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**TITLE: *THE MINERALS INVESTMENT ENVIRONMENT IN NAMIBIA: AFTERMATH OF SADC
HARMONIZATION INITIATIVES***

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DEDICATION

TO MY *FAITHFUL* GOD – THE FATHER; THE SON AND THE PRECIOUS HOLY SPIRIT.

Romans 8:28

“And we know that GOD causes everything to work together for the *good* of those who LOVE GOD and are called according to his purpose for them.”

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ACRONYMS

AMP	Africa Mining Partnership
AMV	African Mining Vision
CFI	Competitive Investment Framework
CSR	Corporate Social Responsibilities
FDI	Foreign Direct Investment
GDP	Gross Domestic Product
HIP	Harmonization Implementation Plan
NEEEF	New Equitable Economic Empowerment Framework
NEPAD	New Partnership for Africa's Development
NIPA	Namibian Investment Promotion Act
NMP	National Mining Plans
REC	Regional Economic Community
RISDP	Regional Indicative Strategic Development Plan
SADC	Southern African Development Community
UNECA	United Nations Economic Commission for Africa

ABSTRACT

Namibia has since gaining independence managed to build a strong mining industry and a solid regulatory framework to govern it. Namibia is a founding member of the Southern African Development Community. As such it has ratified the SADC Treaty and also acceded to the SADC Protocol on mining. The aforementioned instruments lay a foundation for the harmonization landscape within the SADC mining sector.

This study will argue that Namibian government has not created an enabling minerals' investment environment. The country has not put in place appropriate and effective policies and strategies for purpose of attracting, absorbing and sustaining substantial inflow of FDI into the Namibian economy as result of the pursuance of the outlined harmonization initiatives.

INTRODUCTION

1.1. INTRODUCTION AND BACKGROUND OF STUDY

Foreign direct investment in the Namibian minerals sectors is the economy's elixir of life.

The mining sector has historically been the main driver of economic growth in Namibia.¹ Statistics produced by the Namibia Statistics Agency show that the mining sector contributed 11.1% to (Gross Domestic Product) GDP in 2016 and recorded an overall contraction of 6% in real terms.² However, the Chamber Mines is of the opinion that this contraction has been overstated as it has not properly captured the trebling of high value refined copper production in 2016³ and the 10% year-on-year increase in gold bullion output.⁴

Contributions by these two mineral commodities have been further understated in light of the recent increases in the prices of gold and copper.⁵ Overall, mining contribution is also diluted by the exclusion of output from zinc refining and copper smelting activities. Statistics collated by the Chamber revealed that the mining sector generated some N\$28.85 billion in foreign revenue earnings in 2016 in nominal terms.⁶

¹ Economic Contribution of Mining in Namibia. mining remains by far the largest sector of the Namibian economy. In 2009 for example, mineral products excluding cut and polished diamonds) contributed 54% of Namibia's total merchandise exports. See Chamber of Mines of Namibia: Update Report September 17 of 2012. <http://www.chamberofmines.org.na/files/8814/7014/7048/Chamber_Update_Report_September_17_-_2012.pdf> accessed on 25 May 2017.

² Namibia Statistics Agency: Preliminary Annual National accounts 2016. <http://cms.my.na/assets/documents/Preliminary_National_Accounts_20161.pdf> accessed on 26 May 2017.

³ Copper prices surged in the aftermath of US election up to 17% in the fourth quarter. See Maritza Araneda < Commodity Insights Bulletin - Copper Q2, 2016 - Q3, 2016> 16 November 2016, last accessed 30 May 2017.

⁴ The Chamber of Mines of Namibia Annual Review 2016. <http://www.chamberofmines.org.na/files/5814/9314/0176/Chamber_of_Mines_Annual_Review_Web_Final.pdf> last accessed on: 26 May 2017.

⁵ (Ibid.) The review also indicated that the gold price recorded an increase of 28.8% the first quarter of 2016.

⁶ (ibid).

A decade after independence saw Namibia establish a competitive and stable minerals investment environment, but commodity prices were generally low. This did not only negatively impact growth in the mining sector, but also stifled growth in other sectors of the economy.⁷

Over the next decade,⁸ which saw significant rises in commodity prices, the Namibian government introduced a wide range of changes on – taxation, on strategic minerals, state ownership, BEE – but generally in such an ill-considered way that Namibia’s good reputation was severely damaged.⁹

A direct and positive correlation exists between investment in the minerals industry and prospectivity for particular target minerals.¹⁰ When there is geological potential for particular minerals, there is a good chance that investment (local or foreign) will follow.¹¹ Investors expect good government policies, investment incentives and legal framework to sufficiently mitigate the inherent risks in mining projects.¹²

Investment decisions regarding mineral resources are key determinants of the economic growth in any resource-rich country such as Namibia.¹³ The minerals sector contributes largely to the economic growth of the country as aforementioned – therefore in order for the country to achieve economic emancipation, at least partly through the growth of

⁷ Walter Augusto Fernandes ‘The Role of Mining in Economic Development in Namibia post-2008 Global Economic Crisis’ (Master of Science in Engineering University of Witwatersrand 2014).

⁸ The period between 2000 and 2011

⁹ Robin Sherbourne, *Guide to the Namibian Economy 2017* (Institute for Public Policy Research. ISBN 978-99945-60-66-0. Page 175, 217 2017)

¹⁰ International Bank for Reconstruction and Development / The World Bank. Botswana Mining Investment and Governance Review (2016) <<http://www.worldbank.org>> accessed on 26 May 2017.

¹¹ United Nations Economic Commission for Africa Southern Africa Office, ‘Harmonization of Mining Policies, Standards, Legislative and Regulatory Frameworks in Southern Africa’ (30 December 2004) <www.uneca.org/.../harmonization-mining-policies-standards-legislative-and-regulator> accessed on 29 April 2017.

¹² (*Ibid.*)

¹³ Avinash K. Dixit & Robert S. Pindyck, *Investment under Uncertainty* (Princeton University Press; First Printing edition January 10, 1994 ISBN: 9780691034102)

the minerals' industries, the host government must create an investment environment conducive to exploration and mining activities.¹⁴

In 2004, the Southern African Development Community (SADC) started the process of harmonizing mineral policies and regulatory frameworks.¹⁵ The aim was to reduce differences in the operating environment between the member countries of the region.¹⁶ This was done to give Southern Africa substantial negotiating powers in its dealings with other economic groupings and to help reduce prospects for marginalization.¹⁷

Twelve mainland SADC countries¹⁸ were studied and data compiled for recommendations on a regional approach to harmonization. Nine areas of harmonization were identified, including the creation of a conducive minerals investment environment.¹⁹

¹⁴ Refer to Article 99 of the Namibian Constitution, Act 1 of 1990, which provides that: *“Foreign investments shall be encouraged within Namibia subject to the provisions of an Investment Code to be adopted by Parliament”*.

¹⁵ Hudson Mtegha & Oluwatomisin Oshokoya, ‘Mining fiscal environment in the SADC: status after harmonization attempts’ (2011) *The Journal of the Southern African Institute of Mining and Metallurgy*. Volume 111. Page 445.

¹⁶ (See 15 above)

¹⁷ United Nations Economic Commission for Africa Southern Africa Office. 30 December 2004. Harmonization of Mining Policies, Standards, Legislative and Regulatory Frameworks in Southern Africa. <<http://www.uneca.org/.../harmonization-mining-policies-standards-legislative-and-regulator>> accessed on 29 April 2017. Additionally, it has been pointed out that harmonization also helps in the reduction of the costs and risks of doing business across the region.

¹⁸ Kaire Mbuende, ‘Namibia and the Southern African Development Community’ in Anton Bösl, André du Pisani and Dennis U Zaire (eds) *Namibia’s Foreign Relations Historic contexts, current dimensions, and perspectives for the 21st Century (Konrad-Adenauer-Stiftung 2014)*. Namibia formally to SADCC in 1990 as its tenth member state. However, the relationship between Namibia and SADCC dates back to the organisation’s establishment in 1980. The Southern African Development Coordination Conference (SADCC) was constituted in Lusaka, Zambia, on 1 April 1980 following adoption of the Lusaka Declaration-Southern Africa: Towards Economic Liberation. The SADCC was transformed into SADC on 17 August 1992 in Windhoek, Namibia, with a declaration of a Treaty giving the organization a legal character.

¹⁹ United Nations Economic Commission for Africa Southern Africa Office. 30 December 2004. Harmonization of Mining Policies, Standards, Legislative and Regulatory Frameworks in Southern Africa. <www.uneca.org/.../harmonization-mining-policies-standards-legislative-and-regulator> accessed on 29 April 2017.

This research concentrates on the minerals investment environment as one of the areas of prime interest to the investment community. An extract of recommendations from the approved SADC approach is discussed, together with changes in provisions.

The paper examines progress made by Namibia to date in face of harmonization attempts by SADC, and how the attempt has contributed to its mineral investment environment.

1.2. RESEARCH AIMS AND OBJECTIVES

- ❖ The study is aimed at determining whether Namibia has succeeded in creating a conducive minerals investment environment as per the recommendations of the SADC Harmonization report in that regard.
- ❖ The research aims to look at the compatibility of mining laws and policies in Namibia with the SADC Protocol on Mining.

To this end, the overall aim of this study is to identify and highlight the legal factors that are not aligned to the promotion of foreign (FDI) and national investment in Namibia.

1.3. HYPOTHESIS

The Namibian government has not created an enabling minerals' investment environment, and also put in place appropriate and effective policies and strategies for purpose of attracting, absorbing and sustaining substantial inflow of FDI into the Namibian economy.

1.4. RESEARCH QUESTIONS

1.4.1 Primary

- ❖ Has the Namibian government created an enabling minerals' investment environment, and also put in place appropriate and effective laws, policies and strategies for purpose of attracting, absorbing and sustaining substantial inflow of FDI into that sector; In line with the SADC Mining harmonization framework?

1.4.2 *Secondary*

- ❖ What are the underlining theories of foreign direct investment?
- ❖ What is harmonization landscape of the SADC within the extractive industries sector?
- ❖ Does the current legal framework create a conducive mineral investment environment in Namibia?

