

**UPDATE ON THE MAIN LEGAL
ISSUES UNDER THE NAMIBIA
INVESTMENT PROMOTION AND
FACILITATION BILL
(THE “NIPFB” OR “BILL”)**

Presented by:

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BACKGROUND

On 13 October 2021, the Attorney-General advised the Hon. Minister of Industrialization, Trade and SME Development on the Bill and these were some of our key findings:

1. Stiff and vague penalty regime
2. Ministerial overreach

BACKGROUND

1. **STIFF AND VAGUE PENALTY REGIME:**
 - 1.1 Section 32(3) read with section 34(1) and further read with section 34(3) only talks about criminal offenses and makes no room for administrative offences and this creates a regime that is penalty heavy and has the combined effect of potentially deterring or discouraging investment;
 - 1.2 the Bill makes provision for the imposition of a fine or imprisonment (or both under section 32(3)), or and including additional action under section 34(1), including the potential of a court mandated administrative fine under section 34(3);

BACKGROUND

STIFF AND VAGUE PENALTY REGIME CONTINUED:

- 1.3 Section 33(1) empowers the Minister to allow a transgressing investor who committed an offence under section 32, to be given an opportunity to comply with the law by way of a notice compelling it to implement corrective measures as directed by the Minister. The Minister may “delay any further enforcement of any action contemplated under section 34” (section 33(3));
- 1.4 We found section 33(3) to be vague in that the Minister’s power to delay imposing a penalty on the investor who committed an offence does not have a timeframe, nor finality as to what happens if the Minister delays beyond a period which can reasonably be considered too long;

BACKGROUND

2. **MINISTERIAL OVERREACH:**

- 2.1 Section 34(1)(b) empowers the Minister to give a written order to an investor or to write a recommendation to a relevant Minister or other functionary to impose a “*suspension, withdrawal or cancellation of any licence, permit, authorisation or concession, issued under any other law*”;

BACKGROUND CONTINTUED

MINISTERIAL OVERREACH CONTINUED:

- 2.2 We objected to the above provision on the ground that we considered it a Ministerial overreach for the Minister responsible for Trade, to suggest to another Minister (in this Bill referred to as the “relevant Minister”) or functionary, to exercise the above functions, when that specific “*licence, permit, authorisation or concession*” is issued under any other law (which contain objective factors for approval as well as for cancellation);

BACKGROUND CONTINTUED

MINISTERIAL OVERREACH CONTINUED:

- 2.3 There is no list of “*licences, permits, authorisations or concessions, issued under any other law*” — which the current Bill is taking over, nor is there a suggestion to amend any other laws in so far as empowering the Minister of Trade to exercise administrative powers over the “*licences, permits, authorisations or concessions, issued under any other law*”;

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BACKGROUND CONTINUED

MINISTERIAL OVERREACH CONT.

- 2.4 This provision is likely to cause tension if the original administrator of the empowering Act that granted the “*licence, permit, authorisation or concession*” does not find objective factors to revoke or cancel it (in terms of the original empowering Act) or refuses the recommendation of the Minister under the NIPFA — thus, section 34(1)(b) is a potentially litigious matter and if an amendment is not effected, then Ministry has to discuss with the relevant authorities on how to harmonize the law or how to resolve such conflicts.

BACKGROUND CONTINUED

KEY SUMMARY OF THE ATTORNEY-GENERAL'S LEGAL OPINION:

The Hon. Attorney-General certified the Bill and advised the Hon. Minister to address the following policy issues and shortcomings in the Bill:

1. Revise the penalty system under section 32 as we consider them too 'stiff' and likely to discourage investment;
2. Obtain, as a matter of policy, a specific delegation of power to administratively order the section 34(1)(b) “*suspension, withdrawal or cancellation, or, where appropriate, recommend to the relevant Minister or other functionary the suspension, withdrawal or cancellation of any licence, permit, authorisation or concession, issued under any other law*”;
3. Revise section 33((3) to remove the option of the Minister delaying the imposition of a penalty and replace with finality in giving specific timelines for it.

CONSEQUENCES OF AG'S LEGAL OPINION

After certification, the Bill was presented to Parliament. However, the Bill was withdrawn from Parliament and MIT was directed to constitute a Technical Committee (TC) comprising of Senior Officials from key public institutions to consider the concerns raised by the NIPDB and the private sector on the Bill.

