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# The black gold rush in Namibia and its implications for the investor–state dispute settlement



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# Executive summary

Namibia stands at a critical juncture in its economic and energy development. Significant offshore oil discoveries have generated expectations of economic growth, increased public revenues and industrial development. At the same time, the country is pursuing renewable energy and green hydrogen investments while maintaining commitments to climate action and sustainable development. These competing priorities raise important questions about Namibia's ability to regulate foreign investment in line with its changing economic, environmental and development objectives.

This report examines how investor–state dispute settlement (ISDS) mechanisms may constrain Namibia's ability to adapt its policies and regulations as the country expands investment in oil and gas and other strategic sectors. ISDS enables qualifying foreign investors to initiate international arbitration against states for alleged breaches of investment protections, including fair and equitable treatment and protection against direct and indirect expropriation. Such claims may expose governments to substantial compensation liabilities and contribute to *regulatory chill*, where the threat of costly arbitration discourages legitimate public-interest regulation.

The report identifies two principal and overlapping sources of Namibia's exposure to ISDS: its bilateral investment treaties (BITs) and domestic investment legislation. A third, contractual source lies in the arbitration clauses of investment contracts and performance agreements. Namibia has eight BITs currently in force, many of which contain broadly formulated investor protections with limited environmental safeguards. Several provide access to international arbitration, while sunset clauses may extend protection for existing investments for up to 20 years after treaty termination.

Although Namibia signed but has not ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), non-ratification does not eliminate its exposure to ISDS. Four of its existing treaties provide alternative arbitration routes, including arbitration under UNCITRAL Rules, the International Chamber of Commerce (ICC) and the ICSID Additional Facility. This exposure is particularly significant because major petroleum operators hold investments through subsidiaries incorporated in treaty partner countries, including the Netherlands, potentially enabling them to invoke investment treaty protections.

A second source of exposure arises from Namibia's Foreign Investments Act 27 of 1990 (FIA), which allows qualifying investors holding a Certificate of Status Investment to access international arbitration in two specified kinds of dispute. Although the Namibia Investment Promotion Act 9 of 2016 (NIPA) sought to strengthen domestic regulatory authority and remove the statutory route to international arbitration, it has never been brought into force and remains on the statute book. Efforts to replace the FIA therefore remain central to the country's investment governance reforms. The draft Investment Promotion Bill released for public consultation in late 2025 would repeal both Acts, end existing Certificates of Status Investment within six months of its commencement and replace statutory arbitration with a grievances committee, mediation and the Namibian courts. Domestic legislative reform can significantly reduce Namibia's exposure to ISDS but cannot, by itself, extinguish existing international treaty obligations. Addressing these risks requires coordinated reforms to investment treaties, domestic legislation and investment contracts.

These legal risks are particularly consequential given uncertainties surrounding Namibia's long-term energy trajectory. Petroleum investments involve commitments extending over several decades, while

evolving climate policies, energy markets and national development priorities may require governments to amend existing regulatory frameworks. Without adequate safeguards, these changes could trigger costly investment disputes and constrain Namibia's ability to pursue a just energy transition. The challenge is therefore to provide investors with sufficient certainty and protection while preserving Namibia's ability to regulate in the public interest and adapt its approach as circumstances change.

# Recommendations

The report proposes six priority actions to strengthen Namibia's investment governance while preserving its ability to attract foreign investment.

1. Review, renegotiate or phase out older-generation bilateral investment treaties.

Namibia should undertake a systematic phase-out of older-generation bilateral investment treaties (BITs) and the removal of unilateral investor access to international arbitration from domestic investment legislation. Namibia should review its eight BITs currently in force, prioritising termination or renegotiation of those containing broad fair and equitable treatment (FET), indirect expropriation and umbrella clauses without meaningful environmental safeguards. A modern Namibian investment law should place investors and domestic actors within a predictable legal framework, expressly affirm the state's right to regulate for climate, environmental, human-rights and development objectives, and make domestic institutions the primary forum for resolving disputes. The 2025 draft Investment Promotion Bill moves in this direction: it names 'climate action' and environmental protection among the legitimate objectives for which Namibia may regulate, and it sends investor–state disputes to a grievances committee, mediation and the Namibian courts. Its right-to-regulate clause should nonetheless reach beyond measures that prescribe 'special formalities' for foreign investments.

2. Reform domestic investment legislation to strengthen regulatory autonomy.

Since long sunset clauses may preserve treaty protection for existing investments for another ten, fifteen or twenty years, this process should begin before large-scale petroleum production materially expands the stock of protected investments. The successor to the Foreign Investments Act (FIA) should similarly remove the section 13 model of advance state consent to investor–state arbitration. The 2025 draft would do so by ending existing certificates within six months of its commencement, but its preservation of arbitration under performance agreements and other legislation leaves a contractual route open that should be tightly circumscribed. Investors should ordinarily be required to exhaust reasonably available domestic remedies, with international dispute settlement, where retained at all, confined to carefully defined circumstances and preferably conducted on a state-to-state basis.

3. Strengthen environmental and climate safeguards in investment contracts.

New investment contracts should additionally include explicit environmental and climate carve-outs, prohibit or tightly circumscribe stabilisation clauses that freeze future regulation, and make clear that non-discriminatory measures adopted in good faith to protect the environment, implement the Paris Agreement or safeguard public welfare do not automatically constitute compensable indirect expropriation.

4. Improve transparency and public accountability in investment governance.

Namibia needs considerably stronger transparency and public accountability around the new generation of investment partnerships being negotiated in petroleum, critical minerals and green hydrogen. The proliferation of Memoranda of Understanding (MoUs) and strategic partnerships with foreign

governments and investors, sometimes described as 'deals without details', makes it difficult for Parliament, communities, civil society and other stakeholders to determine what obligations the state has assumed, how risks have been allocated and whether dispute-settlement or stabilisation provisions have been included. Namibia should therefore fully implement the Access to Information Act 8 of 2022 and extend the duty to publish performance agreements in the 2025 draft Investment Promotion Bill to investment agreements, petroleum licences, major MoUs and associated fiscal and dispute-settlement provisions, subject only to narrowly defined legitimate confidentiality exceptions.

5. Leverage Namibia's natural-resource potential to negotiate more balanced investment arrangements.
Namibia should use, rather than underestimate, the bargaining power created by its oil, uranium, critical-mineral, renewable-energy and green-hydrogen potential. The continued growth of foreign direct investment (FDI) despite regulatory uncertainty demonstrates that investors are prepared to accept a degree of political and regulatory risk where commercially significant resources and opportunities exist. Namibia therefore does not need to exchange excessive legal protection for investment.

6. Ensure investment law serves Namibia's development strategy.
Ultimately, the objective should not be to eliminate investment protection, but to ensure that investment law serves Namibia's development strategy rather than determining it. Preserving the sovereign capacity to change course as climate science, energy markets and domestic priorities evolve will be as important to Namibia's long-term prosperity as attracting the investment itself.

Together, these recommendations seek to ensure that Namibia's investment regime provides legal certainty for investors without compromising the government's ability to respond to changing environmental, economic and development priorities.

# 1. Introduction

Namibia stands at a critical moment in its economic and energy policy trajectory. Recent offshore oil discoveries in the Orange Basin have generated significant expectations that Namibia could become a major oil producer by the end of the decade. Discoveries in the Venus and Graff fields, announced in 2022 by international energy companies, have been described as among the most significant hydrocarbon finds globally in recent years.[1] The Namibian government has consequently signalled ambitions to begin oil production by 2030, thus positioning its oil and gas sector as a potential driver of its economic growth, fiscal revenues and energy security.[2] At the same time, Namibia has also articulated strong commitments to climate action and a just energy transition, in its Nationally Determined Contributions (NDCs) under the Paris Agreement and its emerging strategy to become a global leader in green hydrogen production and renewable energy development.[3]

These competing ambitions create a complex policy landscape. While oil and gas development may promise fiscal gains, it also exposes Namibia to a range of long-term legal and financial risks associated with international investment agreements and investor protection regimes. One of the most significant of these risks arises from the investor–state dispute settlement (ISDS) mechanism embedded in many bilateral investment treaties (BITs) and international investment contracts. ISDS provisions allow foreign investors to bring claims directly against states before international arbitration tribunals if government measures are alleged to have harmed their investments.[4] In practice, this can include claims for compensation not only for sunk investments but also for lost future profits resulting from regulatory changes or changes in policy decisions.

For countries like Namibia that are at an early stage of developing hydrocarbon industries, these risks are particularly significant. Where tribunals find a treaty breach, compensation may, in appropriate cases, include loss of future profits, particularly where they can be established with sufficient certainty. This means that if Namibia were to approve large-scale oil developments and later adopt policies to limit fossil fuel production in pursuit of climate commitments, foreign investors could potentially bring arbitration claims seeking compensation.[5] The resulting financial exposure can be substantial. Studies of ISDS awards show that damages can reach hundreds of millions or even billions of dollars, while the costs of defending arbitration cases alone can average US$8 million per dispute.[6] For developing economies with limited fiscal budgets, such liabilities can divert critical public resources away from climate mitigation, adaptation and social development priorities.

These dynamics raise broader questions about how Namibia can balance potential oil and gas revenues with its long-term development and climate objectives. International energy transition scenarios show that expanding fossil fuel production is incompatible with achieving global climate targets. The International Energy Agency's Net Zero by 2050 scenario concludes that no new oil and gas fields should be approved for development beyond those already committed if the world is to remain within a 1.5°C warming pathway.[7] At the same time, investment arbitration frameworks developed during earlier phases of globalisation continue to provide strong legal protections for fossil fuel investments.