1.5. RESEARCH METHODOLOGY AND LIMITATIONS

1.5.1 *Methodology*

The research overall is qualitative and descriptive, supported by various pieces of legislation and policy documents and lessons learnt from other jurisdictions. Thus a comparative analysis of these policy and regulatory systems is submitted, albeit briefly, in an attempt to meet the thesis objectives.

The methodology for this dissertation will come mainly from desktop analysis. The literature will then be critically analysed and compared in a detailed and balanced manner in order to accomplish the main object of the study, mainly to answer the aforementioned research questions and further sufficiently provide academically informed conclusions and recommendations.

1.5.2 *Research parameters*

This research work was undertaken subject to a number of constraints. This paper concentrates on the mining investment environment as one of the areas of prime interest to the investment community. Consequently, the work will not explore the other nine thematic areas of the SADC harmonization report.

Though a direct measure of the impacts of the specific mining policy changes on the investment in the sector is a preferable approach, , there are some barriers to doing so. The effects of policy on deterring exploration investment may not be immediately apparent due to the lag time between when policy changes are implemented and when economic activity is impeded and job losses occur.

1.6. SIGNIFICANCE OF STUDY

The significance of the creation of a conducive minerals investment environment is underscored by the contribution the minerals sector makes to the overall economic development of the country.²⁰

In light of the above, it is submitted that the findings of the study may assist policy-makers in attracting private capital, and to make investors' decision-making processes more objective. In terms of relevant academic research work with respect to the topic, there is inadequate country specific literature available in the public domain. Therefore, the work may be used as persuasive scholarship by other researchers who are interested in the subject for purposes of further research on other aspects that this study may not have covered.

1.7. CHAPTER OVERVIEW

This thesis will consist of five chapters. The first chapter sets out the rationale of the study and provides a list of significant issues on which the research has been based on. The primary research question, research objectives and questions are also outlined in that chapter. Chapter two provides a conceptual framework of the study. It does so in two parts – firstly by presenting a theoretical discussion of regional integration and secondly by discussing theories under-pining foreign direct investment.

Chapter three will briefly examine the harmonization landscape of the SADC within the extractive industries sector. The aim of chapter four is to assess the current macroeconomic legal framework that effects the Namibian mining industry. Additionally, the chapter also looks at the role played by mining in macroeconomic i.e. the contribution of mining to the economy. Finally, chapter five summarises the main findings, discusses further recommendations and the significance of this study.

²⁰ There is evidence that Namibia's economy is and continues to be heavily dependent on mining. See footnote(s) 2, 3 & 4 [fullstop]

CHAPTER TWO

SADC REGIONALISM AND THE DETERMINANTS OF FOREIGN DIRECT INVESTMENT: A CONCEPTUAL FRAMEWORK

2.1 INTRODUCTION

The core objective of this chapter is to explore the theoretical approach that underpins regional integration in the Southern African Development Community (SADC)²¹. It is imperative from the outset of this thesis, to be very clear about what regional integration entails. This is because understanding regional integration lays a foundation for the chapter. It enables the reader to understand the confines and rationale of the SADC integration agenda. Relevant theoretical perspectives that underpin foreign direct investment will also be discussed.

Economically, regionalism and economic integration among nations is anticipated to increase the chances for investment, be useful to the people of the nations, and foster exploration of growth and development resources.²²

2.2 CONCEPTUAL APPROACH TO SADC REGIONALISM

In this section, the author will provide a brief overview of the applicable theory for the SADC Regional Economic Community (REC) regionalism.

Regionalism and economic integration are not necessarily the same concept. Regionalism is a much broader concept based on political, economic, social, cultural, and geographical demarcations; whilst economic integration is limited to a purely economic aspect. This is because economic integration comprises the set of political and economic measures "designed to eliminate discrimination between economic units that belong to different national states".

²¹ San Bilal and Jan Vanheukelom, 'Regional dynamics in Africa: High stakes for development' European Centre for Development Policy Management, Discussion Paper 174, (2015) <http://ecdpm.org/publications/regional-dynamics-africa-high-stakes-development/> accessed 31 July 2017 "regions" can also be understood as "political and social projects devised by human (state and non-state) actors in order to protect or transform existing structures".

²² Daniel Sakyi & Eric Evans, 'Regionalism and Economic Integration in Africa: A Conceptual and Theoretical Perspective' The African Capacity Building Foundation, Occasional Paper No. 22, 2014.

The term involves the process of trade, economic and financial convergence of integrating states. It implies the process of integration of various economies in a given area or region into a single unit for the purpose of regional economic development.²³ Regionalism is a political economy phenomenon that requires a more general theory of social and economic transformation.²⁴

Additionally, *regionalism* is an immensely volatile and transformative process; not a static metric that can be easily pinpointed, quantified, and confined to a definition.²⁵ In SADC, regionalism has been perceived as means whereby the region could exploit collective resources, attract foreign direct investment (FDI), access global markets and prevent increased marginalisation in the global economy.²⁶

2.2.1 MARKET LED NEO-LIBERAL APPROACH²⁷

The central issue for neo-liberalism lies with economic efficiency or, more generally, with ensuring growth in economic terms by means of participating in global wealth-generating activities.²⁸ This process is market-driven and led by state and non-state actors. The focus shifts from an imagined political and historical community to a spontaneous, self-interested and self-selected market force driven community of non-state and state actors.

²³ (See 22 above).

²⁴ Richard Gibb, 'Regional Integration and Africa's Development Trajectory: meta-theories, expectations and reality', (2009) Volume 30, Issue 4, Third World Quarterly, <<http://www.tandfonline.com/loi/ctwq20>> accessed 26 July 2017.

²⁵ Benjamin Ersing, 'On the Economic State of the Latin American Project', Working Paper, (2012) accessed: 29 July 2017 <https://www.academia.edu/4096365/Regional_Economic_Integration_in_Latin_America>

²⁶ 'Regional Integration in the Southern Africa Development Community: A case for Developmental Functionalism' https://intelliconn.wordpress.com/2012/10/30/regional-integration-in-the-southern-africa-development-community-a-case-for-developmental-functionalism/#_ftn4 accessed 31 July 2017.

²⁷ Faten Agad, 'New Regionalism as an approach to Cooperation in Africa with reference to the New Partnership for Africa's Development (NEPAD)' (LLM Thesis, University of Pretoria 2007).

²⁸ Alexander Tim Zajontz, 'Regionalism in theory and practice: The transformative potential of civil society in Southern Africa' (Masters Thesis 2013, University of Stellenbosch)

“new regionalism in Africa implies “new effort towards fostering greater integration, interdependence and partnership among African peoples, governments and economies, with the aim of deriving additional leverage in relations with the outside world, particularly on the economic front.”²⁹

SADC regionalism is introverted towards more open and market-oriented regionalism which postulates “policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the people of the Region generally, among Member States”. Over the last two decades, SADC has systematically subscribed to the neoliberal orthodoxy and market integration as the means for regional development, promising redistribution, development, and poverty alleviation through growth”.

To neoliberals, the *essentialia* of regionalism is state interdependence, with the most important areas being the economy and security.³⁰ They focus on the position of interstate institutions and regional organizations for managing interdependencies and attaining combined goals on a regional basis.³¹ The expanding nature of interdependencies increases the need for cooperation among countries and institutions to tackle issues generally affecting countries involved.³²

Neo-liberal institutionalists thus claim that states engage in international cooperation, to broaden their “conceptions of self-interest [and to] widen the scope of cooperation”. According to the theory, developing states might consciously increase their dependence on investment and markets in developed cores, while at the same time enhancing their regional voice in the wider economic dialogue.³³

²⁹ Shola Omotola, ‘Globalization, New Regionalism and the Challenge of Development in Africa’ (2010) Vol. 4 No. 1, pp. 103-136, *Africana*.

³⁰ Christian Fjader, ‘Regionalism in Asia and Europe in a Theoretical Perspective: ‘Rationalist’ and ‘Ideational’ Approaches’ (2012), 10: 73-101, *Asia-Pacific Journal of EU Studies*.

³¹ (See 22 above).

³² (See 22 above).

³³ Shaun Breslin, Christopher W. Hughes, Nicola Phillips, Ben Rosamond (eds) *New Regionalism in the Global Political Economy: Theories and Cases* (Routledge, London 2004).

Based on their assumption of interdependence and thus the need for cooperation, neoliberal institutionalists propagate regionalism as being good and beneficial to members of a region. However, to be beneficial in practice, regionalism needs to be formally institutionalised, as with SADC. The intentional institutional design is perceived as the most effective mechanism by which common problems are solved, which in turn, are essential to the creation of not only functional, but also political spill-over.³⁴ In SADC, the institutionalisation has been evidenced by the different integration phases SADC is supposed to pass through using various instruments agreed among the member states. The (Mining) Protocol in focus is dealt with in chapter three.

The drivers of regional integration may be positive or negative; internal (enhancing economic development and growth regionally) or external to the region. The main drivers for regionalism are (material) gains states expect.³⁵ These include reduced transaction costs, policy externalities, economies of scale, technological innovation due to greater competition, more foreign direct investments, and greater economic and political weight in international markets and institutions.³⁶ The theory of market led neo-liberalism therefore conceptualizes SADC regionalism as driven by independent decision making of regional actors responding to causal factors located within or outside the region.

2.3 CONTEXTUALISING SADC REGIONAL INTEGRATION

Since the beginning of the decolonization process in the 1960's, the establishment of sub-regional economic communities was a significant part of Africa's development strategy and virtually all African countries have embraced regionalism. The commitment to regionalism was without doubt, part of broader aspirations of continental integration, which takes its roots from the Pan-African movement of shared values.³⁷

³⁴ <<https://intelliconn.wordpress.com/2012/10/30/regional-integration-in-the-southern-africa-development-community-a-case-for-developmental-functionalism/>>

³⁵ Tanja A. Börzel & Thomas Risse (eds.) *Oxford Handbook of Comparative Regionalism* (Oxford: Oxford University Press, 2016).

³⁶ Tanja A. Börzel & Thomas Risse (eds.) *Oxford Handbook of Comparative Regionalism* (Oxford: Oxford University Press, 2016).

³⁷ (See 24 above).