Subsequently, a joint meeting of the CCT and CCTED held on 2nd March 2022 was apprised on the withdrawal of the NIPFB from Parliament. The meeting resolved that the TC should convene to consider the following areas in the Bill:

1. The perceived superpowers of the Minister of Industrialization and Trade and lack of clarity of roles vis-à-vis the roles of the NIPDB to review approve and make decisions on all and sundry investments made in Namibia;
2. The entry point and power limitations of the NIPDB in the Bill;
3. The lack of accommodative stance to expropriate and review investor transgressions in the Bill;
4. Consultations with the private sector be undertaken before the revised Bill is re-submitted to Parliament for deliberations.

TECHNICAL COMMITTEE

The Technical Committee (TC) has duly been established and meetings have been held to discuss the above-mentioned areas that led to the withdrawal of the NIPFB. The Technical Committee is composed of:

MIT, NPC, NIPDB, MoF, BoN, MoJ, AG

The TC held 12 meetings and 2 workshops (discuss TOR and programme activities, to review provisions and propose amendments, discuss policy matters around roles and functions of MIT and NIPDB, consider input from stakeholders, consider final stakeholder consultations)

THE TC CONSIDERED THE FOLLOWING MAIN AREAS:

1. **PERCEIVED SUPERPOWERS OF THE MINISTER OF INDUSTRIALISATION AND TRADE TO REVIEW, APPROVE AND MAKE DECISIONS ON ALL AND SUNDRY INVESTMENTS**

We reviewed section 5 (powers of the Minister) and Section 8 (which deals with the establishment of the investment promotion agency) with the aim to identify and demarcate the functions, responsibilities and reporting lines between the Ministry and the NIPDB so that they are clearly reflected in the Bill. Furthermore, the phrase “in consultation with” has been included in Section 5 so that the Minister does follow a general consultation process. Further amendments were proposed to highlight and reinforce that the Minister only has the mandate over Strategic Investments as so defined and not all and sundry investment decisions. Strategic Investments were also defined and frontloaded in the Bill by the Technical Committee’s review to ensure more clarity.

THE TC CONSIDERED THE FOLLOWING MAIN AREAS:

2. **ENTRY POINT AND POWER LIMITATIONS OF THE NIPDB IN THE BILL**

Unlike the original Bill as tabled in Parliament in November 2021 (which outlines facilitation and promotion functions and designate such to NIPDB), it has been proposed that the NIPDB should be established explicitly, within this Bill, with a clear function and reporting structure, as well as clearly demarcated roles and powers (see Part 3 to 5 – Section 8 to 36).

All mandates of the NIPDB are placed in one section of the Bill to ensure coherence in terms of its mandate and implementation activities.

THE TC CONSIDERED THE FOLLOWING MAIN AREAS:

3. **THE LACK OF ACCOMMODATIVE STANCE TO EXPROPRIATE AND REVIEW INVESTOR TRANSGRESSIONS IN THE BILL**

It was generally perceived that the draft Bill is heavy on penalties in terms of its cumulative impact so derived from both administrative and criminal penalties. To address these concerns, we reviewed section 30, 31, and 34 (now section 62, 63, & 64).

On Expropriation, the TC reviewed Section 23 (now Section 53).

On Resolution of dispute, the TC reviewed Section 30 (now Section 60): inserted minor changes regarding the appointment of a mediator for more clarity and transparency.

THE TC CONSIDERED THE FOLLOWING MAIN AREAS:

The entire Section 31 (1) (a-f) (Offences and Penalties), has been moved to administrative offences, as they are not criminal, and they deserve administrative sanctions instead of criminal sanctions. Section 31 (2) (now Section 62(3-4)) are criminal offences and should get criminal sanctions.

Additionally, Section 34 (now Section 64) on action to be taken against investor or investment for offences, the Committee proposed that sub-section (1) (b) should be changed to incorporate the term “notifying” the relevant Ministers of the transgression. This clarifies that the Minister responsible for investment does not take unilateral decisions and terminate investments that are established under laws and mandates of other ministries.

OTHER MATTERS REVIEWED

Section 7: Inspectors

The term “Inspector” was understood by some reviewers to be too intimidating and be regarded as policing, therefore it was proposed that it should be replaced with “*Compliance Officers*”. This function is purely a policy enforcement matter, and the detailed responsibilities should be outlined in the Regulations, not in the law. After further considerations of additional information on the mandate, beyond Investor Law Enforcement, it was determined that this should help ensure efficient business regulation for which the function is thus under the purview of the Minister of Industrialisation and Trade. The intention is not to establish new positions but rather the effective utilisation of current regional economists within the offices of the MIT, along with requisite powers.