Against this backdrop, Namibia faces an important strategic challenge on how to safeguard its policy space to pursue a just energy transition while navigating international investment obligations and attracting responsible investment. The interaction between ISDS mechanisms and emerging climate policies has become a central issue in global debates about reforming international investment law. Scholars,

international organisations and policymakers have increasingly argued that existing investment regimes were designed for an era prioritising capital protection and may not adequately reflect contemporary priorities such as climate governance, sustainable development and equitable risk allocation.[8]

Beyond the direct financial consequences of arbitration, scholars have identified the phenomenon commonly referred to as 'regulatory chill'.[9] The prospect of costly arbitration may discourage governments from adopting or strengthening public-interest regulation, including environmental protection, climate measures, public-health initiatives and natural resource governance reforms, because of concerns that such measures may trigger investment claims.[10]

ISDS allows foreign investors to bring claims directly against host states before international arbitration tribunals.[11] Unlike domestic litigation, ISDS enables investors to bypass national courts and seek compensation before international tribunals such as the International Centre for Settlement of Investment Disputes (ICSID) or tribunals constituted under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules. These mechanisms were originally developed to encourage foreign investments by protecting investors against arbitrary state conduct. ISDS has evolved into one of the most significant features of contemporary international investment law.[12]

Most ISDS claims arise from alleged breaches of broadly framed investment treaty protections rather than direct expropriation alone. These commonly include fair and equitable treatment (FET), which requires states to treat investors fairly, transparently and consistently; protection against direct and indirect expropriation, which protects investors against the unlawful seizure of their investments or government measures that substantially deprive them of the value or use of their investments; full protection and security, which requires states to take reasonable measures to protect investments from harm; national treatment, which requires foreign investors to be treated no less favourably than domestic investors in comparable circumstances; and most-favoured-nation (MFN) treatment, which requires states to treat investors from one foreign country no less favourably than investors from other foreign countries in comparable circumstances.

The legal consequences of ISDS processes have increasingly come under scrutiny in the context of global climate policy. As governments evolve and adopt measures to phase out reliance on fossil fuels, tighten environmental regulations and accelerate renewable energy transitions, investors have begun using ISDS mechanisms to challenge these policies. Several high-profile cases exemplify the scale of potential liabilities. In *Rockhopper Exploration v Italy*, an arbitration tribunal ordered Italy to pay compensation exceeding €190 million after the government banned offshore oil drilling as part of environmental reforms.[13] Such cases demonstrate the large scale of how ISDS mechanisms could delay climate policy decisions and turn abandoned fossil fuel projects into substantial financial liabilities for states.

This paper examines the potential implications of ISDS provisions for Namibia's emerging oil and gas sector and assesses how investment treaty protections could affect the country's ability to implement climate and energy transition policies in the future. The paper also explores strategic options available to Namibia, including reforming investment treaty commitments, renegotiating investment contracts, and strengthening legal safeguards to preserve regulatory flexibility.

More broadly, the analysis situates Namibia's experience within wider debates about the reform of international investment governance. As other African countries explore the possibility of newer fossil fuel developments while simultaneously committing to energy transitions, Namibia's policy choices may offer

important lessons for the continent. Ensuring that investment frameworks support – rather than constrain – long-term development and climate objectives will be critical for achieving an equitable and sustainable continental energy transition.

# 2. What is the ISDS?

The investor–state dispute settlement (ISDS) emerged as a central mechanism within the modern international investment regime during the rapid expansion of bilateral investment treaties (BITs) and international investment agreements (IIAs) from the late 1980s onwards. The first BIT was signed between Germany and Pakistan in 1959, but the overwhelming majority of the more than 3,000 BITs globally were concluded after 1990, particularly during the wave of neoliberal globalisation and market liberalisation that followed the end of the Cold War.[14] ISDS subsequently became embedded within the international investment regime as a conventional enforcement mechanism, particularly through institutions and procedural frameworks such as the International Centre for Settlement of Investment Disputes (ICSID) and the UNCITRAL Arbitration Rules. It primarily enables foreign investors to bring claims directly against host states before international arbitral tribunals for alleged breaches of treaty obligations, including fair and equitable treatment (FET), protection against indirect expropriation, most-favoured-nation treatment and compliance with umbrella clauses.[15]

In contrast to the international trade system administered largely through the World Trade Organization (WTO), where disputes are resolved between states, the international investment regime gives private corporations the legal capacity to pursue claims at the international level.[16] Simmons characterises this development as a major shift in international economic governance, as it enables private investors, rather than states, to commence legal action against sovereign governments. Whereas the international trade regime operates through the comparatively centralised and institutionally integrated framework of the WTO, the investment regime developed through a vast network of bilateral agreements. This produced a fragmented legal architecture in which private investors possess exceptionally extensive procedural rights.[17] The ability of private investors to bring claims directly against sovereign states is widely regarded as one of the most transformative developments in international law. This mechanism appears not only in the vast majority of bilateral investment treaties, but also in regional and sector-specific agreements, including the Energy Charter Treaty, the North American Free Trade Agreement and the Central American Free Trade Agreement.[18]

This development has fundamentally altered the structure of economic governance by conferring extensive rights on foreign investors and creating an inherent imbalance within many bilateral investment treaties. Investors are generally able to determine when, where and on what legal grounds to bring claims against public authorities for compensation. This imbalance is further intensified by the non-reciprocal nature of investment treaty arbitration, which does not grant states an equivalent right to initiate proceedings against private firms. This gives them an "extraordinary agenda-setting power in future law development".[19] This allows firms to reshape the development and interpretation of law and presents as a major consequence of international arbitration.

Gus Van Harten argues that ISDS establishes a parallel system of adjudication through which foreign investors may circumvent domestic courts and contest public policy measures before ad hoc international

tribunals. By contrast, citizens and affected communities have no comparable entitlement to bring international claims against states, reinforcing Simmons's critique of the structural asymmetry embedded in the investment regime.[20]

Despite this context, the primary rationale advanced for bilateral investment treaties (BITs) and ISDS is that enhanced legal protection for foreign investors promotes foreign direct investment (FDI). During the proliferation of BITs in the late 1980s and 1990s, many developing states entered into these agreements on the assumption that they would strengthen investor confidence, demonstrate policy credibility, mitigate political risk and encourage greater capital inflows.[21]

This assumption has, however, been questioned by several scholars. Bonnitcha observes that the empirical relationship between investment treaties and increased FDI remains uncertain, with existing studies producing mixed and inconclusive findings.[22] Singh and Ilge similarly argue that many governments concluded BITs without persuasive evidence that these agreements would deliver meaningful developmental benefits.[23] They contend that the economic gains associated with BITs are often overstated, while the legal and financial risks associated with ISDS are underestimated. Gus Van Harten further criticises the assumption that ISDS is necessary to attract investment, arguing that many countries continue to receive high levels of foreign investment without extensive investment treaty protections or international arbitration mechanisms like Brazil.

ISDS also has serious legitimacy concerns regarding the structure, operation and political economy of ISDS itself. Langford, Behn and Lie demonstrate through social network analysis that investment arbitration is dominated by a small and highly interconnected professional elite.[24] Using data from 1,039 investment arbitration proceedings, they show that a tiny group of arbitrators, counsel and expert witnesses repeatedly circulate through different institutional roles in what they term a "revolving door" system.[25] This system is characterised by individuals who occupy multiple institutional roles across different cases, leading to "double-hatting".[26]

Van Harten further notes that the revolving door system raises concerns about institutional safeguards and independence by removing judges from the adjudicative marketplace and positioning them instead in a public institution. This creates a credible prospect of bias in the system which is inconsistent with the rule of law.[27]

These findings support broader criticisms made by Zhan regarding arbitrator independence, repeat appointments, "double-hatting" and the absence of an appeals mechanism. Building on the legitimacy crisis of ISDS, he argues that there is inconsistency and unpredictability in arbitral decisions. He notes that treaty language is sometimes interpreted differently, producing inconsistent jurisprudence and uncertainty regarding the meaning of treaty obligations. This is compounded by a lack of an appeals mechanism because substantive legal errors or inconsistent interpretations cannot easily be corrected.[28]

## The oil and gas sector: a target of ISDS?

The literature on ISDS shows that arbitration claims increasingly concern sectors that are closely connected to public welfare, natural resources and the exercise of sovereign regulatory authority. As a major producer of natural resources, Africa is particularly exposed in the context of the energy and industrial transitions.

