding property in trust for or otherwise on behalf of the accused or has acquired such property as a gift from the accused, such property shall, in the absence of evidence beyond reasonable doubt to the contrary, be presumed to be in the control of the accused.

(3) The court shall, in addition to the penalty imposed under section 56, order the confiscation of any pecuniary gain or property-

(a) found to be in the ownership of the accused; and

(b) of an amount or money value not exceeding the amount or value of pecuniary gain or property the acquisition of which was not proven beyond reasonable doubt to the court.

(4) Any application for an order under subsection (3) shall be made by the Director within twenty eight days after the date of the conviction, except that such order shall not be made in respect of property held by a person other than the person convicted-

(a) unless that other person has been given reasonable notice that such an order may be made and had an opportunity to show cause why it should not be made; or

(b) if that other person proves to the court beyond reasonable doubt in any proceedings to show cause that he had-

(i) acted in good faith as regards to the circumstances in which the property came to his possession; and

(ii) so acted in relation to the property that an order in the circumstances would be unjust.

(5) Nothing in subsection (4) shall be construed as limiting the court's discretion to decline to make an order under section 56 on grounds other than those specified in subsection (4).

(6) An order under subsection (3) may be made subject to such conditions as the court thinks fit regard being had to all circumstances of the case.

(7) A court may make orders under both paragraphs of subsection (3) in respect of the same offence but shall not make orders under both provisions in respect of the same pecuniary gain or property.

(8) An order under subsection (3) may make provisions for taking possession of property to which the order applies and for the disposal of such property by or on behalf of the Government.

Penalties

55. A person convicted of an offence under any provision of this Chapter is liable to a fine not exceeding N\$500 000 or to imprisonment for a term not exceeding 25 years, or to both such fine and such imprisonment. In addition such person so convicted shall forfeit all of the assets obtained, in whole or in part, as a result of such offence as set forth more fully in Chapter 5.

Freezing of assets

56. (1) Where a person is charged or is about to be charged in any court with a corruption offence or any other related offences, the court may order, on an application by the Prosecutor-General, subject to such conditions as to the duration of the order or otherwise as the court deems fit-

(a) the attachment in the hands of any person named in the order all moneys and other property due or owing or belonging to or held on behalf of the accused; and

Comment [A32]: Changing the penalties from discretionary to mandatory forfeiture is important because it does not just prevent corruption but makes enforcement more serious. It is a signal, sends a message to prosecuting bodies as well as to the public and hence deters

Comment [A33]: So far, Namibia has provisions regarding the freezing of assets under the Prevention of Organized Crime Act (POCA). To include similar provisions in the ACA coordinates the different laws and stresses the importance of the crime of corruption. It is also in line with Art. 31 UNCAC.

(b) the prohibition of the accused or any other person named in the order from transferring, pledging or otherwise disposing of any money or other property so attached.

(2) The court may, in respect of any order under subsection (1), specify moneys or salaries, wages, pensions, or other benefits that shall be paid to or received by the accused indicating the source, manner and circumstances of payment or receipt.

(3) In making an order under subsection (1), the court may authorise-

(a) the payment of debts incurred in good faith and due to creditors of the accused before the request for the order was made by the Prosecutor-General; or

(b) the sale, transfer or disposal of any property by the accused where the court is satisfied that such sale, transfer or disposal is necessary in order to safeguard the property rights of any other person claiming interest in the property.

(4) An order made pursuant to this section shall take effect forthwith and the Prosecutor-General shall-

(a) cause notice of the order to be published in the next issue of the *Gazette* and in at least two daily newspapers widely circulated in Namibia; and

(b) give notice of the order to-

(i) all notaries;

(ii) banks, financial institutions and cash dealers; and

(iii) any other person who may hold or be vested with property belonging to or held on behalf of the accused.

(5) An order under this section shall, subject to any condition to the contrary imposed under subsection (1), remain in force until-

(a) the Prosecutor-General decides not to proceed with a prosecution; or

(b) the final determination of the charge.

(6) Where an order under this section ceases to have effect or is revoked, the Prosecutor-General shall cause notice to be published in the *Gazette* and in at least two daily newspapers widely circulating in Namibia.

(7) Any payment, transfer, pledge or other disposition of property made in contravention of an order made under this section shall be null and void.

CHAPTER 5 FORFEITURE OF PROCEEDS OF CORRUPTION

Comment [A34]: Namibia already has an Asset Forfeiture Unit. This Chapter will coordinate the different policies, enhance the ACCs position in this process and clarify the consequences that corruption can have for assets. It is also in line with Chapter V UNCAC.

Forfeiture of proceeds of corruption

Comment [A35]: See Section 1

57. (1) The Commission shall, in collaboration with the Prosecutor-General recover proceeds of corruption through confiscation to the Government.

(2) Where a person is convicted of an offence of corruption under this Act, the Prosecutor-General shall apply to the convicting court or to any other appropriate court not later than three months after conviction of the person for forfeiture order against any and all property that was obtained, directly or indirectly, through corruption.

Comment [A36]: See Section 1

Comment [A37]: Making prosecutions more effective

(3) For the purpose of this part, “proceeds of corruption” means any property that is derived or obtained by a person from the commission of corruption offences

Notice of application

58. (1) Where the Prosecutor-General makes an application for a forfeiture order against property in respect of a person’s conviction of corruption offence-

(a) the Prosecutor-General shall give written notice of the application to the person or to any other person he has reason to believe may have an interest

in the property;

(b) the person, and any other person who claims an interest in the property, may appear and adduce at the hearing of the application; and

(c) the court may, at any time before the final determination of the application, direct the Prosecutor-General to give notice of the application to a specified person or class of persons in a manner and within such time as the court considers appropriate.

(2) Where the Prosecutor-General makes an application for an order for pecuniary he or she shall give the person together whom the application is made a read notice about such application and that person shall have the right to appear and adduce evidence at the hearing of the application

Forfeiture Orders

59. (1) Where the Prosecutor-General applies to a court for a forfeiture order under section 61 against property in respect of a person's conviction of an offence and the court is satisfied that the property was obtained through corruption offence, the court shall order that the property or such of the property be forfeited to the State.

