

**Consolidated Comments on the New
Equitable Economic Empowerment
Framework and the NEEEF Draft Bill**

Submitted by
Namibia Chamber of Commerce and Industry
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1. EXECUTIVE SUMMARY

The object of the National Equitable Economic Empowerment Framework is wholeheartedly supported as we are cognisant of the shameful inequalities in economic development among our people. The efforts of the framework are imperatives which we must collectively as Namibians accept with a full understanding of our cause, the moral rightness of doing so and a full belief in our abilities to do it. Notwithstanding the entire intent of the policy and draft law, the text thereto sometimes goes astray from the spirit of harambee, to support the empowerment of the needy and the disadvantaged Namibian citizens. Needless to say, we feel the framework and draft bill could be tweaked to optimize results by focusing on certain high impact areas and reducing the associated economic costs. The most pragmatic approach to engineer the framework to its optimum would be a structured dialogue forum with the object of jointly developing the framework further, which could run over four months with weekly meetings. Nevertheless, we herewith provide our initial and humble but significant comments. It has been noted that the Bill in its current form is a layman draft. Any opinions to the bill in this form may dilute all the effort currently being given to the substance of the document.

- a) Implementation of the Framework and Bill in its current form requires formal racial classification, promotes racial polarization, blames apartheid white racism, brushes over complex causes of inter-racial inequality; erodes social trust, keeps focus on the past, pushes some citizens in the cold while risking brain drain and capital flight. Moreover, its construct is divisive and a recipe for serial corruption. Racial discrimination is not our cause but rather the upliftment of the poor and empowerment of the disadvantaged while allowing every Namibian to progress further and indeed enjoy their fundamental rights enshrined in the constitution. Every able Namibian, natural or juristic person should be called to duty in the same manner we embrace a progressive tax system. If racial discrimination is still a mischief among us, it should be condemned and dealt with in the severest sense on a case-by-case basis. Moreover, we find certain provisions in the Bill to cross:
- b) The express prohibition in Article 10(2) of the Constitution against discrimination on the grounds of sex, race, color, ethnic origin, religion, creed and social or economic status;
- c) The protection of property in article 16 (1) of the Constitution;
- d) The protection against unfair and unreasonable treatment by administrative bodies expressed in terms of Article 18 of the Constitution may be used to challenge the constitutionality of the Bill in our courts;
- e) The fundamental freedom of association in Article 21 (1) (e) and the freedom to practice any profession, or carry on any occupation, trade or business as per Article 21 (1) (j) of the Constitution;
- f) The constitutional directive under Article 23 prohibiting any practice of racial discrimination.
- g) The provisions of Article 2(2) provide that, parliament should be the one to enact any legislation that constitutes a limitation of fundamental rights, not a Council or Commissioner as prescribed under the NEEEF Bill.
- h) The Provisions of Article 23(2) of the Constitution do not override the more fundamental provisions and principles of Article 23(1) of the Constitution, which condemns any practice of racial discrimination in strong terms. It can only be employed if there is shown to be a rational connection between any policies and programs allowed

under Article 23(2) of the Constitution i.e. the particular discriminatory measure and the readdressing of social, economic or educational imbalances in the Namibian Society, and then only if such social, economic or educational imbalances can be shown to arise from past discriminatory laws. It is our argument that those that were previously disadvantaged before Independence are not necessarily still in the same economic position.

- i) Article 23(2) does not generally authorize the limitation of other fundamental rights or freedoms which, if they are affected by policies and programs allowed under it, can only be limited in compliance with Article 22 of the Constitution, which requires that such limitation must be of general application, may not negate the essential content if such other fundamental law, may not be aimed at a particular individual and must specify the ascertainable extent of such limitation and identify the article in the constitution on which authority to enact such limitation is claimed to rest.

With regards to the character of the entire initiative and with the benefit of hindsight, insight from experiences in the Republic of South Africa with BEE and considering the measure of economic empowerment proposed, we appeal to the Prime Minister to set up a broader consultation process with a timeframe of at least 3 months to get more clarity on certain issues and to find a basis for a solution to the problems NEEEF is targeting – in the spirit of Harambee / pulling together!

The table below summarizes our understanding of the core empowerment pillars and our perceptions of both their costs and benefits. We recommend the exclusion of pillars one and pillar two of the Namibia Equitable Economic Empowerment Framework.

Indicator	Beneficiary	Description	Assumptions	Perceived Costs	Perceived Benefits	Net Cost Benefit
Economic Ownership	Upper Class Well-connected	Selling of Equity stakes to FDPs	FDPs raises capital to pay for the stake in the company	Disruptive and intrusive law Lost FDI Capital flight Balance of payment pressures as foreigners sell out Over-exposures banks and diversion of funding from pressing challenges of housing and SME financing.	Improved corporate activity	Negative
Management control and employment equity	Upper Class and Middle Class	Racially representation on boards and top management and general employment	Company follow their normal appointment process to appoint directors and executives Employees are appointed on merit, companies remove ceilings in career advancement for previously disadvantaged persons	Requires formal racial classification and promotes racial polarization; blames white racism, brushes over complex causes of inter-racial inequality; erodes social trust and keeps focus on the past Pushes some citizens in the cold Brain drain divisive than cohesive racial quotas add to inefficiency	Diversified and expanded network of opportunities. Gained experiences provides formerly disadvantaged wider opportunities More diversified workforce	Negative
Human Resources and Skills Development	Middle Class	Skills development of racially disadvantaged employees	Requires companies to invest in the training of formerly disadvantaged persons which includes core skills	Increased labor costs	An improved skillset, improved productivity	Positive
Entrepreneurial development and marketing	Middle Class	Investing and supporting FDPs /entrepreneurs	Enterprise development becomes an effective tool to create or improve a company's upstream and downstream partners	Sharing proprietary information Need to invest in program, monitoring and control systems	Reduced Costs Streamlined operations Improved quality products or reduced defective products More established businesses Significant business partners, suppliers or clients	Positive
Corporate Social Responsibility	Poor, Needy, Community	Investing in the community	Requires a company and its employees to be involved in the community	Increase in cost of doing business and reduced cash-flow to owners	Improved company positioning due to community involvement	Positive