Several scholars maintain that periods of economic restructuring, industrial reform, energy transition, democratic change and shifts in resource governance can heighten states' exposure to ISDS claims and international arbitration.[29] Anderson and Pérez-Rocha demonstrate how reform in the extractive industries, a strengthening of environmental protections or a change in resource governance structures may expose countries to ISDS.[30] El Salvador reportedly spent approximately US$13 million defending itself against the gold company Pacific Rim's claims for an amount nearly equal to the country's entire environmental and natural-resources budget in 2013.[31] The authors therefore argue that states "never truly win" in ISDS because even successful defence imposes significant fiscal burdens.[32]

According to an International Institute for Sustainable Development report, as of 2022 the fossil fuel industry is the most litigious industry in the ISDS system by number of cases, accounting for almost 20 per cent of the total known ISDS cases across all sectors. In comparison, the second most litigious sector, the mining industry, is accountable for 11 per cent of known ISDS cases across all sectors. The vast majority of fossil fuel arbitrations are related to the oil and gas industry (92 per cent). Further, almost half of all fossil fuel cases are related to upstream investments, which comprise all operations from the exploration of new fossil fuel reserves to their extraction.[33]

This is problematic, especially for Africa, whose industries are mostly upstream. And, for the context of climate change. This has also culminated in a global backlash against the international investment regime. Countries such as Bolivia, Ecuador and Venezuela withdrew from the ICSID Convention after facing numerous arbitration claims from extractive corporations. Other states, including South Africa and Indonesia, reviewed or terminated bilateral investment treaties.[34]

## Regulatory chill: the impact of ISDS on regulatory space

Salehi accordingly argues that ISDS should not be treated as a conventional form of private commercial arbitration. Instead, it is better understood as a mode of transnational public adjudication, since disputes frequently concern matters such as non-discrimination, taxation, environmental regulation, industrial policy, public utilities, energy governance and sovereign economic decision-making.[35]

Scholars such as Singh and Ilge contend that the broadly worded and imprecise standards contained in investment treaties have allowed arbitral tribunals to adopt expansive interpretations of investor protections. This, in turn, may contribute to 'regulatory chill', whereby governments hesitate to adopt public-interest regulations because of the perceived risk of costly investor claims.[36]

They point to disputes involving tobacco regulation, hazardous waste disposal, taxation, and environmental governance as evidence that ISDS increasingly intrudes into core areas of democratic regulation. One major example discussed in the literature is the 2011 arbitration initiated by Philip Morris against Australia over plain-packaging tobacco laws. Although Australia ultimately prevailed before the Permanent Court of Arbitration in 2015, the case became symbolic of broader concerns that multinational corporations could use ISDS to challenge legitimate public-health measures.[37]

Tienhaara expands this argument by emphasising that regulatory chill does not depend solely on governments losing cases.[38] Rather, the mere threat of expensive arbitration, where average legal costs can exceed US$8 million according to United Nations Conference on Trade and Development (UNCTAD) data cited.[39] Tienhaara describes regulatory chill as occurring when an investor, or group of investors, invokes the threat of arbitration in response to a particular regulatory proposal. Faced with the prospect

of legal proceedings, governments may withdraw, weaken, postpone or decline to implement or enforce the proposed measure.[40] Tienhaara's contribution is one of the most invaluable in the regulatory chill literature. She concludes by asserting that many investor–state conflicts never reach formal arbitration because the threat alone may alter political behaviour – ultimately shaping governance disproportionately.

The Vannessa Ventures dispute in Costa Rica illustrates a prominent example of specific regulatory chill.[41] The Canadian mining company sought approval for the Crucitas gold mining project, which faced strong opposition due to concerns over deforestation, endangered species and environmental degradation. While Costa Rica's environmental authorities initially resisted approving the project's Environmental Impact Assessment (EIA), the venture was protected under the Canada–Costa Rica BIT and repeatedly threatened arbitration under ICSID for damages amounting to approximately US$240 million. Due to the threat of successful arbitration, Costa Rica's environmental agency ultimately approved the project after the company linked withdrawal of its arbitration claim to approval of the EIA.[42] Ultimately ISDS can lead to regulatory chill, significantly impacting the ability of states to preserve the policy space required to regulate in the public interest.

## 2.1 The impacts of ISDS in Africa

### Egypt

Egypt provides another example in Africa of how changes in energy policy can give rise to investor–state arbitration. Over the past two decades, Egypt sought to position itself as a regional energy hub through the development of its natural gas sector and liquefied natural gas (LNG) export infrastructure. At the same time, increasing domestic energy demand and recurrent gas shortages prompted the government to prioritise domestic consumption over contractual export commitments.[43]

These competing priorities culminated in the suspension of gas supplies to the Damietta LNG plant, which was operated by Unión Fenosa Gas. The interruption of gas supplies effectively prevented the investor from operating the facility, leading Unión Fenosa Gas to commence arbitration against Egypt under the Agreement on the Reciprocal Promotion and Protection of Investments between Egypt and Spain.[44] In 2018, the ICSID tribunal found Egypt liable and awarded the investor approximately US$2 billion in compensation for breaches of the bilateral investment treaty.[45]

Egypt's experience shows how government measures adopted in pursuit of legitimate public policy objectives, such as safeguarding domestic energy security and ensuring access to electricity, may nevertheless expose states to significant financial liability under international investment agreements. For emerging hydrocarbon producers such as Namibia, the case demonstrates how future policy decisions affecting petroleum production, export obligations, environmental regulation or the broader energy transition could similarly give rise to investor–state arbitration where foreign investments are protected by investment treaties.[46]

### Tanzania

Tanzania provides another important example of how legislative reforms in the extractive sector may expose states to investor–state arbitration. In recent years, Tanzania introduced a series of reforms to

strengthen state control over its natural resources, increase domestic participation in the mining sector and ensure that mineral wealth generated greater economic benefits for the country. These reforms included amendments to mining legislation and changes to the licensing regime aimed at enhancing national oversight of extractive industries.[47]

These reforms gave rise to investor–state arbitration in *Indiana Resources Ltd and Others v United Republic of Tanzania*. The dispute arose after the Tanzanian government revoked the investor's retention licence as part of broader reforms to the country's mining regulatory framework. The investor alleged that the cancellation of the licence breached the protections contained in the Agreement between the Government of the United Kingdom and the Government of Tanzania for the Promotion and Protection of Investments and commenced arbitration before ICSID.[48] In 2021, the tribunal found Tanzania liable for unlawfully expropriating the investment and awarded compensation to the investor.[49]

Tanzania's experience then becomes an example of how reforms intended to promote sovereign control over natural resources and advance domestic development objectives may nevertheless expose states to investor–state arbitration where foreign investments are protected under bilateral investment treaties. For emerging petroleum producers such as Namibia, the case demonstrates that future reforms relating to petroleum licensing, local content requirements, fiscal arrangements or broader resource governance could similarly become the subject of ISDS claims where they substantially affect foreign investor rights.[50]

## 2.2 ISDS: declining in prominence?

The Energy Charter Treaty (ECT), signed in 1994, is one of the most widely used investment treaties in the energy sector and has been the basis for numerous ISDS claims involving fossil fuel investments. The ECT allows energy investors to bring arbitration claims against states for measures affecting their investments, including policies aimed at phasing out fossil fuels.[51] Over the past decade, several European countries have reconsidered their participation in the treaty due to concerns that it could hinder climate policy.

Several countries, including Germany, France, the Netherlands, Spain and Italy, have announced plans to withdraw from the treaty.[52] Their decisions reflect growing concern that existing investment protection regimes may conflict with climate transition objectives. Although the European context differs from that of African emerging producers, these withdrawals show a broader trend that governments are increasingly questioning whether older investment treaties remain compatible with contemporary climate policy goals.

The ECT was designed to provide a framework for energy co-operation and promote energy security through open and competitive energy markets, and members can bring claims against another for any violations. The withdrawal began with Russia in 2009, and later Italy, Spain, the Netherlands and Slovenia also announced their withdrawal. Some of the treaty standards of investment protection produce high risk levels for international dispute. The overall increase in investor claims in renewable energy reform has driven this.

However, with sunset clauses in place that protect investments almost 20 years after withdrawal, fossil fuel investments remain protected by the ECT's provisions.[53] This extended protection has been criticised by states and politicians as obstructing the adoption of meaningful environmental policies and legislations. For instance, in 2017, Rockhopper, a UK-based oil and gas company, brought an arbitration claim against Italy after the Italian government introduced a ban on offshore oil production in late 2015 – this was one of about seven arbitration claims initiated against Italy since its withdrawal.[54] The EU's unanimous decision

in April 2024 to withdraw from the 1994 EU ECT is the most recent and possibly most obvious indication that ISDS is losing its appeal for the biggest capital-exporting jurisdictions.[55] This is despite the attempts to reform the system by UNCTAD, mainly due to its contradiction with government measures to climate change – signalling the recognition of how ISDS impacts state sovereignty to regulate in the public interest.

These concerns have prompted growing reform efforts across Africa. South Africa, for example, terminated several of its older bilateral investment treaty dispute resolution clauses and catered for them in its domestic laws, the Protection of Investment Act, emphasising domestic remedies and the state's right to regulate its own affairs.[56] At a continental level, the Pan-African Investment Code and the Investment Protocol to the African Continental Free Trade Area reflect a broader movement towards recalibrating investment governance by preserving regulatory autonomy while continuing to facilitate responsible investment. These developments mirror wider international discussions taking place through UNCITRAL Working Group III concerning reform of the ISDS system.[57]

The Pan-African Investment Code (PAIC) is to develop a more balanced model that could respond to the legitimacy crisis of ISDS while still addressing investor confidence. Although it is non-binding, it is significant because it was one of the first comprehensive attempts to articulate an African approach to international investment law.[58] Its objective was not simply to protect foreign investors, but to promote, facilitate and protect investments that foster sustainable development in African member states. The PAIC preceded the African Continental Free Trade Area (AfCFTA) Investment Protocol and provided an important normative reference point for later debates on how investment protection, sustainable development, state sovereignty and dispute settlement should be balanced in a continental African investment regime. However, the PAIC also reveals the limits of consensus on the continent as the dispute settlement provision was one of the most contested aspects of the Code, reflecting divergent African positions on whether ISDS should be retained, restricted or rejected. For Namibia and other African countries considering new fossil fuel development, this experience highlights the importance of evaluating how investment treaties interact with long-term energy policy.

Beyond individual treaty withdrawals, a broader movement to reform ISDS is emerging across the Global South. Several countries in Latin America, Asia and Africa have begun reconsidering their investment treaty commitments in light of concerns about regulatory autonomy and fiscal risk. One of the most prominent reform initiatives is taking place within UNCITRAL, where states are negotiating potential reforms to the ISDS system through the UNCITRAL Working Group III process.[59] These discussions focus on issues such as improving transparency in arbitration proceedings, addressing conflicts of interest among arbitrators, establishing appellate mechanisms, and exploring alternatives to traditional investor–state arbitration.