(2) In granting an application for forfeiture order, the court may give any directions necessary or convenient for giving effect to the order, including, without limiting the generality of the foregoing, directions to an officer of the court to do anything necessary and reasonable to obtain possession of any document necessary for the transfer of any property subject to registration by the registrar of the court.

Effects of forfeiture order

60. (1) Where the court has made a forfeiture order, the court may appoint a *curator bonis* to perform any of the functions in respect of that property.

(2) On the date when a forfeiture order takes effect the property subject to the order is forfeited to the State and vests in the *curator bonis* on behalf of the State.

(3) When a forfeiture order takes effect the *curator bonis* must take possession of that property on behalf of the State from any person in whose possession it is found.

61. The provisions of the Prevention of Organised Crime Act shall apply in relation to the fulfilment of the forfeiture order.

CHAPTER 6 GENERAL PROVISIONS

Liability for offences committed outside Namibia

62. (1) The provisions of this Act shall, in relation to Namibian citizens and persons domiciled or permanently resident in Namibia, have effect also outside Namibia, and when an offence under this Act is committed outside Namibia by any such citizen or a person so domiciled or resident, such person may be dealt with in respect of that offence as if it had been committed at any place within Namibia.

(2) The provisions of this Act shall have effect when an offence under this Act is committed on board a vessel that is flying in the flag of Namibia or an aircraft that is registered under the laws of Namibia at the time the offence is committed.

Comment [A38]: Art. 42 UNCAC requires jurisdiction for offences committed on a vessel or an aircraft.

(3) The acquittal or conviction of a person by a foreign court of law on a criminal charge for an offence similar to an offence referred to in this Act, which would be a bar to subsequent charges against that person for the same offence if committed in Namibia, is a bar to further proceedings against him or her under any law relating to the extradition of persons, in respect of the same offence, outside Namibia.

Jurisdiction of magistrates' courts

63. Any magistrate's court has jurisdiction to impose any penalty mentioned in this Act.

Presumption of corruption

64. Where, in proceedings under this Act, it is proved that a gratification was offered, promised or given, or solicited, accepted or obtained or agreed to be accepted or obtained by a public officer or from a person, or agent of a person holding or seeking to obtain a contract from a public office, the gratification shall be deemed to have been offered, promised or given, solicited, accepted or obtained or agreed to be accepted or obtained as an inducement or reward as referred to in section 33 unless the contrary is proved.

Comment [A39]: This provision helps in cases of lack of evidence in certain cases. It is modelled after strong laws such as the Singapore Prevention of Corruption Act or the Tanzania Prevention and Combating Corruption Act

Protection of informers and information

65. (1) Subject to subsection (2), no information related to commission of an offence under this Act shall be admitted in evidence in any civil or criminal proceedings and no witness in any civil or criminal proceedings shall be obliged to -

Comment [A40]: The protection of informers and information is made more comprehensive and wider, modelled after Singapore Prevention of Corruption Act or the Tanzania Prevention and Combating Corruption Act

(a) disclose the identity or address of any informer or person who assisted the Commission in an investigation into an alleged or suspected offence under this Act; or

(b) answer any question, if the answer to such question would lead, or would tend to lead, to discovery of the identity or address of such informer or person.

(2) If any book, document or paper which is the subject of evidence or liable for inspection in any civil or criminal proceedings contains an entry in which any such informer or person is named or described, or which might lead to the discovery of that informer by public the court shall cause all such passages to be concealed from view by public or to be obliterated so far as

may be necessary to protect the informer or such other person from discovery by public.

(3) Any informer who shall suffer reprisal or retaliation or victimization or injury or any harm from a person accused of corruption, perpetrators of offences of corruption and their accessories shall be afforded reasonable protection, compensation and assistance by the Government upon ascertainment by the Commission the magnitude of victimization, injury or harm.

(4) If in any proceedings before a court, the court, after full inquiry into the case, is satisfied -

(a) that an informer wilfully made a material statement which the informer knew or believed to be false or did not believe to be true; or

(b) that justice cannot fully be done between parties without disclosing the identity of an informer or a person who assisted the Commission in an investigation into an alleged or suspected offence under this Act or any other law, the court may permit inquiry into, and require disclosure of, the identity of the informer or person concerned.

(5) In a case contemplated in subsection (4)(b) the court may -

(a) direct any person whose presence is not necessary at the proceedings to leave the court room before permitting the inquiry into the identity of an informer or person referred to in that subsection; and

(b) issue an order prohibiting the publication by any person of any information that may disclose the identity or address of such informer or person.

(6) No action or proceedings of a disciplinary, civil or criminal nature may be instituted or maintained by any person or authority against any informer or a person who has assisted the Commission in an investigation

into an alleged or suspected offence under this Act or any other law in respect of any information, other than a material statement which he or she knew or believed to be false or did not believe to be true, disclosed by him or her to the Commission for the purpose of assisting the Commission in the performance of its functions under this Act.

Protection of witnesses, experts and victims

Comment [A41]: This section provides for additional protection of witnesses, experts and victims from negative consequences for cooperating, which incentivizes more witnesses to report, following the encouragement of Art. 32, 33 UNCAC.

66. (1) Notwithstanding any written law, rule of law or practice to the contrary no witness shall, in any proceedings for an offence under this Act be regarded as an accomplice by reason only of receiving or making any payment or delivery by him or on his behalf of any advantage to the person accused or, as the case may be, by reason only of receiving or making any payment or delivery of any advantage by or on behalf of the person accused to or from him.

(2) Where a person-

(a) discloses to a member that a person, public official, body corporate or public body is or has been involved in an act of corruption; and

(b) at the time he makes the disclosure, believes on reasonable grounds that the information he discloses may be true and is of such a nature as to warrant an investigation under this Act, he shall not incur civil or criminal liability as a result of such disclosure.

(3) Any person who victimises a person who has made a disclosure under subsection (2) commits an offence.

(4) In this Part, “victimisation” means an act-

(a) which causes injury, damage or loss;

(b) of intimidation or harassment;

(c) of discrimination, disadvantage or adverse treatment in relation to

person's employment; or

(d) amounting to threats of reprisals.

Limitation of liability

67. No person, including the State, is liable in respect of anything done or omitted in good faith in the exercise of a power or the performance of a duty conferred by or under this Act.