Regional integration is a process whereby two or more countries in an area join, to pursue common policies and objectives.³⁸ This can be done in matters of general economic development or in an economic field of common interest to the mutual advantage of all the participating states.³⁹

It can therefore be said that regional cooperation in different areas fuels integration.⁴⁰ This ultimately leads to the creation of shared government architecture with legislative and governance competencies over a region.⁴¹ It creates a relationship among units (states) in which they are mutually interdependent and jointly produce system properties which they would separately lack.⁴²

In today's globalised economy, regional integration is viewed as a strategy to cooperatively position a state into global markets.⁴³ This in turn provides for improved competitiveness, and increased negotiating capacities so that as a regional collective, countries can participate effectively in the world economy and politics.⁴⁴

This led to the establishment of various *Regional Economic Communities* (REC's), such as SADC. The fourteen (14) member REC was established in 1992 when the SADC Treaty was signed by its founding members in Windhoek.⁴⁵

³⁸ Samuel Asante, *Regionalism and Africa's Development: Expectations, Reality and Challenges* (St Martin Press, Inc. New York 1997).

³⁹ (See 38 above).

⁴⁰ (See 27 above).

⁴¹ Nubong Fohitung, 'The Applicability of European process of regional integration to the African context: An analysis of institutional and policy frameworks in the European Union and in the African Union' (Thesis, University of Pretoria, 2016)

⁴² (See 41 above).

⁴³ Rachel Mukamunana & Dr. Kabelo Moeti, 'Challenges of Regional Integration in Africa: Policy and Administrative implications' 2005, *Journal of Public Administration* October.

⁴⁴ (See 43 above).

⁴⁵ Saurombe Amos, 'The role of South Africa in SADC regional integration: the making or braking of the organization', 2010, Vol. 5, Issue 3, *The Journal of International Commercial Law and Technology*. The SADC Treaty, which the ten members signed on that date, entered into force on 5 October 1993, after all these states had ratified it.

According to the preamble of the SADC treaty, the purpose of the SADC is to promote deeper economic cooperation and integration in Southern Africa to help address many of the factors that make it difficult to sustain economic growth and socio-economic development.⁴⁶ The community has an objective to promote equitable economic growth through regional economic integration.⁴⁷

It is a well-known fact that the Southern African sub-region has an exceptional mineral endowment.⁴⁸ As a direct consequence, mining is a major economic activity in the sub-region. It is for this reason that the Heads of State and Government signed the SADC Mining Protocol, which took effect on 8 February 2000.⁴⁹

As per the SADC Protocol on mining, member states must strive to create a conducive environment for attracting local and foreign investment... to the mining sector.⁵⁰ The protocol aims to create a thriving mining sector that can contribute to economic development by harmonizing national and regional policies.⁵¹ One of the primary objectives of the Protocol is to harmonize mining policies within the region.⁵²

It can therefore be deduced that *harmonization* of the mining sectors in the SADC Mining Protocol, emanated from the treaty establishing the Southern African Development Community (SADC) which was signed in Windhoek, Namibia, in August 1992.⁵³

⁴⁶ Preamble of SADC Treaty; "...SADC is determined to alleviate poverty with the ultimate objective of its eradication through deeper regional integration and sustainable economic growth"

⁴⁷ Article 5 of the SADC Treaty; further evidenced by the provisions of Article 1 of the same Treaty.

⁴⁸ Rod Alence & Robert Mattes, 'Mineral Governance Barometer: Southern Africa' Open Society Initiative for Southern Africa, OSISA

<http://www.osisa.org/sites/default/files/osisa_barometer_report-finalallowres.pdf>

⁴⁹ Implementation Plan for the Harmonization of Mining Policies, Standards, and Legislative and Regulatory Frameworks in Southern Africa, April 2008
<repository.uneca.org/bitstream/handle/10855/5264/bib.%2035787_1.pdf> accessed: 28 July 2017

⁵⁰ See Article 6(3) of the Protocol. The Protocol came into force in February 2000, <http://www.sadc.int/tThirdWorldQuarterly,30:4,701-721hemes/economic-development/industry/mining/>, accessed: 31 July 2017.

⁵¹ (See 27 above).

⁵² See Article 2(2) of the SADC Protocol on Mining.

⁵³ (See 49 above).

Harmonization involves synchronizing the laws in the member countries.⁵⁴ It reduces differences in laws to the barest minimum, but it does not eliminate them. Harmonization allows countries to take account of their diverse national needs when implementing the harmonized laws. Harmonization (indeed some may argue unification) of laws is an important part of the legal infrastructure of integrated economies.⁵⁵ In the context at hand, harmonization refers to the merging of national systems for managing and administering the mining sector in a manner that reduces dissimilarities in the operating environment between countries of the SADC region.⁵⁶

Harmonization is part of the economic integration theory which views the broad path of integration as passing through a series of progressively deeper stages. Economic integration progresses through various stages – free trade area, customs union, common market, economic union and complete economic integration.⁵⁷

An economic union is achieved through a much greater degree of harmonization of national economic policies.⁵⁸ It has often been argued that without harmonization, meaningful integration cannot be achieved.⁵⁹

2.4 CONCEPTUAL APPROACHES TO SADC REGIONAL ECONOMIC INTEGRATION

“at least at the level of rhetoric, economic integration in Africa has come to be regarded as a panacea, the answer to all problems of underdevelopment”⁶⁰

⁵⁴ Richard Frimpong Oppong, *Legal Aspects of Economic Integration in Africa* Cambridge University Press, 2011 published in New York.

⁵⁵ Richard Oppong, 'Relational Issues of Law and Economic Integration in Africa: Perspectives from Constitutional, Public and Private International Law' (PHD Thesis, University of British Columbia, 2009) (See 49 above).

⁵⁷ Southern African Development Community is not common market yet. Nonetheless, each has a protocol dealing with the free movement of persons.

⁵⁸ (See 49 above).

⁵⁹ Richard Frimpong Oppong 'Observing the Legal System of the Community: The Relationship Between Community and National Legal Systems under the African Economic Treaty' 2006, Vol 15: 41, page 70 2006 Tulane Journal of International and Comparative Law Tulane Journal of International and Comparative Law.

⁶⁰ Samuel Asante, *African Development: Adebayo Adedeji's Alternative Strategies*, (New York: Hans Zell Publishers 1991).

The section progresses to identify and discuss the contribution of an economic perspective to understanding the economic aspect of regionalism. Simply placed, the theoretical framework for regional economic integration applicable to the SADC minerals sector *harmonization* sphere. The term regional economic integration limits economic integration to a region.⁶¹

Regional economic integration comprises a set of political and economic measures designed to eliminate discrimination between economic units that belong to different national states.⁶² Regional integration requires independent nation states to cede their national sovereignty, make political commitments and sacrifices, and forego certain benefits in the interest of the larger body.⁶³

2.4.1 OPEN REGIONALISM

This section briefly examines SADC regional integration approach in order to understand appreciate the modality which the SADC regional integration follows.

It would logically follow that the conceptual and theoretical aspect of economic integration identified, shares some parallels with neoliberalism. The theory of *open regionalism* presupposes a sort of economic integration and cooperation based on principle of non-discrimination and compatible with multilateralism.⁶⁴

Open regionalism is a process that results from reconciling the interdependence that stems from special, preferential agreements, and that which basically arises from the market signals that are produced by trade liberalisation in general.⁶⁵ What open regionalism seeks

⁶¹ Monone Madyo, 'The Importance of Regional Economic Integration in Africa' (Thesis, University of Pretoria, 2008).

⁶² (See 61 above).

⁶³ Peace Jiboku, 'The Challenge of Regional Economic Integration in Africa: Theory and Reality' (2015) Africa's Public Service Delivery & Performance Review Journal <www.apsdpr.org/index.php/apsdpr/article/download/96/95>.

⁶⁴ José Briceño Ruiz, 'The Economic Theory of Integration in Central America and the Caribbean: From Autonomy to Open Regionalism, 1999, Vol.2, Asian Journal of Latin American Studies.

⁶⁵ Latin America Economic Integration, Cooperation Investment and Business Guide; Volume 2 Strategic Information and Opportunities Handbook; 2016; International Business Publications, USA Washington.

to accomplish is to make explicit integration policies compatible with, and complementary to enhance international competitiveness.⁶⁶

SADC has a policy objective of developing an economic community through the pursuit of market integration.⁶⁷ That is coupled with an ideological disposition and belief in the merits of economic integration for the improvement of the welfare of the citizens and as an avenue to exercise more influence on global arena.⁶⁸

2.5 CONCEPTUAL FRAMEWORK: ATTRACTING FDI

There is a growing consensus on the positive role and impact of FDI on the prosperity and development of a country, and its translation in the national policies and regulations.⁶⁹ FDI has been defined as long-term international capital movement, made for productive activity and accompanied by the intention of managerial control or participation in the management of a foreign firm.⁷⁰

There are several factors influencing FDI,⁷¹ and any effort to discuss conceptual issues on FDI must be cautious to avoid sweeping generalizations. It is important to note that this study is based on the neo-classical investment theory which posits that foreign investment is wholly beneficial for a country.⁷² Several FDI theories exist to explain the attractive factors for FDI in a country.

⁶⁶ Economic Commission for Latin America, 'Open Regionalism in Latin America and the Caribbean: Economic Integration as a Contribution to Changing Patterns with Social Equity' (1993) Santiago de Chile: ECLAC <www.cepal.org/id.asp?id=4747> accessed 06 August 2017.

⁶⁷ (See 41 above).

⁶⁸ (See 41 above).

⁶⁹ (See 41 above).

⁷⁰ FDI: A Conceptual Framework
http://shodhganga.inflibnet.ac.in/bitstream/10603/53001/9/09_chapter%202.pdf accessed: 20 July 2017.

⁷¹ Some of the considerations may include adequate and reliable power; infrastructure especially feeder roads to reach the remoteness areas, designated areas for investment projects, such as farming land, industrial plots, where investors may acquire for investment purposes etc

⁷² Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment*, 3rd edition (Cambridge University Press, UK 2010).