While the outcomes of these negotiations remain uncertain, the reform process reflects widespread dissatisfaction with aspects of the current ISDS system. Several countries have also pursued unilateral reforms. For example, Brazil has adopted a different approach by negotiating Cooperation and Facilitation Investment Agreements (CFIAs) that focus on dispute prevention and institutional dialogue rather than investor–state arbitration.[60] These initiatives demonstrate that investment governance frameworks are evolving and that countries have multiple options for managing investor–state dispute risks.

## 2.3 The structure of Namibia's investment treaty network

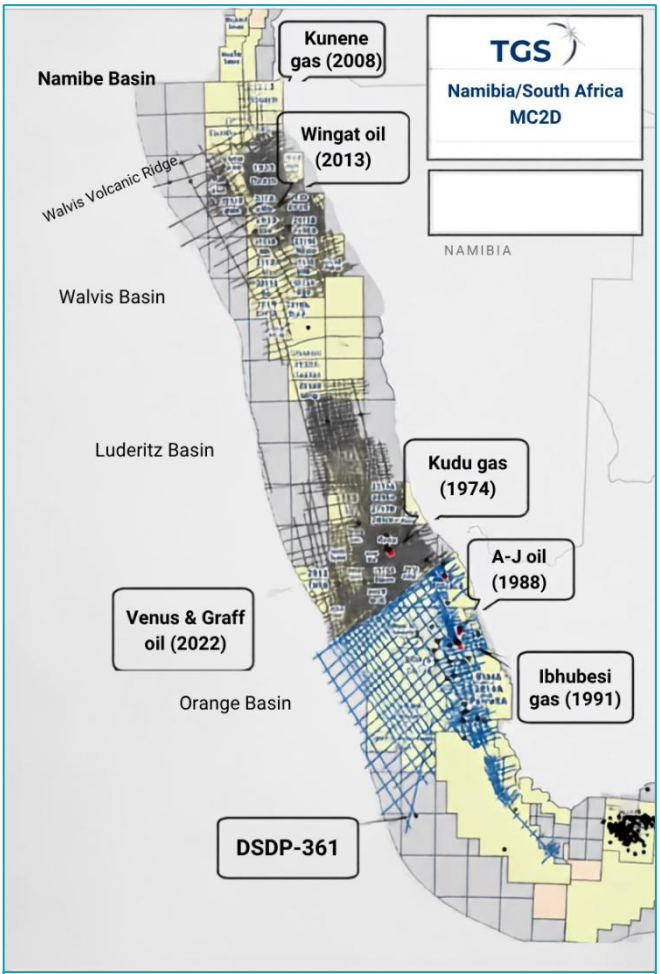
Namibia's current exposure to ISDS risks is rooted in the structure of its investment treaty network, which was largely established in the years following independence in 1990.[61] During this period, many newly independent and developing states entered into BITs as part of broader economic liberalisation strategies aimed at attracting foreign capital and signalling regulatory stability to international investors.[62] Namibia followed this global trend and concluded several investment treaties during the 1990s and early 2000s with major capital-exporting countries.[63]

These treaties were negotiated at a time when the dominant paradigm in international economic law prioritised strong investor protection mechanisms, including direct access to international arbitration. As a result, many of Namibia's BITs contain relatively broad protections for foreign investors and provide access to arbitration through ISDS mechanisms administered under institutions such as ICSID or arbitration rules developed by UNCITRAL.[64]

According to the UNCTAD Investment Policy Hub, Namibia has concluded bilateral investment treaties with several states including Germany, the Netherlands, the United Kingdom, Switzerland, Spain, Austria, Finland, Malaysia and France, among others.[65] Many of these countries host multinational corporations with significant involvement in the global oil and gas sector or financial institutions capable of structuring investment vehicles for energy investments abroad. The presence of these treaties means that Namibia's oil sector, if developed at scale, would operate within a legal framework that grants foreign investors the ability to challenge certain government actions before international arbitration tribunals.

# 3. How the oil and gas rush could expose Namibia to ISDS

Namibia's extractive economy is entering a period of significant transition. Recent offshore oil discoveries, alongside growing international demand for uranium, lithium, copper, graphite, rare earth elements and other strategic minerals, have increased the country's economic and geopolitical importance.[66] In the oil and gas sector, Venus is currently Namibia's most advanced offshore development, with a final investment decision anticipated in 2026 and production expected to begin in 2029.[67] The project is planned around a floating production, storage and offloading vessel capable of producing approximately 150,000 barrels of oil per day. Galp is meanwhile advancing appraisal work at its Mopane discovery, which has been estimated to contain as much as 10 billion barrels of oil equivalent. Shell is continuing evaluation of the Graff and Jonker discoveries, although development has been complicated by technical challenges. Investor interest in Namibia's offshore petroleum sector has also continued to grow, illustrated by BP's entry into the market in April 2026 through the acquisition of a 60 per cent operating interest in offshore blocks in the Walvis Basin. Major investors include multinational companies like TotalEnergies, Galp, Shell, QatarEnergy, Chevron, Azule Energy and ExxonMobil.[68] There is potential to generate investment and public revenue to create a structured economy. These investments, while with complicated supply chains, are headquartered in countries including the United States, United Kingdom, France, the Netherlands and Qatar.[69]




Location map showing the southern South Atlantic basins in offshore Namibia and South Africa

Source: TGS Technical Library

Government policy increasingly emphasises a shift away from a model centred predominantly on extraction and the export of unprocessed commodities towards greater beneficiation, domestic processing, industrialisation, employment creation and local participation in mineral and energy value chains.[70]

Key petroleum legislation dates from the early 1990s and the government is now considering reforms in areas including mineral beneficiation through its upcoming National Upstream Local Content Policy which targets 15 per cent local participation by 2030, while institutions such as Petrofund and the Namibia Investment Promotion and Development Board are facilitating skills development and supplier integration, environmental regulation, water governance and wider domestic value capture.[71]

Regulatory reform is well underway, including an overhaul of any outdated legislation. For example, in the oil and gas sector, the Petroleum Exploration and Production Amendment Bill of 2025 – one of the most significant overhauls of the country's upstream oil and gas governance since the original Petroleum Act was enacted in 1991 – transfers certain powers from the Minister of Industries, Mines and Energy to the President, and provides the Director-General under the President with an Upstream Petroleum Unit in the Office of the President. The main aim of the bill is to shift licensing decisions to the Petroleum Unit.[72]

The bill, tabled by the South West Africa People's Organisation (SWAPO) party has been met with controversy due to the centralisation of decisions within the presidency. Petroleum licensing and contracting involve high-value assets, significant discretion and long-term fiscal consequences. Where decision-making authority is concentrated without strong transparency and anti-corruption safeguards, there is greater scope for discretionary or inconsistent decisions, conflicts of interest and regulatory capture.

Furthermore, the unit was established before the legislation governing the new institutional arrangement has been enacted by Parliament.[73] This creates questions about legal mandate and accountability. Although this does not necessarily render the unit unlawful, establishing the institutional arrangement before the legislative process is complete may constrain Parliament's ability to shape its mandate, powers and accountability mechanisms. There was also a lack of consultation with key institutions such as the Law Reform and Development Commission.[74] This is an official statutory institution tasked with reviewing Namibia's legal system.

# 4. Black or green gold: uncertainties in Namibia's energy sector

Namibia's energy sector is developing at a time of significant change in global energy markets. Although oil and gas continue to play an important role, future demand is increasingly shaped by climate commitments, shifting investment patterns and growing scrutiny of fossil fuel projects.[75] Namibia ratified the United Nations Framework Convention on Climate Change (UNFCCC) in 1995 and the Paris Agreement in 2016, thereby committing to the global climate governance architecture.[76] Namibia's updated Nationally Determined Contribution (NDC) sets an ambitious target of reducing emissions by 91 per cent below business-as-usual levels by 2030, subject to international support.[77] In addition, Namibia has adopted a Long-Term Low-Emission Development Strategy aimed at achieving a net-zero and climate-resilient economy by 2050.[78]

Additionally, the National Policy on Climate Change 2011 aims to create a co-ordinated national framework for responding to climate change while ensuring that climate action supports the country's broader development priorities.[79] Its central emphasis is on reducing Namibia's vulnerability and strengthening resilience, particularly because of the country's exposure to drought, variable rainfall, water scarcity and the dependence of large parts of the economy and population on climate-sensitive sectors. A further aim is to mainstream climate change across Namibia's policy, legal, institutional and development-planning frameworks, rather than treating it solely as an environmental issue.[80] The policy calls for greater co-ordination between ministries and different levels of government, stronger institutional and technical capacity, and adequate domestic and international financing for climate adaptation and mitigation. Importantly, it links climate action to environmental sustainability, equitable use of natural resources, stakeholder participation and human-rights-based development.

The Green Industrialisation Blueprint of Namibia released in August 2024 entrenches the government's commitment to reduce greenhouse emissions through green hydrogen and other renewable energy projects to drive economic growth.[81] It does so through strategic international partnerships, particularly with the EU and Germany, which have been important in mobilising finance and attracting significant private investment. This has been done through the SDG Namibia One Fund and the government's equity stake in the Hyphen project.[82] Long-term environmental management plans are also paramount and should state how brine from desalination plants will be disposed of, alongside a holistic assessment of cumulative environmental impacts. Furthermore, transparent and inclusive public consultations will be essential to ensure the sustainability of development and maintain international credibility. Transparency for tenders will also be crucial moving forward.[83]

However, the buy-in for green hydrogen production is declining after its pioneer President Hage Geingob passed away, with some previously 'green hydrogen' policies being renamed 'green industrialisation' policies signalling a shift away from its focus.[84] For example, the Green Hydrogen Council was renamed the Green Industries Council in 2025 to guide Namibia's *broader* green industrialisation agenda.[85] While the publicly cited objective has been to broaden the focus of the green agenda, including a focus on policy co-ordination, institutional alignment and investment priorities to accelerate industrialisation, economic diversification and job creation, the experts interviewed[86] view it as a reprioritisation of green hydrogen.