OTHER MATTERS REVIEWED

Section 8: Performance Agreements with investors

Performance Agreements of strategic investments will be signed by the Minister.

Any other investment in an economic sector or business activity that has not been designated by regulation made pursuant to section 12 (now section 42) is open for investment and ownership participation by any investor in any legal form permitted by the applicable law. The process relative to approval of strategic investments, by the Minister, must be a consultative process with other Ministers related to such an investment. This only applies to investments defined as strategic (an investment of national importance, which has significant impact on the development of the country), and not to all investments.

Should a strategic investment already be covered by performance requirements, including rights and obligations for the investors, under another economic Ministry, any approval, including any conditions thereto or performance agreement under the other applicable law, will remain in place and is deemed the approval or agreement under this law as well.

OTHER MATTERS REVIEWED

Section 9: Investment Promotion and Facilitation

Section 9 (d), makes reference to the Export Processing Zone Act no 9 of 1995. However, certain provisions of this Act have been suspended until the SEZ Law is in place to repeal it.

Section 10: Integrated Client Service Facility (ICSF)

Section 10 was integrated into Section 6, under the functions of the Board, and reflect that the Minister may/may not (discretionary) delegate the Board to implement the one-stop-shop.

OTHER MATTERS REVIEWED

Section 11: National Investment Policy

The policy function (development and review) should fall under the Ministry, which is the lead institution, and should seek input from key stakeholders (both public and private) including the Board.

Section 11 was therefore integrated into Section 5 under the functions and powers of the Minister.

Section 12 (now section 42): Designation of categories of economic sectors and business activities for certain categories of investors

The Committee took note of concerns referring to designated sectors for Namibians and joint venture entities with majority shareholding by Namibian are lumped together under Section 12 (2) (b) (now section 42(2)(b), “*reserved for Namibians*”. However, after lengthy interrogation and seeking legal advice the TC resolved that the term remain as is, since “*Namibian*” is adequately defined under the Definition section.

OTHER MATTERS REVIEWED

Section 19: Approval of investment and time periods relating to approval

The turnaround time for the process of approval and admission of investment should not be detailed in the primary law, but rather moved to the regulations.

Section 24 (now section 54): Payment of Compensation

The Payment of Compensation is a standard provision within investment agreements and is common investment policy language. Moreover, it provides investors with certainty and a sense of transparency. The same has been adopted in the SADC bilateral investment treaty template, as well as forming part of the draft AfCFTA Investment Protocol. Therefore, the Committee proposed to maintain the details under this section.

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OTHER MATTERS REVIEWED

Section 27 (now section 57): Facilitation of visas and permits of investors, dependents and foreign personnel

This is a standard provision within investment agreements and investment policy language. Additionally, it provides assurance to the investor as it reflects the facilitation function of the Agency. The same has been adopted in the SADC bilateral investment treaty template, and forms part of the draft AfCFTA Investment Protocol. Therefore, the Committee proposed to maintain the details under this section.

Section 28 (now section 58): Capacity development and transfer of skills

It was discussed whether this provision is necessary in this Bill since it might have been addressed in other existing laws. Nevertheless, the TC proposed to maintain this provision as it is a standard provision within investment agreements and investment policy, however it was agreed to considering softening the language/tone.

OTHER MATTERS REVIEWED

Section 29 (now section 59): Transfer of funds

There has been a concern that this section is perceived not relevant as it is observed to be a duplication of the Exchange Control Act. However, after thorough discussion it was also deemed necessary to retain it as safeguard provision (especially subsection 4, as it serves as fall-back position for a country in case of unforeseen circumstances). After consultations with the Ministry of Finance and Bank of Namibia, the TC proposed that the Bill should provide certainty and retain the safeguard provision to protect the country in cases of a crises.

OTHER MATTERS REVIEWED

- The TC not only incorporated the concerns from OMAs, but also considered those initially received in writing from private sector (NALOBA and NCCI).
- All concerns were addressed and the Bill revised where appropriate and with good reason.
- A detailed matrix has also been drafted to address all concerns in greater detail.
- The suggestions from the TC are yet to be approved by the policy makers at CCT/CCTED .

Thank you