Repeal and amendment of laws

68. (1) The Prevention of Corruption Ordinance, 1928 (Ordinance No. 2 of 1928), and the Prevention of Corruption Amendment Act, 1985 (Act No. 21 of 1985), are repealed.

(2) The Public Service Act, 1995 (Act No. 13 of 1995) is amended by the insertion in Schedule 3 to that Act -

(a) in the first column, of the expression "Anti-Corruption Commission"; and

(b) in the second column, of the expression "Director: Anti-Corruption Commission".

Short title and commencement

69. This Act is called the Anti-Corruption Act, 2003 and comes into operation on a date determined by the Prime Minister by notice in the *Gazette*.

**APPENDIX B
REVISIONS TO NAMBIA INVESTMENT
PROMOTION ACT, 2016**

GOVERNMENT GAZETTE

OF THE

REPUBLIC OF NAMIBIA²⁷⁵

N\$15.00

WINDHOEK - 31 August 2016

No. 6110

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GOVERNMENT NOTICE

No. 199 Promulgation of Namibia Investment Promotion Act, 2016 (Act No. 9 of 2016), of the Parliament 1

Comment [Capestone42]: All comments made to this Act are illustrative and not exhaustive, in part because the Act needs to be reconsidered in its entirety to achieve its stated purpose. The overarching effect of this Act will discourage and hinder investment as well as, specifically, natural resource development as it introduces new concepts and conditions the pre-existing investment climate. Moreover the natural resource sector, with its distinctive conditions, requirements and challenges, should be addressed in separate legislation.

Government Notice

OFFICE OF

THE PRIME MINISTER

No. 199

2016

**PROMULGATION OF ACT
OF PARLIAMENT**

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

ACT

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

²⁷⁵ Please note that the views expressed herein are those of the authors only and not the institution with which they are affiliated or associated.

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)

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Comment [Capestone43]:

These objectives while, worthy and necessary to Namibia's economic growth are overly encompassing and not sufficiently focused in so far as, this is a legislative framework that has as its primary, almost exclusive, aim to promote and attract domestic and foreign investment. The concern with having so many goals is that it creates a countervailing effect in their achievement and will create uncertainty for prospective investors.

We recommend that:-

- The current objectives of the Act be removed and replaced with narrow and focused objectives that deal specifically with attracting domestic and foreign investments.
- The foreign investment goals should be clear and distinct.
- The goals should be prioritized.

Comment [Capestone44]:

As a general comment, the definitions in the Act are ambiguous, not precise and may result in confusing, conflicting and even unfavourable interpretation. Moreover, they will result in litigation, which itself will have a negative impact on the investment climate of Namibia.

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

PART 1

INTRODUCTORY PROVISIONS

Definitions

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

“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

Comment [Capestone45]: This definition is illustrative of the lack of preciseness and ambiguity in the language. What is the purpose of this definition?

Comment [Capestone46]: The word “any” effectively, means “all”. Consequently nearly every activity that involves capital is covered. The definition needs to be more precise.

Comment [Capestone47]: This theoretically includes the sale and purchase of a home at a profit, which is presumably not what was intended.

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

Comment [Capestone48]: The concern here is that effectively, all business activities include the assumption of risk while there is not necessary an expectation of profit.

With respect to (b), there appears to be a contradiction, as an activity that loses money, irrespective of the expectation, would not be making a contribution to the economic development of Namibia with the consequence that it would not be a business activity. This is clearly not what is intended.

Comment [Capestone49]: What is an expansion? The term expansion is not defined.

Comment [Capestone50]: What is a major expansion? There is also no definition for a minor expansion? It should be noted that businesses operate dynamically. If expansions require approval, then this effectively constitutes micro-management.

Comment [Capestone51]: In lieu of current business, is it really necessary to define this so narrowly. Are there clear definitions and boundaries between the different business sectors? How does this correspond with current business concepts? Again this would constitute micro-management.

Comment [Capestone52]: There should be a separate expropriation act, in terms of which reference to that act should be included.

Comment [Capestone53]: Who is going to determine this?

Comment [Capestone54]: The scope of this ownership and control should be considered together with the issue of beneficial ownership.

Another consideration is whether this includes profit sharing agreements. Will a company qualify as Namibian where it is not owned or controlled by a Namibian but, receives a large share in the profits of a Namibian company or of a company owned or controlled by a Namibian.

Moreover what is controlled? Under some laws 5% can constitute control. Further what about management agreements? Can they can constitute control?

Comment [Capestone55]: This wording is inconsequential.

(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;

Comment [Capestone56]: What is a substantial operation? Term substantial is not defined.

Comment [Capestone57]: This effectively implies micromanagement of the economy. This appears to support the view that the Namibian government has the intention to expand its role in the oversight of the investment and effectively to be a micro-manager.

A government with appropriate laws and regulations can regulate investments. But approving proposals should be limited to those that effect national security, natural resources and a limited number of activities which should be defined and specified.

Comment [Capestone58]: This conditions everything that a potential investor may want to do in Namibia. Is this the intent or purpose?

The benefits of foreign takeovers should be considered when attempting to condition investors in this regard. Foreign takeovers generally lead to better governance and management to the extent that foreign corporate laws are more stringent than that of Namibia. This will effectively boost corporate efficiency. Namibia should be incentivized by the effect of improved economic efficiency and consequently, encourage FDI as a vehicle for enterprise restructuring.

Additionally, conditioning the expansion of an investments curtails the spinoff effects of innovation and the improvement of skills.

Comment [Capestone59]: There is no “or” after the semicolon. This affects the reading of the provision to mean that (b) and (c) could be read together. In the absence of the word “or,” a semicolon implies that “and” should be read into the provision. This creates considerable ambiguity.

(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

Comment [Capestone60]: This again, conditions everything that a potential investor may pursue in Namibia. See Comment [Capstone58]

(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,

Comment [Capestone61]: What is effective management?

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 –

What is influence? How far does this concept extend? Does an advisor influence? Does a banker which has given a loan, influence?

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

In our view, this concept effectively covers everything, both the capacity to affect a decision as well as the effect itself.

(ii) a debt security of another enterprise;

Example: A mere discussion on the management decisions would fall within the scope of influence.

(iii) loans to an enterprise;

How would you prove influence?