Briefly, a good example would be the *law and development social theory* which in essence posits that law can be used to engineer capacity for investment negotiations.⁷³

2.5.1 Eclectic Paradigm

The Eclectic paradigm of J.H. Dunning, known as the OLI model, has been the most influential framework for empirical investigation of FDI determinants for decades.⁷⁴ In terms of the Dunning's eclectic paradigm the returns to FDI and FDI itself, can be explained by three groups of factors: the *ownership* advantages of firms (O), which indicate the competitive advantages of the firm which is going to do its business internationally; by *location* factors (L), which explain where MNC is going to produce or do its business; and by *internalisation* factor (I).⁷⁵

The ownership represents advantages include economies of scale, exclusive production and technical expertise, managerial and marketing skills.⁷⁶ It has been argued that these (O) advantages largely take the form of privileged possession of intangible assets and the use made of them are assumed to increase the wealth-creating capacity of a MNC, and hence the value of its assets.⁷⁷

These pull factors of host country contribute to decision made by multi-national companies/corporations ('MNCs') to employ ownership advantages to produce abroad.⁷⁸ Internalization (I) factors determine the host nation's ability to exercise monopoly power over the assets under the governance, an internal market is created between parent-company and affiliates to control key resources of competitiveness or to reduce the risk of

⁷³ Maria Oluyeju, Resource for Infrastructure (R41) Investment Agreement Between Resource Rich Sub-Saharan African Countries and Corporate Developers: A Cooperative Pursuit of Mutual Interests or a Poisoned Chalice? (LLM Thesis, University of Pretoria 2017)

⁷⁴ Stoian, Carmen R. and Filippaios, Fragkiskos (2008) Dunning's eclectic paradigm: A holistic, yet context specific framework for analysing the determinants of outward FDI: Evidence from international Greek investments. *International Business Review*, 17 (3). pp. 349-367. ISSN 0969-5931. <<https://kar.kent.ac.uk/9871/1/IBRRRevisedLast.pdf>>

⁷⁵ Stephany Abokzele Adongo & others, 'On China's FDI Leadership and Lessons for Ghana's FDI Development: A Theoretical Perspective' 2016 IJSRSET | Volume 2 | Issue 6 |

⁷⁶ (See 75 above)

⁷⁷ (See 75 above)

⁷⁸ (See 75 above)

selling them as well as the right of use of them, to foreign firms.⁷⁹ According to this theory, FDI is chosen as a market entry strategy so that a firm can exploit its ownership advantages. The OLI model to a certain extent emphasizes the negative impact nationalization and the effects of BEE policies on investment.

2.5.2 Theory of Internationalization

The theory of internationalization mainly relates to the transaction cost approach.⁸⁰ The basic hypothesis of this theory is that multinational firms emerge when it is most advantageous to internalize the use of intermediate goods such as outsourcing their technology through the market.⁸¹ The baseline forecast of the theory is that, given a distribution of the allocations of factors, multinational activity will be positively related to the costs of organizing cross-border markets in intermediate products.⁸² This theory finds limited, but mentionable, application in the context of this study, as it relates to the overall harmonization effect and cross border markets access for all SADC member states, if conditions are in equilibrium.

2.6 CONCLUDING REMARKS

This chapter has explored the different theoretical perspectives on SADC regional integration as well as the determinants of FDI in a country. As mentioned, Southern Africa's development is inextricably linked to its mineral resources. The region has called for the harmonization of its sectoral (mining) policies as part and of its regional integration scheme.

In a global village where economic blocs have become important in the international political economy, harmonization will give Southern Africa substantial negotiating powers in its dealings with other economic groupings and will help reduce prospects for marginalization. Inflows of FDI are often important and, at times, essential for a country's economy. The approaches discussed in this chapter pertaining to FDI pave way for chapter four's analysis on the impact of regional integration on national FDI determinants.

⁷⁹ (See 75 above)

⁸⁰ (See 75 above)

⁸¹ (See 75 above)

⁸² (See 75 above)

The next chapter provides an overview of various legal harmonisation initiatives at a regional level, within the mining sector.

3.1 INTRODUCTION

This chapter will briefly examine the harmonization landscape of the SADC mining sector. In some instances, mineral investment in SADC countries is constrained by mineral policies, mining codes and environments that have not been conducive to mining.⁸³ Traditionally, it has been argued that in order to increase intra-regional FDI, member states of SADC should harmonise their policies and procedures for mineral extraction.⁸⁴

In terms of foreign direct investment (FDI) flows, investors tend to consider the prospectivity of an entire region, even though the mines they develop are in individual countries.⁸⁵ Investment promotion campaigns are therefore better undertaken at the regional level based on a regional sense of expectation. Therefore, harmonization not only promotes the sharing of best practices but also helps to ring -fence the region from global predators in the investment arena.⁸⁶

The Charter of the AU obliged Member States to co-ordinate and harmonise their general policies in a number of fields, including economic co-operation.⁸⁷ It is important to note that the African Union (AU) has identified coordination and cooperation regarding natural resources as one of the sixteen (16) priority areas for African integration.⁸⁸ The AU is Africa's

⁸³ Hudson Mtegha, 'Towards a Minerals Policy for Southern African Development Community (SADC)', (Doctor of Philosophy Thesis, University of Witwatersrand, 2005).

⁸⁴ Olawumi D. Awolusi, 'Mining Sector and Economic Growth in Southern African Economies: A Panel Data Analysis' <https://www.tips.org.za/research.../1223_4a356b8cc353d5f245883d1f590175c6> .

⁸⁵ Dirk Willem te Velde, 'Government Policies Towards Inward Foreign Direct Investment In Developing Countries: Implications for human capital formation and income inequality' <http://www.oecd.org/dev/2698620.pdf>, accessed on 10 October 2017.

⁸⁶ United Nations Economic Commission for Africa Southern Africa Office, 'Harmonization of Mining Policies, Standards, Legislative and Regulatory Frameworks in Southern Africa' (30 December 2004) <www.uneca.org/.../harmonization-mining-policies-standards-legislative-and-regulator> accessed on 29 April 2017.

⁸⁷ See Art II (2) of the Charter of the Organization of African Unity, 49 UNTS 39/2 ILM 766 (1963).

⁸⁸ Chrysantus Ayangafac, 'Utilising the Management of Natural Resources to Forge a Union Government for Africa' in Timothy Murithi (ed) *Towards a Union Government for Africa: Challenges and Opportunities Institute for Security Studies, 2008*, <<https://issafrica.org/chapter-13-utilising-the-management-of-natural-resources-to-forge-a-union-government-for-africa-chrysantus-ayangafac-institute-for-security-studies>>, Accessed: 17 August 2017.

premier institution and principal organisation for the promotion of accelerated socio-economic integration of the continent.⁸⁹

The SADC region is a major reservoir of some of the world's most valuable minerals, many of which have not been exploited to the fullest.⁹⁰ SADC is striving to become one of the safest and most stable destinations of foreign investment in the world.⁹¹ This chapter gives an overview of the regional instruments that form the foundation of the regional harmonization framework.

3.2 THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (SADC) TREATY

The Southern African Development Community (SADC) was established as a development coordinating conference (SADCC) in 1980 and transformed into an intergovernmental development community in 1992.⁹² It is an organisation that strives for regional integration to promote economic growth, security and peace in the southern African region.⁹³

Harmonization in the SADC region is rooted in the Treaty establishing the Southern African Development Community (SADC), which was signed in Windhoek, Namibia, in August 1992.⁹⁴ The SADC Treaty is a legally binding and all-encompassing framework by which countries shall coordinate, harmonize and rationalize their policies and strategies for sustainable development in all areas of human endeavour.⁹⁵ The SADC Treaty is the supreme law of the community.

⁸⁹ Tapiwa Shumba, 'Revisiting legal Harmonisation under the Southern African Development Community Treaty: The need to amend the Treaty', (2015), Law, Democracy and Development, Volume 19.

⁹⁰ SADC Major Achievements and Challenges 25 Years of Regional Cooperation and Integration, <http://www.sadc.int/files/7713/5826/4978/Achievements_booklet.pdf> Accessed: 20 August 2017.

⁹¹ (See 90 above).

⁹² <<http://www.sadc.int/about-sadc/overview/sadc-facts-figures/>> Accessed: 22 August 2017

⁹³ Anyanwu, J.C. and Yameogo, N.D. 'What drives foreign direct investments into West Africa? An empirical investigation', (2015), African Development Review, 27(3): 199-215.

⁹⁴ United Nations Economic Commission for Africa Southern Africa Office, 'Harmonization of Mining Policies, Standards, Legislative and Regulatory Frameworks in Southern Africa' (30 December 2004) <www.uneca.org/.../harmonization-mining-policies-standards-legislative-and-regulator> accessed on 29 April 2017.

⁹⁵ (See 90 above).

The main economic objective has been recast and expanded to indicate that the SADC shall:

*"promote sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration; achieve complementarity between national and regional strategies and programmes..."*⁹⁶

Article 5(2) reiterated that SADC shall endeavour, *inter alia* to harmonise political and socio-economic policies and plans of Member States; encourage peoples of the region to develop economic, social and cultural ties, and to participate fully in the implementation of SADC projects.

Additionally, member states must undertake to adopt adequate measures to promote the achievement of the objectives of SADC, and shall refrain from taking any measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of the Treaty.⁹⁷ Article 21(2) requires that Members States coordinate, rationalise and harmonise their overall macro-economic and sectoral policies and strategies, programmes and projects in the areas of co-operation through the appropriate institutions.

The treaty provides for the development of protocols for integration in identified sectors of regional cooperation and integration.⁹⁸ The Protocols set out the principles and procedures under which Member States will conduct their cooperation in specific areas.⁹⁹

SADC sectoral Protocols are crucial in the organization's community building and integration process. They provide the legal framework for Member States to cooperate and work together towards the attainment of common objectives, aimed at cementing the social,

⁹⁶ Southern African Development Community Treaty, See Article 5 (1)(a).

⁹⁷ Southern African Development Community Treaty, See Article 6(1).

⁹⁸ Southern African Development Community Treaty, See Article 22. It should rather be: See Art 22 of the Declaration and Treaty of the Southern African Development Community, 1992.

⁹⁹ (See 90 above).

economic and political fabrics of the Member States.¹⁰⁰ The Protocols are meant to create specific legal regimes in all the areas they regulate, i.e. legal regime on tourism, health, education, mining, etc. Such Protocol includes the SADC Mining Protocol which will be discussed in detail below.