Additionally, by late 2024, Namibia's green hydrogen ambitions appeared to be facing both political reprioritisation and implementation delays. SWAPO's September 2024 election manifesto retained green hydrogen as an important component of the country's development strategy but placed greater emphasis on long-standing hydropower plans and development of the offshore Kudu gas resource.[87] At the same time, implementation of the green hydrogen pipeline remained limited, with only three of 14 approved projects having completed pilot-phase construction, while the flagship Hyphen Hydrogen project was reportedly running almost a year behind schedule. Most other projects remained at feasibility, environmental assessment or licensing stages, and the sector had generated only around 400 mostly temporary jobs, compared with earlier projections of 180,000–250,000 jobs within five years.

As such, the legal framework is not coherent with public statements and even intentions of the Namibian government, signalling a lack of preparedness for investments in key sectors, as has been the case in the green hydrogen sector.[88] The Namibia Green Hydrogen Programme, which has received significant international attention and investment interest, seeks to leverage the country's solar and wind resources to produce green hydrogen and green ammonia for export.[89] These initiatives indicate that Namibia's long-term development strategy increasingly emphasises renewable energy systems and low carbon industrial growth. The Synthetic Fuels Act, a cornerstone of Namibia's strategy to unlock its green hydrogen potential by providing a robust and comprehensive regulatory framework, is also yet to be passed. The act aims to align green hydrogen and its production with international standards. Its overarching goal is to create an enabling environment, mitigate operational uncertainty for developers and establish stringent quality benchmarks to facilitate exports.[90]

There is also a major regulatory gap where flagship projects like Hyphen[91] are governed by a Memorandum of Understanding (MoU).[92] These MoUs currently governing the sector are not legally binding, thus posing a challenge to regulate the implementation, control, evaluation and monitoring of green hydrogen production. Namibia has concluded co-operation arrangements with Germany, the Netherlands and the EU, reflecting a broader strategy of positioning the country as a future supplier to European markets.[93] Co-operation with Germany includes support for green hydrogen production, processing, storage, transport and private-sector project development, while co-operation with the Netherlands has focused particularly on developing Namibian ports as green hydrogen export hubs, and linking production in Namibia to the Port of Rotterdam and north-west European markets.[94]

At the regional level, the 2022 EU–Namibia MoU on sustainable raw material value chains and renewable hydrogen established a wider strategic partnership covering investment mobilisation, infrastructure, skills, research, regulatory co-operation and local value addition. A roadmap for implementing this partnership was subsequently presented in October 2023, and the partnership has increasingly been operationalised through the EU's Global Gateway framework, including support from the EU and the Netherlands for green hydrogen and green industrialisation initiatives in Namibia.[95]

These arrangements are significant because, although they are distinct from Namibia's older bilateral investment treaties, they facilitate a new generation of foreign-backed investments in hydrogen, renewable energy and associated infrastructure. At the same time, many of these arrangements remain insufficiently transparent, with limited public information on their detailed terms, investor protections, dispute-settlement provisions and the allocation of risk between Namibia and its foreign partners. This creates uncertainty as to whether some agreements may contain clauses providing for investor–state arbitration or other forms of international dispute settlement.

Namibia's uncertain policy context also coincides with complex institutional architecture for governing the sector. The Namibia Green Hydrogen Programme was being incorporated into the Ministry of Mines and Energy while also reporting through an inter-ministerial implementation committee, alongside oversight from the Green Hydrogen Council and continued involvement by the Namibia Investment Promotion and Development Board under the Office of the President.[96] The Board is, however, a not-for-gain company registered under section 21 of the Companies Act 28 of 2004 rather than a statutory body, and the 2025 draft Investment Promotion Bill would dissolve it and transfer its assets, staff and obligations to a new statutory agency.[97] This proliferation of institutions occurred while many projects remained stalled in pre-construction phases and faced unresolved constraints around licensing, water, infrastructure and equipment. The contrast between expanding administrative structures and limited physical implementation suggests that Namibia's green hydrogen pathway has become more uncertain and fragmented, reinforcing the importance of preserving sufficient policy space to adjust energy and industrial priorities as economic, environmental and developmental conditions evolve – alongside its oil and gas ambitions, this becomes even more important.

# 5. Namibia's bilateral investment treaties and exposure to ISDS

The first exposure that Namibia has to ISDS is through its international investment-agreement network. UNCTAD records 15 bilateral investment treaties, with eight older BITs in force, including agreements with Austria, Finland, France, Germany, Malaysia, the Netherlands, Spain and Switzerland.[98] These older treaties commonly contain broad standards such as fair and equitable treatment and protection against expropriation without the more detailed right-to-regulate language found in many newer treaty models.[99]

However, Namibia signed the International Centre for Settlement of Investment Disputes (ICSID) Convention on 26 October 1998 but has never ratified it, meaning that Namibia is not an ICSID Contracting State and investors cannot currently bring claims against it through ICSID Convention arbitration.[100] Non-ratification matters because Contracting State status would significantly strengthen the enforceability of awards against Namibia.[101] ICSID is a specialised arbitration institution established under the ICSID Convention of 1965, which is administered by the World Bank Group. One of the most important features of the ICSID system is its self-contained enforcement mechanism. Article 54 of the ICSID Convention requires Contracting States to recognise and enforce arbitration awards as if they were final judgments of their own domestic courts.[102]

This has different consequences across Namibia's BITs because their dispute-settlement clauses are not uniform. Older agreements that rely principally on arbitration under the ICSID Convention, such as those with France, Switzerland and Malaysia, do not presently provide investors with a readily available ICSID Convention route unless Namibia subsequently ratifies the Convention or another basis for arbitration exists. However, non-ratification does not eliminate Namibia's exposure to ISDS altogether: several of its BITs expressly provide alternative arbitral mechanisms that operate independently of full ICSID Convention membership.

# Namibia's bilateral investment treaties currently in force

*ISDS, environmental safeguards, termination and policy-space implications*

| BIT | FET/expropriation | ISDS | Environmental/ right-to-regulate safeguards | Termination/ sunset | Policy-space implication |
|---|---|---|---|---|---|
| Germany–Namibia (1994) | Unqualified FET; FPS; direct/indirect expropriation; umbrella clause; no regulatory carve-out. | ICSID after 6 months; UNCTAD maps consent case by case. | None: no environment, sustainable-development, public-health or express right-to-regulate exception. | 10-year initial term; 12 months' notice; 20-year sunset. | High concern: broad standards + no safeguards; 20-year survival prolongs exposure. |
| Namibia–Switzerland (1994) | Unqualified FET; FPS; direct/indirect expropriation; umbrella clause. | Consultations; ICSID after 12 months. | No general safeguard. Protocol permits preferential Namibian rights over future natural-resource exploitation, while protecting accrued Swiss rights. | 10-year initial term; 2-year renewals; 6 months' notice; 10-year sunset. | Some space over future resource rights, but limited once investor rights accrue. |
| Malaysia–Namibia (1994) | Unqualified FET; FPS; expropriation/ equivalent-effect measures; certain state–investor obligations protected. | Express ICSID consent after 3-month consultations. | No express environment/ climate/right-to-regulate exception; investment must comply with domestic law/policy. | 10-year initial term; 1-year notice; 10-year sunset. | Broad protection; expressly covers concessions to search for, extract or exploit natural resources. |
| France–Namibia (1998) | FET linked to international law; FPS; direct/indirect dispossession; special undertakings protected. | ICSID after 6 months if unresolved. | No modern safeguard. Protocol recognises Namibia's constitutional public-interest duty. | 10-year initial term; 1-year notice; 20-year sunset. | Covers natural-resource concessions and maritime-zone/continental-shelf investments; relevant to offshore petroleum. |

| | | | | | |
|---|---|---|---|---|---|
| Finland–Namibia (2002) | Unqualified FET; FPS; umbrella clause; direct/indirect expropriation; no general carve-out. | Courts, ICSID/Additional Facility or UNCITRAL; irrevocable consent. | Strongest safeguard: health/safety/environment language and life/health exception; exception does not apply to expropriation article. | 20-year initial term; 12 months' notice; 15-year sunset. | Better policy-space protection, but environmental measures may still face expropriation claims. |
| Namibia–Netherlands (2002) | Unqualified FET; FPS; unreasonable/discriminatory-measures protection; umbrella clause; indirect expropriation. | ICSID; Additional Facility where Convention requirements unmet. | Environment/social considerations only in preamble; no operative exception or express right to regulate. | 15-year initial term; 10-year renewals; 6 months' notice; 15-year sunset. | Broad protections may affect licences, permits, environmental conditions and energy regulation. |
| Namibia–Spain (2003) | FET qualified by international law; FPS; umbrella clause; indirect expropriation; no regulatory carve-out. | After 6 months: Namibian courts, UNCITRAL, ICSID or Additional Facility. | None: no environment, sustainable-development, public-health or right-to-regulate exception. | 10-year initial term; 10-year renewals; 6 months' notice; 10-year sunset. | Qualified FET offers some constraint, but broad ISDS remains without environmental safeguards. |
| Austria–Namibia (2003) | Unqualified FET; FPS; unreasonable/discriminatory-measures protection; umbrella clause; direct/indirect expropriation. | Unconditional consent; ICSID where available, UNCITRAL or ICC; no exhaustion requirement. | No express environment/right-to-regulate provision; preamble references labour standards only. | 10-year initial term; 12 months' notice; 10-year sunset. | Clear exposure: multiple arbitral routes, no exhaustion requirement and no environmental/general exception. |