2. RECOMMENDATIONS

- i. There is concern that NEEEF is a copy of the B-BBEE scheme in South Africa of which the South African Government is now admitting that it has failed to deliver to its purpose. However, the failed South African model is not the only empowerment framework. Botswana for example incorporated the Citizen Entrepreneurial Development Agency to provide financial and technical support viable and sustainable citizen owned business enterprises. This was done in response to a recommendation made by the National Conference on Citizen Economic Empowerment held in July 1999. Similarly, Namibia could establish a similar agency (Citizen Entrepreneurial Development Agency of Namibia with a mandate to promote the ease of entry into business by Namibian citizens by tilting the playing field in their favor. Promoting viable citizen businesses both within and outside the country that would benefit the country in a meaningful way while priority could be given to owner operated business ventures as opposed to passive citizens looking for non-participating roles as minority investors.
- ii. Companies are responsible for a huge part of the Namibian GDP. Their contribution to macroeconomic stability through the last 26 years should be acknowledged. Besides the proposals given in NEEEF it is advisable to include investment, which leads to job creation into the account of the empowerment context. As will be explained later ownership does not automatically lead to income, but creating opportunities for employment surely does.
- iii. In times of budget constraints and clouded economic perspectives a progressive income taxation can provide the financial means to set up support schemes for targeted interventions and the education system. E. g. a higher tax for the import of luxury cars will work in the same direction. The regulations of Singapore can be taken as the role model for this measure on cars.
- iv. The tax system can be used as an incentive tool with decreasing tax burden for companies who comply with NEEEF. This mechanism is far less invasive into the economic system, less complicated to handle and will not scare away investors.
- v. The income of natural resource extraction in Namibia should be channeled into the direction of skills development, education and support of family structures. The empowerment of people starts with an intact and friendly environment in their early childhood. A whole set of problems is caused by failures in this crucial time of young Namibians: Gender based violence, attitude towards people and objects, lack of social cohesion, relationship management, work ethics etc. To continue with these given failing structures will create another lost generation.
- vi. The tender system must include indispensable criteria of skills development and the fostering of full time employees instead of unregulated contractual work. The tender system can be seen as the biggest VET Namibia is currently offering but it is not used for this purpose. There should be no exemptions from the normal tender process which often lead to doubtful or even corrupted decision.

- vii. Make it easier for Namibian based companies to get tenders. Currently it is easier for foreigners to get tenders as they don't have to comply with specific requirements such as good standing certificates.
- viii. Government and private sector should start a dialogue on the respective roles and boundaries. The constitution speaks about a mixed system but there are messages in the public of GRN demanding a bigger role in the "economic transformation".
- ix. Enforcement of laws and regulations for every company or actor in the economic realm. No one should get a special treatment when it comes to VAT etc., even not the Chinese companies.
- x. Many countries worldwide introduced a kind of youth service, on a voluntary or even on a compulsory basis. It could serve a couple of different purposes, foremost to offer young people the chance to gain experience in life, to put them into the position to make a well-based decision for their professional carrier. The service can offer vocational training like it is being done in the armies of other countries. Especially young men might learn a lot about discipline and motivation and adopt basic social skills.

3. INTRODUCTION, CONTEXT AND OBJECTIVES

A. Introduction

We all agree that inequalities in economic development still exist and therefore wholeheartedly support the empowerment of the needy and the disadvantaged Namibian citizens. Needless to say, we feel the framework and draft bill could be tweaked to optimize results by increasing impact and reducing the associated economic costs. The most pragmatic approach to engineer the framework to its optimum would be a structured dialogue forum with the object of jointly developing the framework further, which could run over four months with weekly meetings. Nevertheless, we herewith provide our initial and humble but significant comments as follows:

B. Context And Objectives

- i. The goals and objectives are commendable, it is morally right that they should be prioritized and even more importantly we believe the private sector can make a significant contribution. However, we think the current text of both the Framework and the draft Bill makes them somewhat unachievable, especially when the means to achieve the respective goals are not linked to specific goals and are purely based on race and / or gender.