To date, 24 Protocols have been signed which provide the legal framework for implementation of agreed decisions at regional level.¹⁰¹ A Protocol, including any amendment thereto, is essentially an instrument of implementation of the SADC Treaty.¹⁰²

3.2.1 SADC COMMON AGENDA

The SADC Common Agenda (which is articulated as Article 5 of the SADC Treaty) sets out key priorities, goals and a regional development plan guided by the vision of SADC.¹⁰³ Additionally it also sets out strategies for pursuing those objectives,¹⁰⁴

The harmonization of mining policies has also been set out in the SADC Common Agenda, which seeks to achieve complementarities between national and regional strategies and programmes. SADC also aims at achieving sustainable utilisation of mineral resources and protection of the environment; and achieving complementarities between national and regional strategies.¹⁰⁵

¹⁰⁰ (See 90 above).

¹⁰¹ (See 90 above).

¹⁰² Southern African Development Community Treaty, See Article 2 of the Amended Treaty.

¹⁰³ (See 90 above).

¹⁰⁴ Clement Ng'ong'ola, 'The Legal Framework for Regional Integration in the Southern African Development Community' (2008), University. Botswana L.J. 3, 46.

¹⁰⁵ Hudson Mtegha, 'Towards a Minerals Policy for Southern African Development Community (SADC)', (Doctor of Philosophy Thesis, University of Witwatersrand, 2005).

3.3 SADC PROTOCOL ON MINING¹⁰⁶

The SADC Protocol on Mining was adopted in 1997 to promote the interdependence and integration of mining policies for the accelerated development and growth of the Mining Sector in the SADC Region.¹⁰⁷

The Protocol aims at harmonising national policies to the objective of integration, facilitating the development of human and technological capacities and promoting private sector participation in the regional minerals industry.¹⁰⁸ Member States must faithfully implement their obligations towards the Protocols that they have signed and committed to, as each Protocol is designed to contribute to the development of the region and its Member States.¹⁰⁹

By way of application, the Protocol is more suited as a tool to harmonise regional mining laws.¹¹⁰ The Protocol is the most appropriate instrument for the harmonisation of cross-border laws because all the member states have ratified it. In this manner, the Protocol symbolises a regional mineral policy statement.

3.3.1 SADC MINING STRATEGIC PLAN

In April 2001, the SADC Mining Sector Co-ordinating Unit held a workshop to develop a strategic plan for implementing the Mining Protocol. The strategic framework for implementing the SADC Mining Protocol, proposed several strategic actions in key areas of integration, including policy and administration; small-scale mining; geology and information systems; safety, health and environment; and investment promotion.¹¹¹

¹⁰⁶ The Protocol became operational on 8 February 2000.

¹⁰⁷ Tadios Muzoroza, 'Mining Law and Policy: A comparative analysis of South Africa and Zimbabwe's mining laws and policy regimes; (University of Pretoria, LLM Thesis, 2010).

¹⁰⁸ (See 105 above).

¹⁰⁹ (See 90 above).

¹¹⁰ Amos Saurombe, 'The SADC Trade Agenda, A Tool to Facilitate Regional Commercial Law: An Analysis' (2009) SA Mercantile Law Journal Volume 21, Issue 5, p. 695 - 709 <https://journals.co.za/content/ju_samlj/21/5/EJC54374> Accessed: 02 September 2017.

¹¹¹ (See 105 above).

The Plan covers seven areas, namely:¹¹²

1. Mining protocol - dealing with issues of institutional framework, policy harmonization, capacity and funding;
2. Information and geology – dealing with efficient information generation and dissemination;
3. Mining, marketing and mineral processing – dealing with promotion of investment in the sector;
4. Small-scale mining – dealing with supporting the development of the sub-sector in the region;
5. Human resource development and technology – dealing with development of skills and technology base;
6. Environmental protection – dealing with environmental standards and initiatives; and,
7. Gender mainstreaming in the mining sector – facilitating the active involvement of women in the sector.

3.3.2 HARMONIZATION OF MINING POLICIES, STANDARDS, LEGISLATIVE, AND REGULATORY FRAMEWORK IN SOUTHERN AFRICA

As a follow-up to the strategic plan the SADC Mining Sector Co-ordinating Unit held a workshop on the harmonization of policies.¹¹³ One of the main conclusions made at the workshop was that:

“Mining is key in our economies, but there is no significant participation by local people. There is need to involve indigenous people in the development of the sector. We should aim at interventions that can bring about effective participation by local citizens.”¹¹⁴

In the preceding years, several studies have been undertaken to deepen regional integration in the SADC. However, these were not directed at harmonizing policy, and legislative and

¹¹² (See 105 above).

¹¹³ (See 105 above).

¹¹⁴ (See 105 above). Proceedings of the Workshop on harmonisation of policies to promote private sector participation in Mining. SADC/MCU-EU/DIAGNOS, Gaborone, March 20-22, 2002.

regulatory environments within the SADC mining sector, but rather, for example, to deepening regional integration to eliminate the fragmented goods market in Southern Africa. To date, the “Harmonization of Mining Policies, Standards, and Legislative and Regulatory Frameworks in Southern Africa,” undertaken in 2004 by SADC with the assistance of the United Nations Economic Commission for Africa Southern Africa Office (UNECA-SA), is the only comprehensive study that addresses the issue of harmonization directly.¹¹⁵

The framework developed for the region is aligned to the Regional Indicative Strategic Development Plan (RISDP)¹¹⁶ and is informed by developments within the New Partnership for Africa's Development (NEPAD)¹¹⁷ and the African Mining Partnership (AMP)¹¹⁸. The Framework was approved by the SADC Mining Ministers in March 2006, in Antananarivo, Madagascar.¹¹⁹

3.3.3 HARMONIZATION IMPLEMENTATION PLAN (HIP)

Also in 2009, the United Nations Economic Commission for Africa (UNECA) and SADC released a report on the harmonization of national mining policies (NMPs) in the SADC region as part of the ongoing collaborative programme between these two organisations to implement the SADC Mining Protocol.¹²⁰

¹¹⁵ United Nations Economic Commission for Africa Southern Africa Office, ‘Harmonization of Mining Policies, Standards, Legislative and Regulatory Frameworks in Southern Africa’ (30 December 2004) <www.uneca.org/.../harmonization-mining-policies-standards-legislative-and-regulator> Accessed on 29 April 2017.

¹¹⁶ Southern African Development community Regional Indicative Strategic Development Plan <http://www.sadc.int/files/5713/5292/8372/Regional_Indicative_Strategic_Development_Plan.pdf> .

¹¹⁷ New Partnership for Africa's Development the technical body of the African Union <<http://www.nepad.org/content/about-nepad>>, accessed 30 October 2017.

¹¹⁸ The African mining partnership was launched in 2004, through the African Union to further the New Partnership for Africa’s Development (NEPAD) objectives through mining and minerals initiatives in the quest for economic development in the continent. <<https://www.gov.za/african-mining-partnership>>, accessed on 10 October 2017.

¹¹⁹ <<http://www.sadc.int/themes/economic-development/industry/mining/>> Accessed on: 10 September 2017.

¹²⁰ Implementing The Framework For Harmonising The National And Regional Policies, Strategies And Programs In Terms Of The SADC Mining Protocol <http://peopleandextractives.org/index.php?option=com_content&view=article&id=173&Itemid=37> Accessed on: 09 September 2017.

Themes were identified in accordance with major issues impacting on minerals development and international competitiveness. Some of the issues are peculiar and specific to the minerals industry while others are crosscutting. This was done to ensure that the pursuit of harmonization is holistic and encompasses all economic, political and social facets in the region. The Harmonisation Implementation Plan has eight themes or areas of work grouped into categories of related activities:¹²¹

- Mineral Policies
- Political, Economic and Social Environment
- General Investment Regulations
- Mining Fiscal Environment
- Mineral Administration and Development Systems
- Artisanal and Small-Scale Mining (ASM)
- Research and Development (R&D)
- Human Resource and Skills development
- Gender

The Harmonization Implementation Plan identified actions that need to be undertaken to bring about specific outcomes in the member States. It has been identified in the plan, that an institutional framework to facilitate the implementation of the Plan has been suggested, together with a monitoring and evaluation process involving the SADC Secretariat and other stakeholders.¹²² The suggested was made in order to ensure that regional economic integration arrangements create a competitive mining sector across SADC.

The Harmonisation Implementation Plan was adopted by SADC Mining Ministers at their meeting held on 12th November 2009 in Kinshasa, Democratic Republic of Congo.

¹²¹ (See 119 above).

¹²² United Nations Economic Commission for Africa Southern Africa Office, 'Harmonization of Mining Policies, Standards, Legislative and Regulatory Frameworks in Southern Africa' (30 December 2004) <www.uneca.org/.../harmonization-mining-policies-standards-legislative-and-regulator> Accessed on 29 April 2017.

3.4 REGIONAL INDICATIVE STRATEGIC DEVELOPMENT PLAN

The SADC Regional Indicative Strategic Development Plan (RISDP) aims to align policies, programmes and activities with a view to deepening regional integration. It is a 15 year regional integration development framework based on the SADC Vision, Mission, Common Agenda and Principles, setting the priorities, policies and strategies for achieving the long-term goals of the Southern African Development Community. It was approved at the SADC Summit in Dar es Salaam, the United Republic of Tanzania, in August 2003.¹²³ The RISDP seeks to provide strategic direction to all activities of SADC and to "operationalise" the Common Agenda¹²⁴

The RISDP identifies intervention areas that are critical for the achievement of deeper integration. The sectoral cooperation and integration intervention areas are trade, economic liberalization and development, infrastructure support for regional integration and poverty eradication, sustainable food security and human and social development.¹²⁵

As the plan has not been incorporated into the SADC treaty, this makes it difficult for SADC to sanction member states that default on the implementation of the plan.¹²⁶

3.5 THE TIMING OF THE SADC MINING HARMONIZATION FRAMEWORK

The SADC Harmonization instruments were coincidentally unveiled at the same time with the continental initiative on mining, the African Mining Vision (AMV). The sharp and prolonged nature of the cyclical nature of market has provoked a rethink of the ideational foundation of governance in Africa's extractive sector. The falling commodity prices and the ensuing fiscal crises are challenging many mineral-rich African countries.