*Source: UNCTAD Investment Policy Hub; treaty texts via UNCTAD and World Trade Institute databases. Years are years of signature; the chronology accepted by the High Court in* Kessl v Ministry of Lands and Resettlement*, for example, records that Namibia ratified the Germany–Namibia BIT in 1997.*[103]
*FET = fair and equitable treatment; FPS = full protection and security.*

Several of its BITs provide arbitral routes that do not depend on Namibia being an ICSID Contracting State. Most notably, the Austria–Namibia BIT permits investors to pursue UNCITRAL or International Chamber of Commerce (ICC) arbitration; the Spain–Namibia BIT provides for both UNCITRAL arbitration and the ICSID Additional Facility; the Netherlands–Namibia BIT expressly provides for use of the ICSID Additional Facility

where one of the contracting parties is not an ICSID Contracting State; the Finland–Namibia BIT provides an independent route to UNCITRAL arbitration.[104] Namibia therefore remains exposed to treaty-based ISDS under these agreements notwithstanding its non-ratification of the ICSID Convention. By contrast, its older BITs with France, Switzerland and Malaysia rely principally on ICSID Convention arbitration and therefore do not presently provide the same readily accessible treaty-based route, while the Germany–Namibia BIT would require the disputing parties to agree on an alternative mechanism if ICSID Convention arbitration is unavailable.[105]

# 6. Namibia: current treaty-based ISDS exposure

Although Namibia does not have BITs in force with several home states of major petroleum investors, including the United States, United Kingdom, Qatar, Portugal and Norway, two of the most significant operators in the Orange Basin hold their Namibian investments through companies incorporated in the Netherlands. TotalEnergies EP Namibia B.V., which operates the Venus discovery and holds interests across PEL 56, PEL 91 and PEL 83, is incorporated and headquartered in the Netherlands, while Shell Namibia Upstream B.V., the operator and licence holder in PEL 39, is similarly incorporated under Dutch law.

These corporate structures potentially bring the investments within the scope of the Namibia–Netherlands BIT (2002), which expressly protects rights to prospect, explore and extract natural resources and provides for investor–state arbitration under the ICSID Additional Facility where one contracting party is not an ICSID Convention State. Consequently, regulatory measures affecting some of Namibia's largest petroleum investments could potentially generate treaty-based claims notwithstanding Namibia's non-ratification of the ICSID Convention.

## Effect of Namibia signing but not ratifying the ICSID Convention

| BIT | ISDS possible now? | Available route(s) | Effect of Namibia's non-ratification of ICSID | Practical exposure |
|---|---|---|---|---|
| Austria–Namibia (2003) | YES – CLEAR | UNCITRAL; ICC | ICSID Convention route unavailable, but treaty expressly provides non-ICSID alternatives. | HIGH – investor can initiate treaty arbitration without Namibia ratifying ICSID. |
| Finland–Namibia (2002) | YES – CLEAR | UNCITRAL; possible Additional Facility issue | ICSID Convention unavailable. UNCITRAL remains independently available; Additional | HIGH – UNCITRAL provides a direct treaty route. |

| | | | | |
|---|---|---|---|---|
| | | | Facility wording is less straightforward. | |
| Spain–Namibia (2003) | YES – CLEAR | UNCITRAL; ICSID Additional Facility | Treaty expressly anticipates a party not being an ICSID Contracting State and provides an alternative route. | HIGH – strong, immediately usable treaty-based ISDS route. |
| Netherlands–Namibia (2002) | YES – CLEAR | ICSID Additional Facility | Treaty specifically provides Additional Facility arbitration where one party is not an ICSID Contracting State. | HIGH – non-ratification does not neutralise the ISDS clause. |
| Germany–Namibia (1994) | CONDITIONAL | Alternative forum only if parties agree | Default ICSID Convention route is unavailable. Treaty wording allows another mechanism if investor and Namibia agree. | MEDIUM/LOW – arbitration possible, but alternative forum likely needs additional consent. |
| France–Namibia (1998) | NOT VIA STATED BIT FORUM | ICSID Convention only in BIT | ICSID Convention arbitration cannot presently proceed against Namibia under the treaty alone. | LOWER treaty exposure now; separate investment contract may still provide arbitration. |
| Switzerland–Namibia (1994) | NOT VIA STATED BIT FORUM | ICSID Convention only in BIT | No clear alternative treaty forum; Convention arbitration currently unavailable. | LOWER treaty exposure now; contractual arbitration remains possible. |
| Malaysia–Namibia (1994) | NOT VIA STATED BIT FORUM | ICSID Convention only in BIT | BIT consent is tied to ICSID Convention proceedings; no express UNCITRAL/ICC/ Additional Facility alternative. | LOWER treaty exposure now; separate contract could create an arbitration route. |

***Source:*** *Assessment based on the dispute-settlement provisions of Namibia's eight BITs currently recorded by UNCTAD as in force, read together with Namibia's current status as a signatory but not a Contracting State to the ICSID Convention. 'ISDS possible now?' refers to treaty-based arbitration and does not determine jurisdiction in any specific dispute.*

The ability of multinational corporations, like Shell and TotalEnergies, to structure investments through subsidiaries has given rise to the practice commonly known as 'treaty shopping'. Treaty shopping refers to the strategic use of corporate structuring to gain access to favourable investment treaty protections.[106] Under this practice, a multinational corporation may establish a subsidiary in a country that has a particularly advantageous BIT with the host state and route its investment through that entity. If a dispute arises, the subsidiary, rather than the parent company, can initiate arbitration under the treaty. For example, in the Pacific Rim vs El Salvador case, the company filed a case under the Dominican Republic–Central America Free Trade Agreement (CAFTA-DR or DR-CAFTA).[107] Such an investor could then claim the protection of either an investment treaty between the home state and the host state or an investment treaty between the third state and the host state.

This strategy has been recognised and documented in numerous ISDS cases. For example, UNCTAD has observed that investors frequently restructure their corporate ownership prior to initiating arbitration in order to gain access to treaty protections.[108] Such restructuring is generally permitted under international investment law provided that it occurs before a dispute becomes foreseeable. Even if the parent companies operating in Namibia's oil sector are headquartered in jurisdictions without favourable treaties, they may still gain access to ISDS protections through subsidiaries incorporated in treaty partner states, as in the case with the Netherlands BIT. Namibian law nonetheless gives the state a screening point over such restructuring. If brought into force, section 11 of the Namibia Investment Promotion Act 9 of 2016 would require ministerial approval before control of a natural-resource investment passes to a foreign investor. The 2025 draft Investment Promotion Bill goes further: it would require prior written approval for any change of control of an investment in a designated sector, including through an enterprise 'inside or outside Namibia which has an effect in Namibia' and through the indirect acquisition of a licence, and its draft regulations designate 'mining, oil and gas' as a strategic sector.[109] Used deliberately, that screen could deter restructuring undertaken mainly to obtain treaty protection.

# 7. Namibia's investment governance uncertainty: to regulate or not to regulate?

A second route of exposure exists under Namibia's Foreign Investments Act 27 of 1990 (FIA).[110] FIA was one of the earliest pieces of economic legislation adopted by independent Namibia against the economic circumstances of the new state. Signed on 19 December 1990, it came into force only on 7 July 1992.[111] Following independence in 1990, the government subsequently introduced legislation intended to attract FDI and reassure foreign investors about the security of investments in the newly independent country. Klazen places the FIA alongside later measures such as the Export Processing Zones Act as part of Namibia's early post-independence strategy to 'lure' investment and describes the FIA and its 1993 amendment as the cornerstone of the country's foreign-investment regime.[112]

The legislation took a liberal and investor-friendly approach, imposing no general requirement for localisation or domestic equity participation (section 3(3)), rather than investment being conditional upon

local ownership, as in the case of South Africa's Black Economic Empowerment legislation. Ultimately, South Africa's first ISDS case would be based precisely on this contention, where an Italian granite company instituted an ICSID arbitration under the Italy–South Africa BIT (1997) and the BLEU (Belgium–Luxembourg Economic Union) – South Africa BIT (1998). After agreeing to settle the case, South Africa recalibrated its investment policy and adopted the Protection of Investment Act 22 of 2015 which came into effect in 2018, notably setting aside the investor–state arbitration provision.[113] The FIA's openness was nonetheless qualified. A licence or agreement granting rights over natural resources may entitle the government to acquire an interest in the enterprise (proviso to section 3(3)); the Minister may, by notice in the Government Gazette, close to foreign nationals any business that Namibians can adequately provide (section 3(4)); and, since 1993, natural-resource laws and licences may grant Namibians more favourable terms (section 3(5)). The proviso and section 3(5) matter for petroleum, where they permit state participation and preferential terms for Namibians. In deciding whether to grant a Certificate of Status Investment, the Minister must also weigh the investment's contribution to the advancement of persons disadvantaged by past discriminatory laws and to equal opportunities for women (section 6(3)(c)–(d)).[114]