(iv) movable or immoveable property and other property rights such as mortgages, liens or pledges;

Comment [Capestone62]: The section is very confusing in so far as reference is made, for example, to the distinction between assets and investments.

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

Ownership of shares are then not considered an investment?

(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;

Comment [Capestone63]: Why is this not considered an investment?

(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;

Comment [Capstone64]: See Comment [Capstone 61] for note on influence. Moreover everything can provide a possibility. Moreover what is effective management?

(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;

Comment [Capstone65]: This is a tautology. If something is binding, how can it not be legally binding?

Comment [Capstone66]: Does this mean that if it indirectly does not affect an investor, this definition will not find application?

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

Comment [Capstone67]: What requirements are there which are binding and that have not been codified into law?

“Namibian” means -

Comment [Capstone68]: This definition does not provide for persons with domicile living in Namibia. This means that a person living in Namibia, married to a Namibian and having business interests in Namibia will have to comply with the stipulations of this Act. This seems rather onerous.

(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;

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“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.

Objects of Act

- 2. 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

Comment [Capestone69]: The provision as a whole does not deal with a person who may disproportionality benefit from a Namibian. And the issue of beneficial ownership is again a concern. How many layers of ownership of a chain of companies is required to determine whether there is Namibian ownership.

Comment [Capestone70]: Strictly interpreted this means that if no one Namibian person holds more than 50% of the shares or voting rights, the company is not Namibian, regardless of the fact that there might be 10 Namibian shareholders each holding 10%. Again, there are beneficial ownership concerns encompassed in this provision. The issue of beneficial ownership needs to be specifically and carefully addressed, which includes a clear and non-ambiguous definition.

Comment [Capestone71]: Careful consideration should be observed when using the term “State”, in the Act. The definition of “State” includes both the commercial and regulatory entities of the government. It is important that the functions of the State as a regulator are not assigned to a commercial arm of the State, such as an SOE.

Comment [Capestone72]: The object of the Act should be as simple as providing for the promotion of the investment climate in Namibia and to achieve sustainable economic growth. The ancillary objects are implicit in this. Refer to Comment [Capstone 43] for reasons.

Comment [Capestone73]: This legislation inherently contradicts the objectives of the Act in so far as the obligations imposed upon the various ministries are concerned. Essentially, the amount of ministerial discretion provided for in this Act, facilitates an environment for indecision, and even corruption.

Comment [Capestone74]: This is all dealt with on a national level. Investments into natural resources including, environment, health, culture e.c.t., should be dealt with independently by each minister within the area of the minister’s designated areas of competence and responsibility, without, for example, having to coordinate with the minister of economy. A very complex structure is hereby being created, which will increase costs, consume valuable time etc.

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;

Comment [Capestone75]: Is this excluding so called “know-how” companies?

- (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.

Comment [Capestone76]: This evidences that the Namibian government is aware of the steps that need to be taken by Namibia going forward. That said, the government should be promoting and not conditioning investments in its facilitation efforts, except for specific sectors which need to be clearly defined and regulated.

PART 2
ADMINISTRATION OF ACT

Administration and implementation of Act

3. (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*.

Comment [Capestone77]: This provision allows for too much ministerial discretion. And imagine that Namibia is successful in attracting significant investment, the Ministry will then be overworked, which means decisions will be slow which will discourage investment.

Powers and functions of Minister

4. (1) Where a foreign investor made an investment proposal to the Minister for consideration, the Minister -

Comment [Capestone78]: In addition, the Minister should also consider the proposal for the investment, based on the recommendations of any other regulatory body, particularly the ministry of environment, which would most probably review the environmental impacts of the potential investment. Still any approval needs to be conditioned on the investor securing all necessary approvals and licenses such as the environmental license.

- (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 -

Comment [Capestone79]: The Minister should also take into consideration the technical and financial capabilities of the investor. I.e. does the investor have the requisite capacity, resources and capabilities to sustain the investment and this needs to be evidenced, which may require a guarantee from the parent company of an investor.

- (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

Comment [Capstone80]: Notwithstanding Comment [Capstone 79], this provision again, provides for excessive discretion. In addition, it creates uncertainty for investors looking to invest in Namibia. Uncertainty is a major deterrent for potential investors.

While we agree that some of the criteria are essential to the developmental strategies adopted in Namibia, as mentioned in our preamble to this review, there is not enough investment flowing into the country so as to implement such stringent requirements for investment. Consideration should be given to what in fact needs to be regulated and that which is simply “nice to have.”

The provision also unfortunately incentivizes corrupt practices.

Furthermore, no indication is given as to what this specified period will be?

Comment [Capstone81]: Something like environmental impact should not be a discretionary item. Instead, there should be some baseline parameters on what are non-negotiable. For example, if the investment would result in significant environmental harm but may result in job creation –we interpret this to mean that the provision effectively allows the Minister to approve it. This should not be the case.

Comment [Capstone82]: In addition to environmental harms being a non-negotiable, certain social harms, such as significant health impacts or significant physical or economic displacement, should also be non-negotiables.

Comment [Capstone83]: What is of strategic importance? The term should be defined.

Comment [Capstone84]: This provision affirms our view that the Act was drafted against the assumption that foreign investors are queuing to invest in Namibia.

How does this provision in any way entice foreign investors? Instead, the provision conditions any investment which will negatively impact on the economic growth of the country.

- (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.

Performance agreements with investors

5. (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

Comment [Capstone85]: Caution should be exercised here in so far as these incentives amount to subsidizing businesses. Careful consideration should be had in the drafting and implementation of these incentives. They should also be publicized. The grant of incentives should be considered very carefully as the best incentive is a reliable legal system.

And a larger question is whether there is a need to give incentives as incentives cost.

Comment [Capstone86]: Specific requirements should be incorporated to deal with the scope and extent of these initiatives. As it stands, the Act does not provide any guidance and effectively provides a carte blanche to the Minister which should be avoided.

Comment [Capstone87]: The term “may” implies that there may be non-binding agreements. In light of Namibia’s objective to become logistics and administrative hub, this is not practical. And what is the real purpose of performance agreement? In natural resources it is understandable that such type of agreements exist. But for other sectors it is questionable.