¹²³ (See 90 above) <http://www.sadc.int/files/7713/5826/4978/Achievements_booklet.pdf> Accessed on 20 August 2017

¹²⁴ Clement Ng'ong'ola, 'The Legal Framework for Regional Integration in the Southern African Development Community' (2008), University of Botswana L.J. 3, 46

¹²⁵ (See 90 above)

¹²⁶ Amos Saurombe, 'The SADC Trade Agenda, A Tool to Facilitate Regional Commercial Law: An Analysis' (2009) SA Mercantile Law Journal Volume 21, Issue 5, , p. 695 - 709 <https://journals.co.za/content/ju_samlj/21/5/EJC54374> Accessed: 02 September 2017>

The endorsed continental framework (AMV) aims to bring about a "transparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socio-economic development. The nature of crises has changed over the last decade, becoming more transboundary in reach, crossing sectors, regions and countries. Crises have become more systemic, marked by a high degree of complexity, uncertainty, ambiguity as well as urgency.¹²⁷

3.6 CONCLUDING REMARKS

SADC member states are aligning their mining legislation with each other in a bid to attract investment and boost economic growth in the mineral rich southern African region. Theoretically, as afore-discussed, if the countries align their legislation, then the competition between these countries will only relate to things like the availability of infrastructure, fiscal regimes, resources, political stability etc. However, the harmonization implementation plan ensures it covers issues specific to the minerals industry and those that are crosscutting. This was done to ensure that the pursuit of harmonization is holistic and encompasses all economic, political and social facets in the region.

The SADC harmonisation of mining laws framework has been in place since 2006 and seeks to align mining policies, mineral processing and value addition policies, research and development and policies on small scale mining enterprises. The harmonisation project is aimed at ensuring that mining policies of member states are knitted in a way to facilitate investment and ensure common standards in the region's mining sector as reflected in its strategy and protocol on mining. Indeed, harmonization is an essential step towards a deeper cooperation among member States in fulfilment of the SADC Common Agenda.¹²⁸

While aiming for greater harmonisation and higher levels of integration within the Community as a whole, there should be flexibility to accommodate special circumstances and particular arrangements between some member states.¹²⁹

¹²⁷ Kojo Busia and Charles Akong, 'The African Mining Vision: Perspectives on Mineral Resource Development in Africa' (2017), *Journal of Sustainable Development Law & Policy*, Vol. 8, No. 1 145, 192

¹²⁸ (See 11 above)

¹²⁹ Clement Ng'ong'ola, 'The Legal Framework for Regional Integration in the Southern African Development Community' (2008), *University of Botswana L.J.* 3, 46

In this chapter, the author discussed the SADC mining harmonization framework to showcase the applicable regional instruments that provide for harmonization. In chapter four, the author will examine how the regional harmonization initiatives have impacted the Namibian mining investment environment.

CHAPTER FOUR An appraisal of Namibia's minerals investment environment after SADC harmonization strategies

4.1 BRIEF BACKGROUND

While geologic and economic considerations are important factors in mineral exploration, a region's policy climate is also an important investment consideration.¹³⁰ Namibia is a founding member of the Southern African Development Community (SADC).¹³¹

Benefits from minerals can only be realised if investment is made in the sector.¹³² With globalisation, countries should compete to attract this investment. Hudson argued that countries must offer terms as attractive as those with similar geological potential.¹³³ This research thesis is concerned with foreign direct investment in the mining sector. Foreign direct investment refers here to an investment made to acquire lasting interest in enterprises operating outside the economy of the investor, in which the investor's purpose is to gain effective voice in management of the enterprise.¹³⁴

¹³⁰ Fraser Institute Annual Survey of Mining Companies 2016 <fraserinstitute.org> accessed: 11 August 2017.

¹³¹ Kaire M Mbuende, 'Namibia and the Southern African Development Community' http://www.kas.de/upload/Publikationen/2014/namibias_foreign_relations/Namibias_Foreign_Relations_mbuende.pdf, accessed 30 October 2017; Namibia formally acceded to SADCC in 1990 as its tenth member state. However, the relationship between Namibia and SADCC dates back to the organisation's establishment in 1980.

¹³² Hudson Mtegha, 'Towards a Minerals Policy for Southern African Development Community (SADC)', (Doctor of Philosophy Thesis, University of Witwatersrand, 2005).

¹³³ (See 132 above)

¹³⁴ Lone Wandahl Mayal, *International investment Law and the Right to Regulate: A Human Rights Perspective* Routledge, 2016.

4.2 ACTIVE IMPLEMENTATION

4.2.1 The SADC MINING PROTOCOL

As per Article 2 of the SADC Mining Protocol:

“Member states shall seek to harmonize national and regional policies, strategies and programmes related to the development and exploitation of mineral resources”

The SADC Mining Protocol promotes harmonization and the economic empowerment of previously disadvantaged persons.¹³⁵

Namibia is a member of SADC and as such is mandated to implementation of the SADC Treaty and the SADC Mining Sector Protocol.¹³⁶ Namibia has ratified the SADC Protocol,¹³⁷ which expressly mandates all member states of SADC to adopt policies that encourage the exploration and commercial exploitation of mineral resources by the private sector.¹³⁸ In this regard, Namibia’s right to regulate must violate international rules (i.e. the SADC Treaty).¹³⁹

Article 100 of the Namibian Constitution also lays a foundation for who regulates and holds ownership over all-natural resources.¹⁴⁰ Additionally, section 2 of the Minerals Prospecting and Mining Act of 1992, which provides for rights in relation to minerals, Declaration and Treaty of the Southern African Development Community that ownership and of all minerals is to be under the administration of the state.

¹³⁵ See Article 2(2) and 2(8) of the SADC Protocol on Mining.

¹³⁶ Ministry of Mines and Energy, (2003). Minerals Policy of Namibia. Ministry of Mines and Energy: Windhoek, Namibia, page 38.

¹³⁷ The SADC Protocol on Mining. Entered into force on 10 February 2000.

¹³⁸ Article 6(1) of the SADC Protocol on Mining. Entered into force on 10 February 2000.

¹³⁹ Refer to Article 144 of the Namibian Constitution, Act 1 of 1990.

¹⁴⁰ Refer to Article 100 of the Namibian Constitution, Act 1 of 1990: Land, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State if they are not otherwise lawfully owned.

4.2.2 MINERALS POLICY OF NAMIBIA

A policy may be defined as:

*A broad guide to present and future decisions, selected in light of given conditions from a number of alternatives; the actual decision or set of decisions designed to carry out the chosen course of actions; a projected program consisting of desired objectives (goal) and the means of achieving them.*¹⁴¹

The Government developed a fully articulated minerals policy that was adopted in 2003. The policy, has as an objective the promotion and encouragement of local participation in exploration and mining.¹⁴² The policy has an explicit provision regarding empowerment, which says *“Government will develop strategies to support Namibian participation in the mining sector to achieve sustainable development”*.

It could be concluded that the policy formulation process ends with policy creation; that is the laying down of a valuable authoritative assignment in the form of a law; a program or a provision.¹⁴³ While policy planning and development is an intellectual process, policy implementation is operational in nature. A good policy needs to be followed up with an implementation plan; otherwise it is as bad as having no policy at all.¹⁴⁴ Accordingly it is submitted that the following laws have been guided by current government minerals policy.¹⁴⁵

4.3. THE NEGATIVE IMPACTS OF THE SADC HARMONIZATION INITIATIVES

It is trite law that SADC member States should make local empowerment a mandatory requirement on holders of exploration and mining licences.

¹⁴¹ Maluleke Samuel Maselesele, *Managing the implementation of the assessment policy in the senior certificate band*, (PHD Thesis, University of Pretoria - 2011)

¹⁴² (See 136 above) page 9

¹⁴³ (See 141 above).

¹⁴⁴ (See 132).

¹⁴⁵ A White Paper often forms the basis of legislation. If the Minister or the Department decides that a new law is necessary to achieve its objectives and implement its policy, the Department will begin the job of drafting the new law.

This requires development of systems that encourage investors to provide meaningful empowerment opportunities to historically disadvantaged persons and communities.¹⁴⁶ To that end, Namibia promulgated the 'Namibia Investment Promotion Act' (NIPA); established the Epangelo Mining Company, and formulated the 'New Equitable Economic Empowerment Framework Bill'.

4.3.1 NAMIBIA INVESTMENT PROMOTION ACT (NIPA)

Over 26 years into Namibia's independence, inequalities in the socio-economic structure of the country's contemporary society indicative of the apartheid era still exist.¹⁴⁷

This has translated into the majority of the indigenous citizens remaining excluded from participating in the economic mainstream. This state of affairs has prompted the Namibian Government to adopt extraordinary mechanisms aimed at trying to remedy the aforementioned socio-economic inequalities.¹⁴⁸

One such mechanism is the promulgation of the Namibian Investment Promotion Act No. 9 of 2016 (NIPA). NIPA was passed in August 2016, and it is set to replace the Foreign Investments Act of 1990.¹⁴⁹ The NIPA provides that certain sectors of Namibia's economy should be reserved for Namibian nationals.¹⁵⁰ The Minister responsible for investment has the discretionary power to reserve categories exclusively for certain categories of investors and an *approval and registration* regime has been introduced.¹⁵¹

¹⁴⁶ (See 11 above).

¹⁴⁷ Tapiwa Warikandwa, 'A tale of two devils; balancing indigenisation objectives and foreign investment in Namibia: Is the Namibia Investment Promotion Act No. 9 of 2016 what the doctor ordered for?'; Unpublished paper.

¹⁴⁸ (See 147 above).

¹⁴⁹ Stefanie Busch, 'The Namibia Investment Promotion Act, 2016: hindering or promoting foreign investment?' <https://www.ensafrica.com/news/The-Namibia-Investment-Promotion-Act-2016-hindering-or-promoting-foreign-invest?> Accessed: 25 September 2017.

¹⁵⁰ Refer to section 8 of NIPA which provides for the *Reservation of categories of economic sectors and business activities for certain categories of investors*.

¹⁵¹ (See 150 above).