The FIA's reputation as 'liberal' and investor-friendly derives not only from market entry but also from the bundle of statutory protections it made available, particularly through the Certificate of Status Investment (CSI) regime in sections 4–15.[115] Two layers of protection should be distinguished. Every foreign national, with or without a certificate, may invest in any business activity open to Namibians, stands in no different position from a Namibian under the laws governing business activity and taxation and faces no general local-participation requirement (section 3(1)–(3)). Only certificate holders, however, enjoy the benefits in sections 8–13: access to foreign currency for loan service and royalties (section 8); the transfer of profits, dividends and sale proceeds (section 9); the retention of export proceeds (section 10); protection against expropriation except in accordance with Article 16(2) of the Constitution, with just compensation paid 'without undue delay and in freely convertible currency' (section 11); and international arbitration (section 13). Sections 14 and 15 govern the amendment, transfer and cancellation of certificates.[116] Only a 'foreign national' – a term that includes a Namibian company whose shares are mostly foreign-owned (section 1) – may apply for a certificate. The grant is discretionary: the Minister 'may' issue a certificate if satisfied that the investment 'will promote the interests of Namibia', having regard to the factors listed in section 6(3) (sections 4 and 7(1)). The investment must also be 'eligible': foreign assets at or above the minimum the Minister fixes by notice in the Government Gazette, or a reinvestment of profits of any amount (section 5(1)); a share or joint-venture acquisition qualifies only if the investor holds at least ten per cent or is actively involved in management (section 5(2)–(3)).[117]

Arbitration under the FIA is also significant, but considerably narrower than a typical first-generation BIT ISDS clause. When applying for a CSI, the foreign investor may elect to have the certificate provide for international arbitration of disputes on two matters only: any compensation payable on expropriation under section 11 and 'the validity or continued validity of the Certificate'. Once the applicant so elects, the certificate 'shall' contain the arbitration clause.[118] Section 13(2) provides for arbitration under the UNCITRAL Arbitration Rules in force when the certificate is issued, unless the Minister and the investor agree on another method of settling disputes and the certificate so provides. Furthermore, and notably, section 13(3) states that where that arbitration provision appears in the certificate, the certificate itself constitutes the *consent* of both the government and the investor to arbitration, and the award is final and binding. The implications of the section are important as they provide the investor with power to institute

arbitration without any further, dispute-specific consent from the government, because the certificate itself records the government's advance consent. The government controls that consent only at the outset, through its discretion to grant a certificate (sections 4 and 7(1)). South Africa's recalibrated Protection of Investment Act ensured that in the case of arbitration, and after the exhaustion of local remedies and courts by the investor, consent of the government is required and only in the context of state–state arbitration, removing the right of investors to international arbitration entirely.[119] In the case of Namibia, the Act retains access to Namibian courts where the arbitration option is not incorporated and parties can also agree to send a particular dispute to the courts.[120] FIA therefore creates a statutory route to investor–state arbitration, but only where the investor holds a CSI, elected arbitration when the certificate was issued and raises a dispute within the two categories specified in section 13(1). Cancelling a certificate does not close the route: cancellation 'shall not affect' the holder's right to refer the cancellation dispute to international arbitration (section 15(2)). Nor has the route lapsed: the FIA remains in force because the Namibia Investment Promotion Act 9 of 2016, which would repeal it, awaits a commencement notice that has never been issued.[121]

The FIA does not contain a provision incorporating Namibia's BITs or making BIT protection a prerequisite for the statutory protections described above. Instead, the FIA and BITs operate as separate legal layers. An investor could therefore potentially possess rights under the FIA, particularly through a CSI, and separately possess treaty rights under an applicable Namibian BIT.[122] This means that changing domestic legislation alone will not itself extinguish Namibia's international treaty obligations or an arbitration offer contained in an existing BIT. The layers do, however, meet in domestic law. In *Kessl v Ministry of Lands and Resettlement*, the High Court held that, before deciding to acquire farms owned by German nationals, the Minister had to consider 'the effect of the Treaty' – the Germany–Namibia BIT – on the owners. The court did not adjudicate a treaty claim: counsel relied on the treaty 'only in the sense that it is something which the Minister should have considered'.[123]

Nonetheless, Namibia did attempt to replace the FIA by enacting the Namibia Investment Promotion Act 9 of 2016 (NIPA).[124] NIPA reflected a movement away from 'open investor friendly climate' towards a more interventionist approach.[125] This however did not occur in a vacuum and coincided with the growing concern about first-generation investment treaties and ISDS.[126] UNCTAD's *World Investment Report 2015* placed preservation of states' right to regulate, reform of ISDS and clarification of standards such as FET and indirect expropriation at the centre of investment-treaty reform.[127] By the end of 2016, UNCTAD recorded 767 known treaty-based ISDS cases, including 62 newly initiated cases in 2016, and reported that around two-thirds of those new cases were based on BITs, predominantly treaties concluded during the 1980s and 1990s.[128]

Regionally, South Africa had adopted the Protection of Investment Act 22 of 2015, reducing reliance on investor–state arbitration; the Southern African Development Community (SADC) approved amendments to Annex 1 of its Finance and Investment Protocol in August 2016 as part of an effort to rebalance investor protection with development and regulatory policy space; and the 2016 Draft Pan-African Investment Code similarly reflected an African effort to rethink conventional investment protection and ISDS.[129]

NIPA represented the domestic expression of this much more interventionist and developmental approach. Whereas the FIA began from the premise that a foreign investor could generally establish the same business as a Namibian and could not normally be compelled to take a Namibian partner, NIPA section 12 provides that a foreign investor may not invest in Namibia or acquire a licence, permit,

authorisation or concession through any form of merger, acquisition, direct or indirect sale or transfer without the approval of the Minister.[130] Section 11 adds that no change of control of a natural-resource investment, and no transfer of a licence or concession, in favour of a foreign investor may occur without the Minister's approval – a rule that bears directly on petroleum licences. Approval also turns on whether 'a substantial number' of listed requirements are met, the first being 'the joint venture with Namibians'.[131] Section 14 requires proposed foreign investment to be evaluated by reference to its net benefit to Namibia, including national-development, public-policy and national-security objectives, employment, advancement of persons disadvantaged by past discrimination, reduction of social and gender inequalities, geographical development, transfer of technology and managerial skills, value addition, procurement from small and medium enterprises and other Namibian suppliers and environmental effects.[132]

Several scholars characterised this as a shift from the free and liberal regime of the FIA to one that increased red tape, administrative delays and uncertainty arising from the requirement for ministerial approval.[133] NIPA nevertheless did not simply remove investor protection. Rather, it recalibrated those protections and removed the statutory route to international arbitration altogether. Section 19(5) continues to provide national treatment, but only 'subject to this Act', only in 'like circumstances' and only for the 'management, operation and disposition' of investments, not for their admission or establishment. Section 19(6) expressly requires the state to take into account factors such as effects on local communities, environmental impacts, the economic sector, linkages to other sectors, the purpose of the regulatory measure and the regulatory process itself. Additionally, NIPA permits expropriation only if it conforms to Article 16 of the Constitution, NIPA and other applicable law, serves the public interest, follows applicable procedures and carries just compensation (section 21). It measures that compensation not by market value alone but by 'an equitable balance between the public interest and the interest of those affected', weighing factors such as the history of the property's acquisition and the purpose of the expropriation, and it subjects both the expropriation and the valuation to judicial review (sections 22–23). That standard departs from the FIA's promise of 'just compensation … without undue delay and in freely convertible currency' (section 11(2)).[134]

Most importantly for ISDS, section 28(4) provides that disputes 'relating to this Act' are exclusively within the jurisdiction of Namibian courts. Arbitration is possible only where the Minister and the investor agree to it in writing, and such arbitration must take place in Namibia under the Arbitration Act 42 of 1965. This is a much more state-controlled mechanism than FIA section 13, which allows a qualifying CSI investor to secure advance consent to international UNCITRAL arbitration. Before litigating, an investor may notify the Minister of the dispute and ask for mediation, but it may also approach the courts directly.[135]

NIPA also addresses treaties, but not by preserving treaty rights. Section 20(1) provides that '[t]he obligations in this Act may not apply in relation to any concessions, advantages, exemptions or other measures' that may result from bilateral investment or free-trade treaties, from multilateral or regional agreements to which Namibia is a party, or from procurement tied to development assistance. The provision is a carve-out from NIPA's own obligations, chiefly national treatment under section 19(5): it prevents an investor from invoking NIPA to claim treaty advantages that Namibia has granted to others. The 2021 Bill and the 2025 draft confirm this reading by placing the same clause as an express exception to national treatment. Section 28 nonetheless leaves Namibia's BIT offers to arbitrate untouched, for a different reason: a domestic statute cannot alter Namibia's treaty obligations on the international plane, and section 28(4) governs only disputes 'relating to this Act'. Nor does NIPA require the exhaustion of domestic remedies. Exhaustion presupposes a later international forum, whereas section 28(4) makes the

Namibian courts the exclusive forum. NIPA thus replaced the FIA's advance consent to international arbitration with exclusive domestic jurisdiction, while leaving treaty-based exposure where it was.[136]

NIPA would repeal the FIA, but it has never been brought into force: its commencement depends on a notice by the Minister in the Government Gazette, and none has been issued. It therefore remains on the statute book, and both the 2021 Bill and the 2025 draft discussed below propose to repeal it together with the FIA.[137] Its stalling has been attributed to substantive legal concerns raised by the private sector. The first concerns the broad discretionary authority granted to the Minister under section 8 to reserve particular economic sectors or business activities for specified categories of investors.[138] That power is broader than its FIA precursor, which allowed the Minister to close to foreign nationals only businesses that Namibians could adequately provide, but it is also bounded: the Minister must act by regulations whose content the Act prescribes, and investments made before a reservation are protected.[139] Although such powers could be used to promote greater Namibian participation in the economy and advance domestic development objectives, they also create scope for arbitrary or inconsistent decision-making. The second criticism relates to NIPA's investment approval and registration regime. Requiring new foreign investments to obtain ministerial approval could create additional administrative burdens and delays, potentially making Namibia less attractive to prospective investors.[140]