Comment [Capstone88]: Notwithstanding Comment [Capstone 46], performance agreements should not impose any obligations on the government. This should be thought of in the context of a license scenario.

Foreign investor should not be allowed to bind the government to some onerous conditions.

Comment [Capstone89]: Furthermore, the needs of an investment project evolve over time and it is essential to clarify that nothing contained in the performance agreement will in any way vitiate the right of the government to do 2 things:

- Revisit the positive contributions required of the investor, and
- Undertake public policy measures for environmental, public health etc. reasons.

minister, the Minister must consult with the other minister prior to concluding the

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

Comment [Capestone90]: In general, no negotiated terms for a performance agreement, linked to the investment, should be in violation of any applicable Namibian law. Any such performance agreement should explicitly make that clear. Further the performance agreement should not include any such terms or conditions, the regulation of which would fall under the purview of another ministry or agency.

Namibia Investment Centre

- (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

Comment [Capestone91]: The effectiveness of the NIC should be improved.

“FDI is unlikely, unless investors have an understanding of the environment in which they will be operating.”(OECD Report, *Foreign Direct Investment for Development: Maximizing Benefits, Minimizing Costs* (2002) at 25)

The question here is whether the NIC is really a “one stop shop” for investors. What is the NIC currently doing to facilitate investment through opportunities for partnership between domestic and foreign investors. It is unclear here, whether the NIC has any lobbying role to influence government to improve Namibia’s investment environment.

That said, the NIC should brand Namibia as a place to do business to foreign investors and owing to the lack of FDI, greater publicity efforts should be adopted.

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
- (c) facilitate the timely receipt of State approvals for permits, registrations, licenses and other documents.
m
ibia 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.

Integrated client service facility

7. (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

(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.

Comment [Capestone92]: The NIC should function as a promotional agency. It should not be undertaking regulatory functions/responsibilities, that are rightly assigned to other ministries and agencies of the government. In fact this would create a sense of mistrust on the part of investors.
As such it might work in consultation with regulatory bodies. However, assessment of compliance with approvals, registrations etc. should be conducted by issuing bodies/regulators of such approvals, licenses and registrations.

Comment [Capestone93]: What does this mean?

Comment [Capestone94]: This is an integral function of the NIC and should definitely be retained. The only concern relates to whether this information is made public and how investors ought to find out about it.

Comment [Capestone95]: Additionally, it should be clarified that approval or denial of a license, permit and or registration is to be provided by that ministry/regulatory body, tasked with, responsible for, making such approvals. As such the Minister, cannot, and should not, approve or deny permits or approvals that would be made to other regulatory bodies in pursuit of the investment.

INVESTORS, ECONOMIC SECTORS AND BUSINESS ACTIVITIES

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

8 (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,

Comment [Capestone96]: These “business activities” should be set forth in law and should not be arbitrary or capable of change.

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.

Comment [Capestone97]: These should be listed.

Comment [Capestone98]: This is a costly endeavour for investors. Additionally, there is ambiguity and a lack of definitions in the Act. How are foreign investors notified about this?

As a general note, joint ventures are very difficult to operate under the best of circumstances so this needs to be carefully considered.

Moreover what is a joint venture partnership? Is it legally a partnership? Can it be a corporation?

- (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.

Savings of existing investments after reservation of economic sectors and business activities

9. (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.

Economic sectors and business activities not reserved

10. 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.

Comment [Capestone99]:

Will a foreign investor be motivated to keep his returns in Namibia and expand his/her business, creating much needed employment opportunities?

Additionally, while restrictions on investment are not opposed, a blanket prohibition without standards is unsaleable. This is a “catch-all” provision and effectively includes a service company looking to employ more people.

The main consideration here is whether this coincides with Namibia’s vision of becoming a logistics and administrative hub and therefore, promotes an ‘open economy.’

PART 4
CHANGE OF OWNERSHIP AND CONTROL OF INVESTMENTS

Approval of proposed change of ownership and control of investment

- 11.** (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
- 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

Comment [Capstone100]:
Natural resources is the patrimony of Namibia. However, there is no definition of "natural resource sector."
Notwithstanding, we agree that there should be limitations placed on the sale of an investment in the natural resource sector. And these limitations should be clear and explicit. Moreover we recommend that this sector be addressed in a separate law.

There is no threshold in order to exclude smaller transactions and ensuring efficiency in the application of this provision.

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).

Application for approval of investments

- 12. (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.

Comment [Capestone101]: Does it really make sense to grant the Minister so much discretion? Also what is in contravention should be clearly set forth. Is a minor contravention sufficient?

The word 'may' should be replaced with 'shall.' But the conditions for suspension etc. should be clearly specified. This will decrease pressures on the Minister, provide objectivity and limit potential corruption.

Investors need certainty and any lack of guidance increases uncertainty in investors. The use of the word 'may' will make it more difficult for investors to predict how authorities will act. Investors and their financing banks and other financial institutions require assurance in order to make long term investments. Furthermore, this will decrease the administrative burden on the Minister in so far as he/she will not have to determine afresh how to proceed in each situation. It also decreases the chances of inconsistent or unfavourable decisions being made. It is unreasonable to expect authorities anywhere with their extensive responsibilities to be able to exercise a wide discretion consistently without guidance given by law.

[Footnote: Oil: Uganda's Opportunity for Prosperity (2012) at 119

Comment [Capestone102]: This provision provides for micromanagement by the Namibian government. This is also a timely and costly endeavor for foreign investors and is a deterrent from doing business in Namibia.

The reason for this is that, in order for a foreign investor to acquire a licence, permit or authorization in Namibia, he/she would have to obtain certain regulatory approvals from the various authorities, including the Banks of Namibia, the Competition Commission e.c.t. An additional regulatory oversight provision makes investing in Namibia an onerous task that foreign investors will not look to fondly.

Although it has not been discussed in the report, the example of Estonia could serve Namibia well as it has successfully attracted foreign investment by making itself an open economy without excessive supervision, and certainly no micro-management, on the part of the government.

(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.

Provisional approval of investments

13. (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.

Criteria for approval of investments

14. 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

Comment [Capestone103]: This provision implies that a mere investment into Namibia is not a net benefit. It specifically excludes smaller investments into property. In our view the value of this provision is only realized in relation to 'larger' investments.