These reserved economic sectors or business activities are those:

- a) reserved for the State;¹⁵²
- b) reserved for Namibians and entities whose majority shareholdings are owned by Namibians;¹⁵³
- c) reserved for joint venture partnership between Namibian investors and foreign investors;¹⁵⁴ and
- d) reserved for investors that meet the requirements of section 4 and the prescribed specific conditions.¹⁵⁵

The Act further states that a foreign investor must meet the applicable requirements for categories of investors to invest in the reserved economic sectors or business activities.¹⁵⁶

The limitations also apply where there is a proposed change of ownership or control of an investment to a foreign investor.¹⁵⁷

The Act states that a foreign investor may not invest in Namibia; or acquire any licence, permit, authorisation or concession in Namibia, through any form of merger, acquisition, direct or indirect sale or transfer without the approval of the Minister, the ambit of which is much wider than merely reserved business or economic sectors.¹⁵⁸

The net effect of the NIPA is that investment requirements for foreign investors will now become somewhat more stringent with the reform of the country's investment laws. Sadly, in a neoliberal economic environment, little attention might have been paid to the potential negative impact of an indigenisation driven investment regulation which on the face-of-it favours indigenous Namibians, in selected sectors of the country's economy, over foreign investors.¹⁵⁹

¹⁵² Section 8(2)(a).

¹⁵³ Section 8(2)(b).

¹⁵⁴ Section 8(2)(c).

¹⁵⁵ Section 8(2)(d).

¹⁵⁶ Section 8(4).

¹⁵⁷ Section 8(5).

¹⁵⁸ Section 11 of the NIPA.

¹⁵⁹ (See 174 above).

Whilst the Government of Namibia is faced with a challenge of balancing between indigenisation and foreign investment protection, it has to be established as to which of the two is better suited for the country in global environment. The NIPA could produce unintended results which may further worsen the plight of the intended beneficiaries or simply benefit a well-connected few. Whilst an indigenisation driven promotion of investment legislation may be a plausible initiative, pursuance of such objectives must be sensitive to the undying need to maintain Namibia's competitiveness in doing business.¹⁶⁰

4.3.2 EPANGELO MINING COMPANY

Epangelo Mining Company is a private company with the Government of the Republic of Namibia as the sole Shareholder. It was founded in 2008 and inaugurated on the 3rd of December 2009. The company was established as a flagship to respond to the aspirations of government for increased Namibian participation.

It is subject to the same laws and regulations that govern other companies such the Minerals (Mining and Prospecting) Act No. 31 of 1992 and Mineral Policy of 2003 respectively.¹⁶¹ The company's primary objective is to be a premier local, regional and global mining asset management company, and to occupy a significant position in major commodity businesses, inclusive of uranium, diamonds, copper, gold and various precious metals.¹⁶²

It is befitting to state that Epangelo is formed against the background of fulfilling Namibia's above-mentioned mineral development objectives, including direct participation of the Government of the Republic of Namibia in mining and, subsequently, in the value addition chain of the country's minerals. Epangelo places emphasis on strategic minerals such as diamonds and nuclear fuels but its mandate stretches beyond the confines of strategic minerals and involves interests in exploration of base metals, mining investment as well as trading and beneficiation of mineral products.

¹⁶⁰ (See 147 above).

¹⁶¹ Epangelo Mining Company (Pty) Ltd Company Profile, <<http://www.epangelomining.com/wp-content/uploads/2016/04/Epangelo-Mining-Profile.pdf>>.

¹⁶² Epangelo Mining Company <<http://www.epangelomining.com/>>

There was an early presumption¹⁶³ that the new company would automatically be granted Exclusive Prospecting Licences for exploration and that private sector companies would then have to negotiate joint ventures with Epangelo. The Mining Commissioner has been quoted saying that Epangelo applies for its licences in the same manner as private sector companies.¹⁶⁴ However, he did make clear that the Ministry is likely to advise companies looking for EPLs to consider partnering with Epangelo. Nevertheless, such a presumption has been dissolved by interpretation of section 8 (1) of the NIPA:

“The Minister, in recognition of the sustainable economic sectors, business activities and development objectives of Namibia, its national security interests and the public interest, may, by regulations, reserve certain categories...”

Additionally, the Act provides in section 4, that the Minister may approve investments if he/she is satisfied that the investment involves a joint venture with Namibians. In reading section 4¹⁶⁵ with 14 (a, b, & f) it can be seen that the investment will contribute to the advancement of indigenous Namibians.

In April 2011, when Cabinet announced its plan to declare uranium, gold, copper, coal, diamonds and rare earth metals as ‘strategic minerals’, it also stated that in future exploration and mining licences for these minerals would be reserved for state owned mining company Epangelo, which could then negotiate joint ventures with private companies.¹⁶⁶

The Ministry has conceded that Epangelo had no funding formula when it came into being in 2009 and has since had to survive on relatively small amounts from the national budget (N\$5 million in 2011 although it has said it needs N\$400 million for its planned capital

¹⁶³ Namibia’s New Frontiers Transparency and Accountability in Extractive Industry Exploration; Anti-Corruption Research Programme June 2013 Edited by Graham Hopwood; Institute for Public Policy Research (IPPR) Anti-Corruption Research Programme. This is not the correct way of citing the source.

¹⁶⁴ (See 163 above).

¹⁶⁵ Also see section 4(3)(c)

¹⁶⁶ (See 163 above).

projects. It is conceivable that the lack of financing could be interpreted as meaning that Epangelo expects to have 'free carry' in any joint venture arranged with a private company, although this is not explicitly stated in any policy document or law.

This is a grey area concerning Epangelo which require legal or policy clarification. The Minerals (Prospecting and Mining) Act 1992 is due to be revised but amendments are not likely to come to parliament anytime soon. However, there is a prospect that the existing Act will be amended sooner to incorporate and elucidate on Cabinet's 2011 decision to declare certain minerals as "strategic" and possibly to define Epangelo's exact function.¹⁶⁷

The Government of Namibia recognises that the exploration and development of its mineral wealth could best be undertaken by the private sector. Government therefore must focus on creating an enabling environment for the promotion of private sector investment in the mining sector, and ensure that joint ventures are concluded on commercial terms.¹⁶⁸

4.3.3 NEW EQUITABLE ECONOMIC EMPOWERMENT FRAMEWORK

The National Equitable Economic Empowerment Bill (NEEEF) may be viewed in advent of the ambitious Namibian Harambee Prosperity Action Plan which emphasises the importance of constructing an inclusive Namibian House. Alternatively, the framework may also be viewed through the angle of SADC harmonization recommendations.

The Namibian Parliament recently tabled the NEEEF Bill for consideration by stakeholders and parliament at large. Although the framework is not law yet, it has led to the creation of a negative perception amongst potential investors.¹⁶⁹ This has been evidenced by the fact that BMI said in a bulletin that NEEEF proposals are keeping investors on the side-lines.¹⁷⁰

¹⁶⁷ (See 163 above).

¹⁶⁸ (See 136 above).

¹⁶⁹ Ndanki Kahiurika; The Namibian Newspaper '25% Neeef clause rethink'; <<https://www.namibian.com.na/157994/archive-read/25pct-Neeef-clause-rethink>>

¹⁷⁰ The independent research unit of the Fitch Group, Business Monitor International (BMI), stated in a recent update on Namibia's investment environment; <https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=8&cad=rja&uact=8&ved=0ahUKewivkrXpncXWAhWDD8AKHe0XAPAQFghRMAc&url=https%3A%2F%2Feconomist.com.na%2F22560%2Fgeneral-news%2Fneef-bill-keeps-investors-waiting-on-the-sidelines%2F&usq=AFQjCNGWdUEyXw2I79AFNiDbBWNPetDyGQ>, accessed: 27 September 2017

According to BMI, the requirement for businesses to accommodate 25% shareholding for previously racially disadvantaged individuals, under the empowerment component of the NEEEF, will weigh on investor sentiment.¹⁷¹ It is for that reason that the NEEEF warrants discussion in this chapter.

The NEEEF Bill has created polarised views regarding its suitability for Namibia's economy. The business community has branded it counterproductive as it does not promote the ease of doing business by its provision that corporates should cede 25% of their shares to locals. At the centre of the private sector business owners' argument is the role of free market policies which, if limited by regulatory rigidity, will cause disinvestment or the withdrawal of capital investment as is currently the case with South Africa and Zimbabwe.¹⁷²

The Bill was created as an enabling mechanisms for promoting an 'equitable' approach to realising the benefits accrued from property ownership, affirmative action, government initiatives aimed at promoting the general welfare of Namibians, implementing principles of economic order, foreign investments and the exercise of the government's right to sovereign ownership of natural resources.¹⁷³ The NEEEF is essentially premised on five pillars of economic empowerment namely: 1) ownership; 2) management control and employment equity; 3) human resources and skills development; 4) entrepreneurship development; and 5) community investment.¹⁷⁴

¹⁷¹ The independent research unit of the Fitch Group, Business Monitor International (BMI), stated in a recent update on Namibia's investment environment; <<https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=8&cad=rja&uact=8&ved=0ahUKEwivkrXpncXWAhWDD8AKHe0XAPAQFghRMAc&url=https%3A%2F%2Feconomist.com.na%2F22560%2Fgeneral-news%2Fneef-bill-keeps-investors-waiting-on-the-sidelines%2F&usq=AFQjCNGWdUEyXw2I79AFNiDbBWNPetDyGQ>> accessed: 27 September 2017.

¹⁷² Tapiwa Warikandwa & Ndatega Asheela, 'Economic transformation and investment security in Namibia: An Appraisal of the National Equitable Economic Empowerment Framework Bill' (2016) Volume 3, Issue 1, University of Namibia Law Review < <http://unamlawreview.info/>> accessed 25 September 2017.

¹⁷³ (See 172 above).

¹⁷⁴ The New Equitable Economic Empowerment Framework Bill (as introduced).

The analysis of this thesis into the practicality of the NEEEF Bill and its sustainability is informed by the basic ideology behind the law and economics school of thought. The law and economics school of thought places emphasis on ascertaining the cost implications of introducing any new laws and policies to the economy.¹⁷⁵

Scientific evidence obtained from experiences of South Africa and Zimbabwe in employing indigenisation policies and/or laws, reveals that investors are likely to withdraw their capital investments from countries that impose rigid economic empowerment regulations which threaten their investments.¹⁷⁶

4.4. LESSONS LEARNT FROM OTHER SADC JURISDICTIONS

4.4.1 Black Economic Empowerment Programmes in Zimbabwe and South Africa

Africa and other parts of the world have often seen the indigenous people, who were previously and who remain largely excluded from the economic mainstream, going into a state of euphoria, based on the genuine belief that such programmes are an effective panacea for their existential socio-economic challenges.¹⁷⁷

4.4.2 SOUTH AFRICA

South Africa introduced the Black Economic Empowerment (BEE) Act¹⁷⁸ as an attempt to address the exclusion of black South Africans from the main stream economic activities during the apartheid era.¹⁷⁹ The BEE policy of South Africa targeted private sectors to include a larger population of previously disadvantaged people in their businesses.¹⁸⁰

¹⁷⁵ Nicholas Mercuro, 'The Jurisprudential Niche Occupied by Law and Economics' 2009, vol. 2, The Journal Jurisprudence, p. 62. The law and economics school of thought is defined as the, "... application of economic theory, primarily micro-economics and the basic concepts of welfare economics, to examine the formation, structure, processes, and economic impact of law and legal institutions."