Economic Transformation: We agree with this goal. It is commendable and indeed a necessity for the development of our country into a high-income nation

(as advocated in vision 2030). How we get there is of equal importance. The transition path should be both inclusive and sustainable. We in fact propose to define the goal more properly. The current meaning in the Bill seems to confine economic transformation to a change in the ownership structure of businesses. True economic transformation is more than that. If anything else, forced sale of equity to previously disadvantaged persons on the basis of race or gender does not ensure economic transformation. Economic Transformation calls for improving our fiscal position, while making the economy more competitive to win in the global competition for markets, capital (investments) and talent, which must be sustainable. This competitiveness is the undeniable recipe for economic transformation. Equitable participation of all Namibians in the economy on the other hand is largely hindered by what the Bill also correctly identifies as the inequitable access to productive resources. Land, education or skills, entrepreneurship, culture and access to finance are the greatest barriers. The proposed framework seems to come out of frustration with the pace of social transformation in the country. This is understandable. However, economic transformation and empowerment of the marginalized or economically sidelined can best be corrected by program reforms rather than “controlling the behavior of the private sector operators”. We agree that this cannot be done without the private sector involvement, and hence our request for a structured dialogue.

Social Transformation: There is no denial of the imperative for social progress for all Namibians and the fact that economic transformation does not automatically ensure social transformation. We define social transformation as the building of capacity of a society to meet their basic human needs, establish the building blocks that allow citizens and communities to enhance and sustain the quality of their lives, and create the conditions for all individuals to reach their full potential. In this process, the role of business cannot be overemphasized. However, as mentioned above, established private businesses owned by white males or generally whites are not the reason for the slow social progress in some pockets of our society. They are indeed important players in the upliftment of the presently needy and disadvantaged. Moral suasion and incentive structures are key policy tools, which should not be spared.

- ii. The Bill moves beyond empowerment and transformation of individuals, to restructuring of businesses. It also goes beyond extending a call to duty, to wealth redistribution. Needless to say therefore, it goes too far from addressing the challenges of the needy and disadvantaged. It is also punitive and restrictive in nature rather than incentive based. The draft Bill’s approach is to punish people without looking into the details of the single business person. Again, an alternative and pragmatic approach is to focus efforts on supporting the presently disadvantaged people. This means the baseline should be 2016 and not 1990. Beneficiaries should rather get the tools to access to the bigger pie.

We recommend separating issues and policies for economic transformation from economic empowerment policies. Empowerment can be pursued by improving access to production means and through program and administrative reforms. It is imperative to note that mere ownership of shares is no means to eradicating

poverty because mere ownership of shares does not generate a stream of income by itself but the profitable deployment of capital. NEEEF can at best help the top 15% of the formerly disadvantaged, or the well-off among the previously disadvantaged persons while leaving out 85%, which includes the needy. The poor are unlikely to get the empowerment deals, management jobs, preferential tenders, start new SMEs to run if the real reasons excluding them from fully participating the economy are not tackled. In fact the needy are likely to be harmed if the framework reduces investment, lowers growth, limits jobs.

If we keep mixing things we will not succeed. While government can incentivize the needy and disadvantaged to fully participate in the economy, this can be enhanced with a social contract with the private sector, to include the base of pyramid in their business models. Private sector could be incentivized to do this. Differentiate the objectives and means of intervention. What is seriously needed, is a profile of these marginalized sections of society and a social contract between the private sector and the government. In most cases, the single most powerful empowerment tool is skills development and employment creation, which are in turn a function of the incentive structures and information, which the economic participants in the economy face. It is the human-made systems, rules, laws, regulations, formal or informal that create different incentives. Perhaps Adam Smith said it better, “Little else is requisite to carry a state to the highest degree of opulence from the lowest barbarism but peace, easy taxes and a tolerable administration of justice”. Moral suasion efforts could encourage businesses to assist employees to gain access to housing, health care and skills.

- iii. Reading the text of the draft Bill, one gets an impression that the intent of the drafters is to prescribe the way of doing business in Namibia based on the color of the economic operator’s skin as if all are marginalized except for white men. The basic notions are rather divisive than cohesive. An alternative approach to empowerment (more crucially of the marginalized) could be facilitative in Nature, profiling the challenges of the needy and disadvantaged and addressing the administrative barriers as well. The spirit in the current draft is that white male owned businesses should bear this burden on grounds that they were previously advantaged. While this is a mere assumption, the net would be broader if we rather apply call to duty to everyone able in the same manner we have the progressive tax system. In fact this would also extend the call to action to even foreign and black owned business. As a call to the common good, there is no basis for discrimination. To make this model work the Namibian economy needs to realize a certain level of GDP growth to create more jobs – and then distribute them to the currently needy or disadvantaged persons. E. g. the framework could aim to create 250,000 new jobs for these kind of formerly disadvantaged persons say in a five year period. Private sector could be invited to make pledges and incentive structures devised to ensure the achievement of the plan.

Both the Framework and the Bill are too broad or not sufficiently targeted. We only have a notion of where the wealth is supposed to be taken away but no clear and differentiated understanding about who are the people the wealth should be transferred to. “The poor” is a very abstract term obstructing more insight into

individual peoples' and groups' real situation. The abstract means of transferring "money" fits nicely into this level of discussion but allows us to overlook, misperceive and misunderstand the needs of the people who should benefit. There is a need to identify means to isolate the needy and disadvantaged from the rest of the previously disadvantaged persons. Race, gender, creed or religion are very crude measures which brings other avoidable economic costs. The racial focus of the framework will have many negative consequences, with further negative economic effects. The proposed rigid racial quotas will add to inefficiency. The NEEEF requires formal racial classification and promotes racial polarization; blames white racism, brushes over complex causes of inter-racial inequality; erodes social trust and keeps focus on the past. Thus, in our view, the framework risks misallocation of scarce resources in the name of previously disadvantaged as not all previously disadvantaged persons are currently needy or disadvantaged. In the absence of a fair allocation mechanism, the Bill risks favoritism, nepotism and corruption, make the rich richer, dampen economic growth, increase unemployment, reduce technological development and tarnish our good standing in the global context.