It may also be of value to include language that any such investment should not threaten or have significant impacts on matters of national security.

- who
have been socially, economically or educationally disadvantaged by
- (a) the approval of such change of ownership or control including any conditions set out by the Minister; and
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.

Time period for approval of investment

15. 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.

Comment [Capestone104]: Time periods should be set forth in law or regulations. This should not be left for ministerial discretion which could result a delay in approvals.

Transfer of rights and obligations

16. (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 –

Comment [Capestone105]: The parameters for approval of transfer of rights and change of ownership or control of the investment, should be more clearly articulated. The new investor should ideally have the same profile as the original investor, in regards to being able to operate the investment.

(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.

Comment [Capestone106]: For certain sectors, such as mining, the Act should require that the new investor has the necessary technical and financial capabilities. Please consider including such a requirement.

Comment [Capestone107]: Please ensure that there is a requirement relating to beneficial ownership.

Exception to requirements for approval of transfer of ownership or control

17. (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

Comment [Capestone108]: This provision takes away from 17(1). In terms of this provision, an international bank with a mortgage on a property will be subject to this Act. This may negatively impact upon the ability of Namibians to obtain international funding.

Comment [Capestone109]: What is temporary operation?

relating to the transfer of ownership apply with the necessary changes.

Compliance with all applicable laws

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

Comment [Capestone110]: There is a slight inaccuracy in the drafting. This provision implies that any, even minor, violations result in a default.

Registration of investors and investments

(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).

It would be ideal to define what constitutes applicable laws of Namibia. Does this include international instruments? The definition of applicable laws should then include all treaties and international instruments, which Namibia is a party to.

(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

19. (1) A new investor in any investment above the threshold for registration must register in the manner and form prescribed for this purpose. subsection (1) within 12 months of exceeding the threshold above which registration is required.

Comment [Capestone111]: What is the purpose of this provision? It effectively encourages investors not to grow their investments. So it is a disincentive.

(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 -

Comment [Capestone112]: This provision creates a domestic investment advantage. It therefore contradicts 19(5) in so far as it treats foreign investors differently to domestic investors.

- (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.

Moreover these factors are overly broad. A tech investment; a natural resource investment and a tourism investment are so different, each with their own diverse impacts. Therefore, it is not possible, or even appropriate, to take all of these factors into account, which is required.

Furthermore, would you also consider the level of positive contribution made by an investment in assessing like circumstances?

Application of Act to matters under treaties

20. (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.

Comment [Capestone113]: This is an ambiguous section. Does this mean that a foreign investor who qualifies under a bilateral agreement would not be subject to the Act?

Expropriation

21. (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. **Payment of compensation**

22. (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.

Comment [Capestone114]: What is the reason for the inclusion of this? And what does the word material mean? As we have noted elsewhere, this type of ambiguity will foster litigation against Namibia, which will negatively impact the investment climate.

Comment [Capestone115]: There is no reason for this to be included in the Act, it just raises ambiguities. This should be dealt with in a separate Act. See Comment [Capstone 52]

(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 -

Comment [Capestone116]: What is considered to be an equitable balance? Again expropriation should be fully and appropriately handled in separate legislation and should be in keeping with developed international standards, and the impact of international arbitration decisions.

- (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.

Comment [Capestone117]: Not clear why the profits need to be factored into the compensation. At this stage, it is questionable whether the investor would have taken these profits out already? If not and it is re-invested etc. in the company – would it not get reflected in the fair market value of the company?

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

Comment [Capestone118]: Are capital costs included in fair market valuation? If yes, then this should not be included.

(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.

Right of review concerning expropriation and compensation

23. 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.

Foreign personnel

24. (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.

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

25. (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

Comment [Capestone119]: In the 2017/2018 budget statement, the Minister of Finance states that the “*job content in the Namibian growth equation remains low.*”

As an essential component of economic growth and diversification, Namibia should open the economy up to expert professionals and should allow for future projects and developments to be co-lead or advised by international experts.

On the one hand, this may be a costly endeavour. Namibia may end up spending additional costs in the form of immigration requirements, tax equalizations, concessions, insurance and other payments.

On the other hand, a cost benefit analysis should be done on the potential benefits of opening up the economy to expats. The benefits include the spill-overs of human capital enhancement through foreign presence. In addition, foreign presence in Namibia assists in closing the “knowledge gap” in particular industries and will result in increased skills levels and technology transfers.

“*Empirical and anecdotal evidence indicates that, while considerable national and sectoral discrepancies persist, MNES tend to provide more training and other upgrading of human capital than domestic enterprises.*”

There is an additional concern that Namibians may not be able to benefit from a foreign presence in the absence of adequate regulatory frameworks.

1. Republic of Namibia, Budget Statement for the 2017/2018 Financial Year, available at <http://www.mof.gov.na/documents/27827/345303/Budget+Statement+2017.pdf/9310da77-51f1-4e76-8d2a-f37c987af344> accessed on 15 April 2017 at 3
2. OECD Report, *Foreign Direct Investment for Development: Maximizing Benefits, Minimizing Costs* (2002) at 15

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).

Capacity development and transfer of skills

- 26.** (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).

Transfer of funds

27. (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.

Resolution of post establishment disputes

28. (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.

Comment [Capestone120]: This process should be streamlined in terms of the different bilateral agreements, including bilateral or multi-lateral tax treaties.

It may be of value to make reference to China Australia Free Trade Agreement which includes an interesting proposal for public interest related disputes. Although this agreement is in the context of a FTA, many of its provisions could be applied in the context of this Act.

PART 7 GENERAL PROVISIONS

National security

29. 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.

Regulations

- 30.** (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.

Offences

31. (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

Comment [Capestone121]: This provision works for investments in natural resources only. The problem with this provision is that in the event that Namibia's economy grows, investors looking to take advantage of the domestic market would essentially fall under the ambit of this provision. This would also apply to export opportunities.

To be frank this is micro-management in the extreme and makes potential investors insecure. As noted, Namibia does not attract significant foreign investment and this type of provision will discourage an investor.

Again Namibia could look to Estonia which regained its independence in 1991. It has attracted foreign investment by focusing in know-how activities, supporting businesses in its neighbouring countries, attracting tourism and becoming an open economy. It is also a small nation population wise.