Namibia's investment regime remains incomplete. Its latest proposal, the draft Investment Promotion Bill released for public consultation in late 2025, has also sparked controversy.[141] Similar concerns to NIPA about increasing red tape have been raised. The draft nonetheless narrows NIPA's approval regime. Whereas NIPA requires ministerial approval for every foreign investment, the draft requires approval only in sectors designated as strategic; designation requires a notice in the Government Gazette at least 90 days in advance, public inputs, Cabinet input and published reasons; and the draft regulations deem an application approved if the Minister fails to decide within 90 business days, as extended.[142] The draft empowers the Minister to reserve sectors for Namibians and to require joint ventures, and its draft regulations do both: they reserve for 'Namibians and entities owned by Namibians' retail and agricultural businesses below N$7.5 million, as well as small-scale mining, and require joint ventures of at least 33.3 per cent between Namibian and foreign investors in marine fishing and other sectors.[143] This is one of the most significant shifts in investment policy since independence according to auditing and tax specialist Stefan Hugo.[144] For the petroleum sector, the draft regulations matter even more. They designate 'mining, oil and gas' as a strategic sector, so that investment and changes of control would need ministerial approval judged on their net benefit to Namibia – including the investor's record with communities abroad and, for state-owned foreign investors such as QatarEnergy, their independence from government and the national-security risks they pose. Downstream, the draft regulations reserve for Namibians the road freight of petroleum products and their warehousing and storage.[145] These are the domestic measures most likely to draw treaty claims from operators structured through treaty partners such as the Netherlands. The bill is part of an attempt to modernise the FIA, including since attempts with NIPA faltered; following this the Investment Promotion and Facilitation Bill was introduced in 2021 only to be withdrawn, and subsequent drafts circulated without enactment. The latest iteration in 2025 was also criticised as being too vague to implement and even unconstitutional.[146] Despite this uncertain regulatory context, Namibian FDI continues to grow, amounting to approximately N$2 billion in 2024, as critics argue that when mineral wealth is abundant, investors are willing to confront political risk.[147] Thus, this is an opportune time to leverage Namibia's mineral wealth to ensure that the investment legal regime balances protections for policy space while attracting investment.

The 2025 draft also addresses the two features of the FIA that matter most for this report. First, it would close the statutory route to international arbitration. An investor in dispute with the state 'must, as a matter of first recourse' notify a Grievances Resolution Committee; mediation follows; and the investor may approach the Namibian courts for interim relief or once the dispute remains unresolved 90 days after notification. No statutory route to international arbitration remains, although arbitration under a performance agreement or other legislation survives. Existing Certificates of Status Investment would continue in force but would cease at the earlier of their expiry or six months after the Act's commencement, unless renewed on terms consistent with the new Act; holders would have 36 months to apply for a certificate of approval. The section 13 route would therefore close within six months of commencement, while treaty-based exposure would remain. Second, the draft begins to articulate a right to regulate. It permits measures designed to protect 'legitimate public policy objectives' such as public health, 'climate action' and 'the protection of environment', as well as measures that pursue national development objectives, and it requires investors to observe high standards of responsible business conduct, human rights, labour, anti-corruption and environmental protection. The clause is narrow, however: it covers only measures that prescribe 'special formalities' for foreign investments, and such measures 'may not materially impair the rights granted by other provisions of this Act'. The draft also requires the Minister to publish performance agreements within 45 days, subject to listed redactions.[148] Together with the Access to Information Act 8 of 2022, that duty offers a foundation for the transparency this report recommends.[149]

Two further features deserve scrutiny. Section 65 is internally inconsistent: subsection (1) says that existing certificates 'may not be prejudiced or limited or otherwise negatively affected', while subsection (2) ends them within six months and subsection (3) allows 36 months to apply for a replacement. It is also unclear whether a statutory lapse counts as a 'cancellation' that, under section 15(2) of the FIA, leaves the holder's right to arbitrate intact. In addition, Namibia's three investment texts carry three different measures of compensation for expropriation: the FIA's 'just compensation … without undue delay and in freely convertible currency'; NIPA's 'equitable balance between the public interest and the interest of those affected'; and the draft's fair market value, displaced 'in appropriate circumstances' by that balance and fixed after an independent valuation and Cabinet approval, subject to review by the High Court.[150] Treaty-protected investors may invoke the treaty standard whatever domestic law provides. If the draft is enacted, the result would be a two-tier regime – one measure for investors with a BIT and another for everyone else – that sharpens the incentive to structure investments through the treaty partners discussed in section 6 of this report.

Namibian case law also supports this report's recommendation that domestic institutions become the primary forum for investment disputes. In *Kessl v Ministry of Lands and Resettlement*, the High Court set aside the expropriation of four farms of three German landowners because the Minister had not heard the owners, had not genuinely consulted the Land Reform Advisory Commission and had not complied with the Agricultural (Commercial) Land Reform Act 16 of 1995. The court held that Article 16(2) of the Constitution is not a 'walled-in' provision that excludes the right to be heard, applied the Article 18 standard of fair and reasonable administrative action and required the Minister to consider the effect of the Germany–Namibia BIT on the owners.[151] The case shows that foreign investors can obtain effective protection at home. It also shows that domestic judicial review can unsettle regulators, so a domestic forum does not by itself dissolve the regulatory chill identified in this report.

# 8. Conclusion

For Namibia, the central challenge is to attract and protect the investment needed for its economic and energy ambitions while retaining the flexibility to respond to changing economic, environmental and development priorities. The investment framework governing these projects will be critical to achieving that balance.

Investor–state dispute settlement has become one of the most consequential features of international investment law because it enables foreign investors to bring claims directly against sovereign states before international arbitral tribunals where government measures are alleged to breach investment protections. Although originally justified as a mechanism for protecting investors against arbitrary treatment and political risk, ISDS increasingly reaches into areas of public regulation, including environmental protection, natural-resource governance, energy policy and climate action.

For Namibia, exposure arises through two principal and overlapping legal routes, with a contractual third. The first is its network of older bilateral investment treaties, several of which remain in force and contain broad protections against expropriation, fair and equitable treatment obligations and access to international arbitration, often without modern environmental or right-to-regulate safeguards. The second arises domestically through the Foreign Investments Act 27 of 1990, which remains operative and permits qualifying investors holding a Certificate of Status Investment to secure advance consent to international arbitration under the UNCITRAL Rules, unless another method is agreed, in two specified kinds of dispute. The third lies in investment contracts and performance agreements, whose arbitration clauses both the 2021 Bill and the 2025 draft expressly preserve. These layers mean that Namibia's exposure cannot be addressed solely by reforming domestic legislation. Treaty-based obligations and statutory protections must be considered together.

This exposure is particularly important because Namibia is making long-term investment commitments when its energy trajectory remains uncertain. The country is simultaneously pursuing potentially transformative offshore petroleum development, green hydrogen, renewable energy and green industrialisation while remaining committed to the Paris Agreement and a longer-term ambition of achieving a net-zero and climate-resilient economy by 2050. At the same time, green hydrogen projects have experienced delays, institutional restructuring and political reprioritisation, while the incoming political leadership has placed greater emphasis on oil, gas and other forms of energy development. These domestic uncertainties are compounded by volatile global energy markets, technological change, evolving climate regulation and uncertainty over the long-term demand for fossil fuels.

Petroleum licences, concessions and investment contracts should preserve sufficient regulatory space for the state to amend, shorten, decline to renew or, where justified in the public interest, terminate licences and projects in response to environmental harm, climate obligations, changing economic conditions or shifts in national development priorities. Without such safeguards, the threat of substantial compensation claims could convert legitimate policy adjustment into fiscal liability and contribute to regulatory chill.

The continuing effort to replace the FIA consequently presents Namibia with an important opportunity rather than merely a legislative problem. The failure of the 2016 NIPA to enter into force demonstrates that Namibia has not yet settled the balance between attracting capital and retaining regulatory autonomy. Thus, the upcoming investment law should not simply reproduce an exceptionally liberal

investor-protection model of the 1990 Act nor an excessively discretionary approval regime that creates unnecessary uncertainty. Instead, Namibia can align its legislation with the broader recalibration of investment governance occurring in Southern Africa and across the continent, including South Africa's Protection of Investment Act, the SADC investment framework and the AfCFTA Protocol on Investment. The 2025 draft already moves away from both the 1990 model and NIPA's universal approval requirement: it would close the section 13 route, confine approval to strategic sectors and subject designation to public consultation. Its remaining weaknesses lie elsewhere – in the contractual arbitration route that section 52(6) preserves, the narrow right-to-regulate clause in section 41(4) and the internal tensions of section 65. A modern Namibian investment law should place investors and domestic actors within a predictable legal framework, expressly affirm the state's right to regulate for climate, environmental, human-rights and development objectives, and make domestic institutions the primary forum for resolving disputes. Widening section 41(4) of the 2025 draft into a free-standing right-to-regulate clause, without its 'materially impair' proviso, would be a first step.

Ultimately, the objective is not to weaken investment protection, but to ensure that Namibia can attract responsible long-term investment without limiting its ability to adapt its development strategy as circumstances and priorities change.

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[142] Draft Investment Promotion Bill, 2025, sections 30(2)(d), 31 and 33(1); draft Regulations, regulation 9(1)–(5); *Namibia Investment Promotion Act 9 of 2016*, section 12(1).
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