We thus recommend a change in the text for the Bill to target only the needy and disadvantaged. Most importantly the selection criteria must be based on hard work, dedication, commitment, loyalty, restraint and good will and not on greed, tokenism and discrimination. In addition, the right of sustainable utilisation of Namibia's resources is enshrined in our constitution and should not be restricted on the basis of race and/or gender. Thus, instead of referring to the narrative of race, reference should rather be made to the Constitution and to the concept of Namibian citizenship.

- iv. The current education system is no doubt a bigger contributor to the current poor skills attainment level in the country. Needless to say it requires fixing as the outputs of such a system are too raw for the private sector to refine. One can even argue that relegating certain responsibilities in some areas to the private sector does not yield the best results. Education is one such area where the contribution of the private sector. The private sector does not have the skills to take up this responsibility. Certain owners of enterprises can also not afford to lower their equity as this will take away an income that is not making the venture worthwhile anymore. What is rather needed is a revamp of the whole education system, from kindergarten up to tertiary education. Private sector's contribution is in on the job training.
- v. The tender system is already using public funds to inject them into projects, but these projects do not lead to automatic development in the business sector or skills development. Businesses are only acting on the stimulus of profit and overlook their social responsibility. It ends up the foreign businesses who participate in the public procurement system are extracting not only natural resources but even state coffers and deliver overpriced results leading to a loss of public welfare.
- vi. There is concern that NEEEF is a copy of the B-BBEE scheme in South Africa of which the South African Government is now admitting that it has failed to deliver to its purpose. However, the failed South African model is not the only

empowerment framework. Botswana for example incorporated the Citizen Entrepreneurial Development Agency to provide financial and technical support viable and sustainable citizen owned business enterprises. This was done in response to a recommendation made by the National Conference on Citizen Economic Empowerment held in July 1999. Similarly, Namibia could establish a similar agency (Citizen Entrepreneurial Development Agency of Namibia with a mandate to promote the ease of entry into business by Namibian citizens by tilting the playing field in their favor. Promoting viable citizen businesses both within and outside the country that would benefit the country in a meaningful way while priority could be given to owner operated business ventures as opposed to passive citizens looking for non-participating roles as minority investors.

C. Potential Economic Costs

- i. There is no question NEEEF is powerful incentive structure for corruption at all tiers. Looting of state resources via empowerment tenders is already costing the state dearly, perhaps undocumented. For a start it is now accepted business practice to pay not only tender facilitators to get a tender, but also to pay to be paid, and make donations to the cause of the politically powerful or those who hold the strings. What is needed is a contra of this system, where the state gets best value for money. Mr. Gwede Mantashe of the African National Congress in South Africa perhaps summarized better: “This thing of having a bottle of water which costs R7.00 procured by the Government for R27.00 because you want to create a middle class person who must have a business is not on.....it must stop.”
- ii. We think the language formulation in the current text can be improved as we foresee significant economic costs in the form of additional compliance costs, brain drain and capital flight if some Namibians will feel left out. If ownership in the economy and/or career positions were to be filled, based on conditions of race and/or gender, some professionals will “feel” de-motivated and restricted to participate in the development of this country. This could lead to an extensive "brain drain" from Namibia with devastating consequences. Other countries that have introduced empowerment schemes properly have already experienced this phenomena and are now appealing to the professionals to return. (e. g. South Africa). President Geingob is on record in stating publically that also a white born Namibian has the same rights as fellow black citizens and that nobody should feel left out. The narrative from His Excellency the president is that all Namibians must pull in the same direction (Harambee). Surely the proposed NEEEF legislation proposes exactly the opposite.

The implementation of Pillar 1 and Pillar 2 can potentially introduce disruptive principal agent relationship challenges, as the framework already touches on the structure of these relations. This problem arises when one party (agent) agrees to work in favor of another party (principal) in return for some incentives or perks. Such an agreement can potentially incur huge costs for the agent, thereby leading to the problems of moral hazard and conflict of interest. In business, the greatest liability an entrepreneur assumes is the acceptance of a business partner. A less-

knowledgeable principal or owner can easily feel sidelined or disadvantaged and resort to take decisions not in the best interest of the business. While a legal ownership title can easily be transferred, mastering the challenges of running the business, a kind of ownership related to knowledge, experience and hard work cannot be instantaneously assumed.

- iii. Given the economic costs of the Bill, it might be prudent to analyze the potential impact of the NEEEF on macroeconomic stability. This must be assessed with great diligence not to end up more equal but less wealthy. In the pursuit of this exercise, we might want to define the baselines (data on business ownership at independence in 1990 and now) for all six pillars to show where we started in 1990 and the situation today.