It is identified as Estonia and now by Forbes magazine as "Tiny, But Mighty."

Comment [Capestone122]: Transparency is arguably one of the most important elements in creating an enabling environment for investment.

There are certain threshold levels of transparency, one of which is where *"business operations become so opaque that virtually no investor is willing to enter, regardless of inducements."*

This provision should include acts of grave environmental or social harm. Some impacts, particularly in the extractives industries, can cause significant and irreparable damage to the environment and individuals/communities. In such cases, the investments should be terminated, without an option for a cure period.

Additionally, this provision should include offences related to corruption and disclosure of false information about beneficial owners, all of which should result in the automatic termination.

OECD Report, *Foreign Direct Investment for Development: Maximizing Benefits, Minimizing Costs* (2002) at 26

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). Opportunity for compliance with law

32. (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.

Penalties for offences

33. (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

Comment [Capestone123]: The Act should ensure that certain offenses result in automatic termination of the investment, and revocation of any licenses/permits. As such, no cure period should be provided for such offenses as bribery, corrupt business practices, or deliberate falsehoods or deliberate omissions of facts, so as to perpetrate a fraud.

Comment [Capestone124]: This should not be a matter of opinion. Either the investor is or not in breach.

Comment [Capestone125]: As aforementioned, this opportunity should not be allowed for certain breaches such as corruption, false statements regarding beneficial owners / technical / financial capacity etc.

Comment [Capestone126]: What certainty does a foreign investor thus have in his/her investment? This broad authority should be dealt with by more than one person. The possibility of creating a board or commission should be considered. Also this type of unlimited discretion has fostered corruption in many jurisdictions.

- (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.

(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.

Repeal of laws

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

Savings

35. (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 (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.

Short title and commencement

36. (1) This Act -

(a) is called the Namibia _____ Investment Promotion Act, 2016; and

(a) 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.

Comment [Capestone127]: Accordingly, we are of the view that this Act closes off the economy to any outside influence in the market and does not benefit Namibia but instead, effectively harms the nation.

Again, we reiterate that this Act essentially serves as a “lawyer’s full employment Act,” which will result in needless an expensive litigation, and needs significant attention.

Frankly, this Act needs substantial revisions in order to achieve its purpose of being attractive to investors.

APPENDIX C ALBERTA INTERNATIONAL COMMERCIAL ARBITRATION ACT

INTERNATIONAL COMMERCIAL ARBITRATION ACT

Chapter I-5

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HER MAJESTY, by and with the advice and consent of the Legislative
Assembly of Alberta, enacts as follow

Interpretation

1(1) In this Act,

- (a) "Convention" means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration in New York on June 10, 1958, as set out in Schedule 1;
- (b) "International Law" means the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on June 21, 1985, as set out in Schedule 2.

(2) Words and expressions used in this Act have the same meaning as the corresponding words and expressions in the Convention or the International Law, as the case may be.

Part 1 Foreign Arbitral Awards

Application of Convention

2(1) Subject to this Act, the Convention applies in the Province.

(2) The Convention applies to arbitral awards and arbitration agreements, whether made before or after the coming into force of this Part, but applies only in respect of differences arising out of commercial legal relationships, whether contractual or not.

1986 cl-6.6 s2

Application to court

3 For the purpose of seeking recognition of an arbitral award pursuant to the Convention, application shall be made to the Court of Queen's Bench.

1986 cl-6.6 s3

Part 2 International Commercial Arbitration

Application of International Law

4(1) Subject to this Act, the International Law applies in the Province.

(2) The International Law applies to international commercial arbitration agreements and awards, whether made before or after the coming into force of this Part.

1986 cl-6.6 s4

Conciliation and other proceedings

5 For the purpose of encouraging settlement of a dispute, an arbitral tribunal may, with the agreement of the parties, employ mediation, conciliation or other procedures at any time during the arbitration proceedings and, with the agreement of the parties, the members of the arbitral tribunal are not disqualified from resuming their roles as arbitrators by reason of the mediation, conciliation or other procedure.

1986 cl-6.6 s5

Removal of arbitrator

6(1) Unless the parties otherwise agree, if an arbitrator is replaced or removed in accordance with the International Law, any hearing held prior to the replacement or removal shall be repeated.

(2) With respect to article 15 of the International Law, the parties may remove an arbitrator at any time prior to the final award, regardless of how the arbitrator was appointed.

1986 cl-6.6 s6

Rules applicable to substance of dispute

7 Notwithstanding article 28(2) of the International Law, if the parties fail to make a designation pursuant to article 28(1) of the International Law, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances respecting the dispute.

1986 cl-6.6 s7

Consolidation of proceedings

8(1) The Court of Queen's Bench, on application of the parties to 2 or more arbitration proceedings, may order

- (a) the arbitration proceedings to be consolidated, on terms it considers just,

- (b) the arbitration proceedings to be heard at the same time, or one immediately after another, or
- (c) any of the arbitration proceedings to be stayed until after the determination of any other of them.

(2) Where the Court orders arbitration proceedings to be consolidated pursuant to subsection (1)(a) and all the parties to the consolidated arbitration proceedings are in agreement as to the choice of the arbitral tribunal for that arbitration proceeding, the arbitral tribunal shall be appointed by the Court, but if all the parties cannot agree, the Court may appoint the arbitral tribunal for that arbitration proceeding.

(3) Nothing in this section shall be construed as preventing the parties to 2 or more arbitration proceedings from agreeing to consolidate those arbitration proceedings and to take such steps as are necessary to effect that consolidation.

1986 cl-6.6 s8

Court

9(1) The functions referred to in article 6 of the International Law shall be performed by the Court of Queen's Bench.

(2) For the purposes of the International Law, a reference to "court" or "competent court", where in the context it means a court in the Province, means the Court of Queen's Bench.

1986 cl-6.6 s9

Part 3 General

Stay of proceedings

10 Where, pursuant to article II(3) of the Convention or article 8 of the International Law, a court refers the parties to arbitration, the proceedings of the court are stayed with respect to the matters to which the arbitration relates.

1986 cl-6.6 s10

Crown bound

11 This Act binds the Crown.

1986 cl-6.6 s11

Aids in interpretation

12(1) This Act shall be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the Act in their context and in the light of its objects and purposes.