4. LEGAL COMMENTS

- i. It is a basic requirement for any new laws to be integrated into the existing legal frameworks without creating uncertainty, introducing unregulated and grey areas, loopholes or blockages in the areas they are supposed to regulate. The Framework and the NEEEF Bill in its present status will introduce ambiguity and uncertainties, e.g. there is no clarity about the further process of amending laws and regulations and the creation of new governing bodies and their respective powers.
- ii. The Constitution is the legal backbone of the Republic of Namibia. Since Independence the notion of Namibian citizenship has delivered the most common fundament to base the legal system on. To connect the NEEEF to this stream of Namibian nationhood, reference in NEEEF should be made to “Namibian citizens” and no longer to “race” or “color” which are no positive legal terms in the sense of the Constitution and threaten to tie the Namibian mindset to now legally irrelevant categories. Relating to these notions will introduce a two tier citizenship regime based on race against the constitutional noble ideal of equal citizenship.
- iii. The NEEEF and the Bill are deeply impacting on the architecture of the Namibian legal system. Clarification is needed about any conflicts of “constitutional norms” laid down in the constitution. Consequently there needs to be an assessment on how GRN is going to act in favor or against specific norms once a conflict of norms is identified. It needs to be proven that the Bill is not in contravention with some of the fundamental rights laid down in the Namibian Constitution:
 - a. The right to non-discrimination (Article 10);
 - b. The right to property (Article 16);
 - c. Freedom of association (Article 21 (1) (e));
 - d. Freedom to practice any profession, carry on any occupation, trade or business. (Article 21 (1) (j)).
- iv. **Bill Section 23**, together with some of the definitions in **Bill Section 1**, *prima facie* is considered to violate the fundamental rights and freedoms contained in **Article 21 (1) (e)** (Freedom of Association), **Article 21(1) (j)** (Freedom to Practice any profession, or carry on any occupation, trade or business), **Article 10** (fundamental right to equality and non-discrimination) and **Article 23** (Constitutional imperative against racial discrimination) of the constitution. The questions needs to be answered if it is constitutionally correct for legislation to force an entrepreneur to take in partners. Article 23(2)
- v. **Section 24** provides for the drawing up of the “Economic Empowerment Framework” by the council, subject consultation with relevant government bodies, the private sector and other bodies. However it is then the minister who must submit the “Economic Empowerment Framework” to cabinet for comment and after any change made to it by cabinet, if any, table it in the national assembly for “approval”. This section, in its current form, may violate section 23(2) of the constitution which requires “cabinet to enact policies and programs that are authorized” under the said article.
- vi. **Section 25** authorizes council “by notice in the Gazette” to issue economic empowerment standards”. If any of these standards constitute a limitation of an

individual's fundamental rights and freedoms, **Article 22** must be complied with i.e. Parliament and not only a minister must apply its mind to the matter and legislate accordingly.

- vii. **Section 26** provides regulations which are expected to have a severe impact on the business sector. It requires “*every government body*” to apply relevant economic empowerment standards issued in terms of the NEEEF Bill in *inter alia*, “**determining qualification criteria for the issuing of licenses, concessions or other authorisations in respect of economic activity in terms of any law**”, for “**developing criteria for entering into partnerships with private sector enterprises in designated sectors of the economy**”, or for “**determining criteria for awarding of incentives, grants and investment schemes in support of previously disadvantaged persons**”. The humble question arises in what timeframe does Government expect these empowerment standards be in place and will be executed by the respective administration. Synchronizing the efforts will be key to prevent businesses run into a situation where regulation is imposed but not operational. Situations like this are a door opener for inappropriate administrative practices and in the end for corruption.
- viii. The current understanding of the Bill is that Government will prohibit a person conducting business if it (or the business) does not comply with the NEEEF/Bill. This is contrary to the fundamental freedom enjoyed by “**all persons**” as contained in our Constitution under **Article 21(1)(j)** to “practise any profession, or carry on any occupation, trade or business.”
- ix. **Section 26(2)** of the NEEEF Bill allows the council to exempt government bodies’ from the qualification criteria, “**if particular objectively verifiable facts or circumstances applicable to the body necessitate an exemption or deviation.**” The terms used in this Section are vague and might open the door for a broad and unintended interpretation. Terms like “government body”, “relevant economic empowerment standards (are there irrelevant standards as well?)”. In the process of consultation the council may exempt “such body” or even allow deviations from the requirements due to “particular objectively verifiable facts or circumstances”. Consequently this section paves the way to an uneven application of empowerment standards to certain enterprises (whether foreign investors or not) while they will be stringently applied to other investors. The discretion to grant exemptions may also provide a fertile ground for corruption.
- x. It is commendable to allow the public get access to government’s assessment about how these new regulations comply with the international treaties and contracts the Republic of Namibia has signed or became a partner. Intentionally acting against one of these treaties would bear a severe reputational risk for Namibia in the international community of independent states.
- xi. The World Bank Guidelines on the treatment of Foreign Direct Investment sets out the desirable framework and the essential principles necessary for the promotion of Foreign Direct Investment (FDI). Chapter III of these guidelines entitled “Treatment” recommends the treatment the state governments must extend to investments established in their territory. It states that each state should extend to such

investments by nationals of other states, fair and equitable treatment in accordance with the standards recommended by the guidelines. The guidelines recommend that the treatment of foreign investors should be as favorable as is accorded by the state to its nationals. These relate to the protection and security of the investor and the investment, the granting of permits and licenses, issue of visas for foreign personnel, full protection of the investors rights regarding ownership, control and substantial benefits over his property including intellectual property.

- xii. The Namibia Investor Centre is depicting Namibia as a country with outstanding political, legal and macroeconomic stability. In comparison to many other countries in the region this can be considered to be a unique selling proposition for Namibia. Reliability and trustworthiness in legal and contract matters are crucial factors for investors to decide for or against a business location when making an investment. Feedback from the business sector and especially the financial service sector already reports about an increase in requests to relocate funds or selling off businesses. It seems advisable to structure the further discussions in a way to prevent any unnecessary rumors.
- xiii. The NEEEF/Bill promises to become a powerful legal instrument to impact on many other legal regulations. In other words its sweeping powers seem to be able to override all other laws except the constitution. There needs to be a mechanism to insure the legal status and validity of contracts domestic and international. E.g. the provisions of the **Foreign Investment Act 27 of 1990 (Section 3(2) (3))** under which the current foreign investors in Namibia, have agreed to invest in Namibia.
- “(2) For the purposes of any law governing the establishment and carrying on of any business activity, or the taxation of income, or any other aspect, of any business activity a foreign national shall be in no different position than any Namibian, except as may be otherwise provided by this Act.”*
- “(3) No foreign national engaged in a business activity or intending to commence a business activity in Namibia shall be required to provide for the participation of the government or any Namibian as a shareholder or as a partner in such business, or for the transfer of such business to the government or any Namibian: provided that it may be a condition of any licence or other authorisation to or any agreement with a foreign national for the grant of rights over natural resources that the government shall be entitled to or may acquire an interest in any enterprise to be formed for the exploitation of such rights.”*

To change the rules of the game underway is not the common way to build trust and confidence among the group of international investors. Instead of aiming at such a measure it could be worthwhile to take other means into consideration for a necessary closer inclusion of foreign companies into this initiative. It all starts with the selling of rights to exploit natural resources which do not belong only to the current Namibian population but even to the future generations of Namibians and it continues with the aspects of water and land/soil.

5. ADMINISTRATION AND IMPLEMENTATION OF THE NEEEF

- i. The fight against inequality is reported to be as old as mankind, and we are still struggling despite most modern means of production and social welfare programs. In business predictability is a respected value and so should it be in politics. The NEEEF initiative is seen as a timewise restricted effort in the spirit of Harambee. In fact in its daily implementation it will bring along a more complex economic system than has been in place before. For the sake of social development and economic integration of the disadvantaged people there is an imperative to define the runtime of the project and to give a date when Namibia can return back to a less complex system. A sunset clause will bring a stringent definition to the goals to be achieved and the required structure for monitoring and evaluation.
- ii. Businesses are operating in a complex environment: Markets, laws, trends, technology, human resources etc. The NEEEF/Bill will bring along a lot of regulatory adjustments or even legal amendments. It seems to be advisable to allow for a “Phasing in” into this initiative to preserve the predictability and efficiency of the economic environment for the businesses. Some sectors like architects, engineers etc. might suffer from any delay in the system to deliver the required valuations, forms and certificates. Their employees and families might immediately suffer from any malfunction in the system.
- iii. The Namibian experience has shown that the agendas of high level politicians and Ministers already do not allow to include them in more intense work load without incurring inefficiencies. Therefore it seems advisable to rethink the structure of the NEEEF Council and the Committee. Since these two bodies deal with economic issues relating to the private sector it is advisable to include private sector representatives in a decent manner (50:50) to insure that decisions affecting the private sector may reflect its complexities and imperatives.
- iv. In economic life there are a lot of different kinds of economic units (Start-ups, MSME, Big companies, CC, Sole Proprietor, publicly listed companies, pension funds etc.). It seems advisable to provide targeted interventions for each kind instead of providing a “one size fits all” approach. E. g. it will be challenging and in the end can stop a start-up company if it would have to focus on the correct ownership structure instead of focusing on the market, product, production and finances. On the other hand it might be difficult to find the right business partner in a situation where statistically failure is more common than success.
- v. On the note of efficiency and predictability the implementation of the ownership pillar will bring its own challenges for the banking institutions. For them being the facilitator of the expected high number of share transfers it is not transparent how these transfers will be financed and how this volume of credit will affect other economic activities.

6. THE PILLARS OF EMPOWERMENT

A. Economic Ownership

- i. There are different categories of ownership in the economy. Merely legal ownership of shares in a company is one of them, a second one can be named as “economic ownership” in the sense that a person engages its knowledge, workforce, experience

and motivation into a productive process. The first sort of ownership is restricted to mere financial engagement, requiring only certain financial skills. The second one leads to empowerment of the person in many aspects including the financial skills. Aiming at empowerment in general it is more advisable to foster the second kind of ownership through the implementation of employees' shareholding schemes and the like. Employees as shareholders are very close to the actual production process and the company in general, the employee retention rate and consequently a better skills transfer environment can be fostered, it will bring a better balance of risks and return in comparison with other solutions and last but not least will raise the motivation of employees.

- ii. A more technical view on the general approach of NEEEF leaves us with the insight to differentiate between the **means** and the **objectives** of the intended intervention. Assuming the "eradication of poverty" as part of "creating a socially just society" being the objective mere ownership of shares seems to be no suitable means to reach this goal. The ownership of shares does not only entail certain rights like the rights to receive dividends according to the size of the shareholding or the rights to receive internal financial information. The ownership of shares entails as well certain tasks like effectively controlling the company as a board member and being liable with respect to legal issues. As a new equity shareholder of a company the previously disadvantaged person might be forced to join in a stepping up of the equity if the other shareholders decide to do so. In case of having no more financial means to do so the share in the company's equity will decrease. This might lead to a worse NEEEF scoring and probably the exclusion of the company from public tenders.