(2) In applying subsection (1) to the International Law, recourse may be had to

- (a) the Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session (June 3-21, 1985), and
- (b) the International Commercial Arbitration Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration,

which shall be published in The Alberta Gazette.

1986 cl-6.6 s12

Schedule 1

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.
2. The term “arbitral awards” shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.
3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
2. The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:
 - a) The duly authenticated original award or a duly certified copy thereof;

b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.
2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.
2. This Convention shall be ratified and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.
2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.
2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.
3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

a) Signatures and ratifications in accordance with article VIII;

b) Accessions in accordance with article IX;

c) Declarations and notifications under articles I, X and XI;

- d) The date upon which this Convention enters into force in accordance with article XII;
- e) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

Schedule 2

UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

(As adopted by the United Nations Commission on
International Trade Law on 21 June 1985)

CHAPTER I. GENERAL PROVISIONS

Article 1. *Scope of application*

- (1) This Law applies to international commercial arbitration, subject to any agreement in force between this State and any other State or States.
- (2) The provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.
- (3) An arbitration is international if:
 - (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
 - (b) one of the following places is situated outside the State in which the parties have their places of business:
 - (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
 - (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
 - (c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.
- (4) For the purposes of paragraph (3) of this article:
 - (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;
 - (b) if a party does not have a place of business, reference is to be made to his habitual residence.

(5) This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.

Article 2. *Definitions and rules of interpretation*

For the purposes of this Law:

- (a) “arbitration” means any arbitration whether or not administered by a permanent arbitral institution;
- (b) “arbitral tribunal” means a sole arbitrator or a panel of arbitrators;
- (c) “court” means a body or organ of the judicial system of a State;
- (d) where a provision of this Law, except article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination;
- (e) where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement;
- (f) where a provision of this Law, other than in articles 25(a) and 32(2)(a), refers to a claim, it also applies to a counter-claim, and where it refers to a defence, it also applies to a defence to such counter-claim.

Article 3. *Receipt of written communications*

(1) Unless otherwise agreed by the parties:

- (a) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee’s last-known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it;
- (b) the communication is deemed to have been received on the day it is so delivered.

(2) The provisions of this article do not apply to communications in court proceedings.

Article 4. *Waiver of right to object*

A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.

Article 5. *Extent of court intervention*

In matters governed by this Law, no court shall intervene except where so provided in this Law.

Article 6. Court or other authority for certain functions of arbitration assistance and supervision

The functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by ... (Each state enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.)

CHAPTER II.
ARBITRATION AGREEMENT

Article 7. Definition and form of arbitration agreement

(1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

Article 8. Arbitration agreement and substantive claim before court

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

Article 9. Arbitration agreement and interim measures by court

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

CHAPTER III.
COMPOSITION OF ARBITRAL TRIBUNAL

Article 10. Number of arbitrators

(1) The parties are free to determine the number of arbitrators.

(2) Failing such determination, the number of arbitrators shall be three.

Article 11. Appointment of arbitrators

(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.

(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.

(3) Failing such agreement,

(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;

(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.

(4) Where, under an appointment procedure agreed upon by the parties,

(a) a party fails to act as required under such procedure, or

(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or

(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,

any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

Article 12. *Grounds for challenge*

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

Article 13. *Challenge procedure*

(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

Article 14. *Failure or impossibility to act*

(1) If an arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.

(2) If, under this article or article 13(2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12(2).

Article 15. *Appointment of substitute arbitrator*

Where the mandate of an arbitrator terminates under article 13 or 14 or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

CHAPTER IV. JURISDICTION OF ARBITRAL TRIBUNAL

Article 16. *Competence of arbitral tribunal to rule on its jurisdiction*

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the

arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

Article 17. Power of arbitral tribunal to order interim measures

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

CHAPTER V. CONDUCT OF ARBITRAL PROCEEDINGS

Article 18. *Equal treatment of parties*

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

Article 19. *Determination of rules of procedure*

(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

Article 20. *Place of arbitration*

(1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(2) Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

Article 21. *Commencement of arbitral proceedings*

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

Article 22. *Language*

(1) The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This

agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

(2) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Article 23. Statements of claim and defence

(1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

(2) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

Article 24. Hearings and written proceedings

(1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.

(3) All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

Article 25. Default of a party

Unless otherwise agreed by the parties, if, without showing sufficient cause,

(a) the claimant fails to communicate his statement of claim in accordance with article 23(1), the arbitral tribunal shall terminate the proceedings;

(b) the respondent fails to communicate his statement of defence in accordance with article 23(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;

(c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

Article 26. Expert appointed by arbitral tribunal

(1) Unless otherwise agreed by the parties, the arbitral tribunal

(a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;

(b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

Article 27. *Court assistance in taking evidence*

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

CHAPTER VI.
MAKING OF AWARD AND
TERMINATION OF PROCEEDINGS

Article 28. *Rules applicable to substance of dispute*

(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

(3) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so.

(4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

Article 29. *Decision making by panel of arbitrators*

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.

Article 30. *Settlement*

(1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(2) An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award

has the same status and effect as any other award on the merits of the case.

Article 31. Form and contents of award

(1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.

(3) The award shall state its date and the place of arbitration as determined in accordance with article 20(1). The award shall be deemed to have been made at that place.

(4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.

Article 32. Termination of proceedings

(1) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph (2) of this article.

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when

- (a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;
- (b) the parties agree on the termination of the proceedings;
- (c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of articles 33 and 34(4).

Article 33. Correction and interpretation of award; additional award

(1) Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties:

- (a) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;
- (b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

(2) The arbitral tribunal may correct any error of the type referred to in paragraph (1)(a) of this article on its own initiative within thirty days of the date of the award.

(3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.

(4) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph (1) or (3) of this article.

(5) The provisions of article 31 shall apply to a correction or interpretation of the award or to an additional award.

CHAPTER VII. RECOURSE AGAINST AWARD

Article 34. Application for setting aside as exclusive recourse against arbitral award

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had

received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

CHAPTER VIII. RECOGNITION AND ENFORCEMENT OF AWARDS

Article 35. *Recognition and enforcement*

(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

(2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language.

Article 36. *Grounds for refusing recognition or enforcement*

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.