In case GRN might introduce a tax on dividends in the future this will affect the NEEEF shareholder as well and will have a negative impact on his/her income.

- iii. In capital markets the price of shares is - besides the economic performance of the company - strongly influenced by the liquidity of the market segment which means how many shares can be traded and how many market participants are trading the share. If NEEEF/Bill restricts the free trading of "NEEEF-shares" to trading between previously disadvantaged persons then the market for these "NEEEF-shares" will be less liquid than the market for the non-NEEEF shares. NEEEF-shares will then consequently be traded with a discount leaving the NEEEF-share owner worse off compared to a normal shareholder. The market for privately held companies is already illiquid by nature but then even the shares of listed companies might face a market segmentation. South Africa has developed such a structure in terms of which BEE shareholding is traded apart from the main shares in a listed company. Experience has shown that the main share price inevitably trades at a higher price due to the bigger market for it. Accordingly for empowerment purposes it is important to have a sunset clause when the shares can trade with the main shares again for the BEE shareholders to cash into the higher price.
- iv. The market for corporate control usually mediated by the stock exchange or through OTC dealings is highly responsive to "information" as the theory of financial markets has shown over the years. A closer look at the Namibian situation of information distribution with regards to NEEEF will inform us that the "previously disadvantaged persons" whose financial situation NEEEF is up to alleviate are geographically far off the economic centers or even excluded from the expected distribution of these kind of financial information. Even worse they might

be illiterate, do not speak English, have no experience in this field and have no network at hand to reliably bridge this information gap for them. Basically they will be restricted to the “empowerment opportunities” arising in their home area which indicates that they have a very restricted choice of shares to buy (if there are “white” companies operating at all). In a short analysis of the second pillar it is expected that the intended outcome of NEEEF will not realize for them as well. To act in Management certain skills and experiences are required of which most certainly an untrained and illiterate person in the remote areas of Namibia has no command of. It is likely that these two pillars consequently will incur widespread disappointment about their impact on poverty alleviation. It is to be expected that only the currently less or already no longer disadvantaged persons will profit from NEEEF in this respect.

- v. It needs a clear understanding of how a bankruptcy of a company might affect its NEEEF shareholders. If the NEEEF shareholding is financed by a bank loan the NEEEF shareholders might end up with paying back a loan while the source for the income – the shareholding in the company – has disappeared. A similar situation might occur if the company itself is providing the loan and the former 100% owner has taken the purchase price for the 25% out of the company into some non-accessible accounts. In this case the money is taken away from the NEEEF shareholder and he/she is left off worse than before.
- vi. In line with the Harambee thinking there is a need to look again at levelling the playing field in certain areas. Foreign companies are owning a big part of the Namibian economy and it must be assured that they contribute in a decent manner to the society they are making profit of. In the field of resource extraction we find a situation where the Namibian society is not really profiting from the foreign companies. In the area of taxes there is an experience of lack of transparent operations in some areas of the Namibia economy especially when it comes to traders from China and other countries. Long lasting political friendship and support should not exempt market participants from playing by the laws which must be enforced respectively.
- vii. Would pension funds fall within the NEEEF definition as they are some of the only Namibian broad based ownership/benefit pools of capital fully Namibian owned
- viii. According to the definition in the NEEEF/Bill business enterprise appears to relate to any and all forms of businesses. Since the specific structures of businesses are quite different it is advisable to clarify if the following are included in the definition and how selling off a 25% stake or management can be expected to work in practice:
 - a. Single proprietor businesses, such as lawyers, doctors, engineers, architects or businesses such as plumbers, electricians cannot simply sell off 25% of ownership.
 - b. CC's, specifically property owning CCs and companies that have no management because their only business purpose is ownership of a property in which the owner lives or which probably is rented out.

- c. Listed companies whose shareholding to a large percentage is already owned by Namibian pension funds, specifically the GIPF, or where preference was given to Namibian BEE shareholders that have since sold off their stakes.
- d. Existing “BEE” deals concluded with entities such as Stimulus, where the majority - but not 100% - is black Namibian owned,. In SA 51% BEE owned constitutes a BEE company
- e. Start-up businesses, e. g. exploration mining companies that require constant funding while still in the exploration phase without generating a positive cash flow. Their prospects are unclear and can lead to losses which then must be covered by all shareholders including the NEEEF shareholder. Finding a partner for this kind of companies will be difficult but can lead to a standstill in exploration activities leading to lower GDP in the future. A requirement to have a NEEEF partner from the start will incur more red tape, administrative complexities and will postpone or even cancel projects.

As a consequence it seems advisable to remove pillar 1 and pillar 2 from the proposed NEEEF draft or to exchange them with better targeted measures for the inclusion of the currently disadvantaged persons. The measures should be tailor-made for the specific target groups who share a set of challenges:

1. Geographical location of the target group
2. Educational background
3. Age
4. Accessibility for further education
5. Level of societal inclusion

B. Management Control and Employment Equity

- i. For the sake of a common understanding of this pillar a closer look at the concept of management is needed. In the context given management has two levels of meaning. The first one is to exert control within a given organization. Combined with pillar 1 (ownership) this seems to be the core of the NEEEF initiative. There is the assumption that in Namibia persons belonging to the group of previously disadvantaged persons do not have a balanced or equitable share in management control.

In its second meaning management does highlight a certain function within the concrete working process of businesses. Managers provide guidance for other staff members during the execution of work. Managers therefore not only need to have a certain skills set they acquired in University or any other institution, they need to have experience in their job and the ability to guide their colleagues in doing their job. It is highly questionable if against all claims being made about the skills shortage in Namibia there are well trained managers in the job market who struggle to find a suitable job.

- ii. For a better understanding how this pillar will affect the daily operations of businesses reference can be made to simple models. What if a company is fully equipped with the necessary management skills but now has to change the composition due the NEEEF/ Bill. Will the company need to retrench an experienced white manager who is a valuable asset to the companies’ daily operations and service delivery to hire someone from outside? Or is the company forced to additionally hire previously disadvantaged managers until it fulfill the scoring requirements? What will be the consequences for the company besides the

increased costs, for the retrenched manager and his family and for the newly appointed manager? It is obvious that a change of personnel in most of the cases will lead to a decrease in economic performance, at least for a certain time. If the process should work like described above the question arises how the regulations in the labor law apply to this practice? Is there the idea of introducing a regulation which allows retrenchment for the sake of NEEEF compliance?

- iii. Experience has it that that skills deficits in the country are more acute at management and executive levels as such quota prescriptions in this sphere might have unintended effects.
- iv. It is to be questioned if this pillar will produce the intended results. On the downside its execution will bring a lot of uncertainty into business processes and might lead to a brain drain leaving Namibian companies worse off. As a result it is advisable to abolish this pillar and instead try to foster the skills development in a massive way through providing more bursaries for students to study at top universities in the region or even in other parts of the world. People empowered by their own skills will no longer need to be entitled for any jobs. They will impress with their skills.
- v. If we differentiate between the status quo of companies and the intended future development in this regard it seems advisable to leave the current situation in the companies as they are but to implement certain regulations for further employment of people. In case of equal qualification of applicants a formerly disadvantaged should be given preference. Doing so Namibia is forced to increase the education level and the companies will get the required skills and experience without introducing the racial paradigm.

C. Human Resources and Skills Development

- i. In connection with what was elaborated in the previous section empowerment in business is necessarily closely connected with the development of skills. Persons without skills will not be able to sustainably profit from any “transfer of economic wealth” in what sense ever. The poor and the disadvantaged live in a great distance from the centers of the Namibian society and mainstream economy, both geographically and mentally. To bring them closer to and finally to connect them to the mainstream economic activities education is the most important means. With reference to the often cited saying: It is not about giving them fish in the form of shares, it is about empowering them to develop their own “fish” and become an active member in the Namibian society.
- ii. The present economic system is rewarding people more for their “connections” than for their hard work. If this trend continues further generations will find their role models in life not in the hard working people but in the realms of the tenderpreneurs. This development needs to be corrected and one means for this is to provide higher salaries for people who service the society, for nurses, policemen and other middle class workers. Another area is the respective vocational training. The training standards for these occupations must be raised and consequently the motivation among young learners to choose one of those occupations might raise as well. The pooling of CSR funds in this respect might speed up processes and helps to realize quicker results.

D. Entrepreneurial Development and Marketing

- i. There are a lot of single initiatives in Namibia to foster the entrepreneurial development in the country. It seems useful to think about setting up a matrix for economically important initiatives to which companies can contribute a certain amount of their after tax profit instead of setting up another small initiative which might struggle from the beginning because it only relies on the CSR funds of one company.

E. Financing of Empowerment

- i. It still remains to be clarified how the financing of the pillar 1 ownership transfers will be done. For the sake of the macroeconomic stability there needs to be an assessment about the funds available in the Namibian economy to realize the ownership transfer. A probable outcome might be to introduce a timeframe for certain financing measures or a phasing in and phasing out mechanism. If the intention of Government is to have the 25% ownership requirement implemented all at once there might not be enough capital or funding in Namibia to purchase 25% of 90% of the businesses in Namibia at market prices. In a staggered implementation there is a better chance to get funding and bring more companies to market. With regard to other mega projects it is an extremely high risk if the process has to be stopped or postponed underway due to a lack of financial funds.
- ii. What will happen in cases where shares have been pledged to financiers for the funding of the purchase price and due to non-payment the banks have to take the shares as security. Does the company that sold the shares now be deemed to be non-compliant although the company did nothing wrong. Even while the shares are pledged to the banks, will the company be viewed as compliant? All bank funding will require this to be clarified. This leads to the general question about how the NEEEF shares might be used as a quasi-collateral within the economic process without affecting the NEEEF requirements of ownership by previously disadvantaged persons.
- iii. How can be controlled that NEEEF shareholders will not sell their (listed) shares to non-NEEEF shareholders? Will there be a formal registration process for NEEEF shareholders? Which organization will be responsible for this task? How can be made sure that if a NEEEF shareholder sell his shares to a non-NEEEF shareholder this will not result in negative consequences for the company affected by this behavior?

7. Word of thanks

The NCCI would like to express our sincere gratitude to the Hon. Prime Minister to allow us to submit our humble opinions on NEEEF and the respective Bill. We as the voice of the business sector would like to stress again that we support the

underlying set of goals and would like to offer our support in organising a round table on NEEEF to secure the best solution for our beloved motherland Namibia!

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