¹⁷⁶ Booker Magure, 'Foreign investment, black economic empowerment and militarized patronage politics in Zimbabwe', 2012, vol. 30(1), Journal of Contemporary African Studies, p. 67.

¹⁷⁷ (See 172 above).

¹⁷⁸ Black Economic Empowerment Act of 2013

¹⁷⁹ Talkmore Chidede, *Legal Protection of Foreign Direct Investment: A Critical Assessment with Focus on South Africa and Zimbabwe*, Anchor Academic Publishing, 2016.

¹⁸⁰ Wilhelmina Shakela & John Shimaneni, 'The Legal Viability of NEEEF and its impact on mining operations in Namibia' (2016) Volume 3, Issue 1, University of Namibia Law Review < <http://unamlawreview.info/>> accessed 25 September 2017.

As a result, Anglo American announced that it is withdrawing its supply of coal to Eskom because of government's requirements that 'blacks' must own at least 55 percent of a supplier.¹⁸¹ The mining company claimed¹⁸² that the shareholding will happen on commercial basis. This approach is not unique to Anglo.

Shortly thereafter, such implementation with regards to the ownership pillar by the previously disadvantaged resulted in a R54 billion loss in mining stocks, demonstrating that the security of property rights is a great factor for investment in the mining sector. The legal requirement for black equity participation and other requirements to secure mining rights was deemed to make SA investor-unfriendly.¹⁸³

This in turn resulted in huge financial losses and reduced investment. Furthermore, it was argued that BB-BEE should be encouraged but not be a requirement due to the high risk and capital-intensive nature of exploration.

4.4.3 ZIMBABWE

The rationale behind the Indigenization and Empowerment (IEEA) Act 14 of 2007 which was signed on April 17 of 2008 is to increase participation of local people in the domestic economy.¹⁸⁴

The IEEA is one such contemporary measure introduced by the government to address economic imbalances. Its policy objectives are to economically empower indigenous Zimbabweans¹⁸⁵ by increasing their participation through economic expansion and growing their productive investment in the economy to create more wealth for poverty eradication.¹⁸⁶ The IEEA provides for indigenisation in the resource and non-resource based sectors¹⁸⁷ General Notice 114 of 2011 unambiguously provides for indigenisation in the

¹⁸¹ (See 180 above).

¹⁸² (See 180 above).

¹⁸³ (See 180 above).

¹⁸⁴ (See 180 above).

¹⁸⁵ See section 2(1) of the IEEA regarding the definition of an indigenous Zimbabwean.

¹⁸⁶ Section 3(1)(a) of the IEEA.

¹⁸⁷ (See 172 above).

mining sector by requiring that businesses operating in the sector to dispose 51% equity to designated entities.

Governments are torn between inviting foreigners to do business in their countries but also to ensure that its people are able to compete with the foreign investors. FDI and indigenization are like a catch 22 situation. Much controversies arise when countries are trying to create a balanced environment to attract foreign investments while at the same time introduce laws that put limitations on FDI.

The Indigenisation law also gave Zimbabweans the right to take over and control foreign owned companies in Zimbabwe to empower its citizens. The resulting economic performance of the country post implementation of these policies has however been down tracking suggesting that the economy seems not to be responding to these stimuli for which it was enacted.

The major issue of concern is that the policy discourages the flow of foreign direct investment that is greatly required to resuscitate the ailing industrial sector in Zimbabwe. The operations of the Zimbabwe Stock Exchange were affected by negative perceptions of investors on the empowerment laws, because foreign investors normally lead in the buying and selling of shares.

However, a clear indicator of the negative effects of indigenisation laws is the significant decline in FDI from USD 950 million in the period 1991 to 1999 to USD 400 million between 2000 and 2011.²¹¹ This indicates a decline in FDI by USD 550 million. In effect, between 2000 and 2011 FDI in Zimbabwe measured a negative real economic growth rate averaging 5%.¹⁸⁸ Empirical evidence shows that since the inception of the IEEA there have been considerable FDI outflows and dwindled FDI inflows in Zimbabwe.

From Zimbabwe's experience, Namibia has to realise that there is a need to ensure that the NEEEF Act, if passed into law, should be clear on how it will be implemented. The

¹⁸⁸ (See 172 above).

compliance period set for the economic empowerment programme must be clearly outlined. The threshold of 25 % must be clearly justified and security on the businesses of foreign investors, regardless of the economic empowerment programmes, must be guaranteed.

Failure to address these concerns is likely to lead to an economic collapse in Namibia similar to what is currently prevailing in Zimbabwe. Investors have pulled out in numbers, with high unemployment being now the order of things in Zimbabwe.

4.5 THE POSITIVE IMPACTS OF THE SADC HARMONIZATION INITIATIVES

4.5.1 ENSURE AVAILABILITY OF BASIC GEOLOGICAL INFORMATION

It has been recommended that the efficient management of mineral resource information and optimal access to land would only be realized when there is access to information.¹⁸⁹ The Namibian Ministry of Mines and Energy (MME) and Trimble Land Administration have developed this Mining Cadastre Portal to improve transparency and promote investment in the Namibia mining sector.

4.5.2 ENVIRONMENTAL MANAGEMENT

The SADC Protocol expressly mandates all member states of SADC to promote sustainable development by ensuring that a balance between mineral development and environmental protection is applied.

To that effect Namibia has passed the Environmental Management Act (EMA) 7 of 2007. In terms of the EMA), the Minister of Mines and Energy may not issue a mineral licence until the applicant has been furnished with an environmental clearance certificate.

A person wishing to apply for an environmental clearance certificate must lodge an application with the Minister of Mines and Energy, who is designated as the competent authority in terms of the Environmental Management Act.

¹⁸⁹ (See 11 above).

In terms of the Minerals Act, an environmental impact assessment study must be furnished to the Ministry of Environment (specifically to the Environmental Commissioner) before a mining project can proceed. An environmental impact assessment indicates the extent of any pollution of the environment before any prospecting operations or mining operations are being carried out. It further provides an estimate of any pollution, if any, likely to be caused by such prospecting operations or mining operations. However, it does not indicate any environmental rehabilitation mechanisms.

If environmental degradation is likely to occur, an environmental management plan indicating the proposed steps to be taken to minimize or prevent to the satisfaction of the Commissioner any pollution of the environment in consequence of any prospecting operations or mining operations carried on by such mineral licence.

An Environmental Management Plan (EMP) is a key document and should consist of the set of measures to be taken during implementation and operation to eliminate, offset, or reduce adverse environmental impacts to acceptable levels. It focuses more on the impacts arising from the construction and operational phases of the mine rather than those prevalent after closure.

It can be deduced from the abovementioned legislative provisions that rehabilitation is incorporated early in the project planning stage. In other words, the mining license granted to mining operators mandates them to rehabilitate. However, they do not lay down explicit steps to be taken for rehabilitation and enforcement mechanisms. Rehabilitation after the lifetime of a mine is explicitly excluded. The meaning of rehabilitation in the Namibian context and what is exactly required remains undefined.

The legal acts and policies currently in place must serve in the nearest future as a starting point for the preparation of a comprehensive legal framework.

Environmental legislation makes a difference. It establishes binding policies and standards, provides the basis for substantive and procedural regulations and creates institutions at least theoretically capable of implementing policies and enforcing rules. Mine sites should

be rehabilitated to their natural or pre-determined states or to a generally accepted sustainable development use level.

Under the current legislation, it is relatively easy to satisfy closure obligations because performance criteria have not been regulated. However, the Namibian Minerals Policy calls for broader responsibility on the part of the licence holder, namely in addressing social responsibility, in compliance with national policies and best practice, and in providing mechanisms to rehabilitate closed mines to sustained land or coastal use.

In order to bring these policy objectives into operation, and bearing in mind that mine closure is a complex combination of socio-economic and biophysical considerations, more detailed processes need to be put in place to allow for meaningful relinquishment that can be accomplished.

4.6 CONCLUDING REMARKS

Namibia has indeed taken national ownership of SADC regional policies and regional accords; and the government has committed itself to regional integration through normative, legislative and economic decrees and implementation instruments. The Namibian Minerals Policy has been a primary consideration in the development of national mineral policies to preserve alignment and congruency at the national and sectoral levels.

In the case of Namibia, the overall objective was to provide guidance to the sector that was already in the private domain. The mineral sector was expected to address the historical marginalization of the mostly black majority and play a broader role in the economy,¹⁹⁰

The minerals policy has an explicit policy instrument that “Government will encourage the mining industry to address social responsibilities through support programmes, training and community participation”. In addition there is another special provision in regard to

¹⁹⁰ A comparison of the processes used during the development of the national mineral policies of Tanzania and Namibia by H.D. Mtegha & OTHERS; The Journal of The Southern African Institute of Mining and Metallurgy VOLUME 110 NON-REFEREED PAPER OCTOBER 2010 <<http://www.scielo.org.za/pdf/jsaimm/v110n10/06.pdf>>

empowerment, which states that “Government will develop strategies to support Namibian participation in the mining sector to achieve sustainable development”.

In a global environment, the harmonized Southern African mineral policy environment has to be internationally competitive, as Foreign Direct Investment (FDI) will continue to play an important role in the sector due to the shortage of a local critical capital mass to develop the sector.¹⁹¹ In this new, highly competitive, austere environment, governance and policy attractiveness will become increasingly important differentiators in the performance of African countries.¹⁹²

Other options must be sought to increase the participation of previously disadvantaged persons into Namibia’s economic mainstream. Such mechanisms could include introducing binding agreements on how businesses must pursue their Corporate Social Responsibilities (CSR) obligations.

After all, CSR is a form of economic empowerment of the previously disadvantaged persons. Employee share of ownership schemes could also be considered as should human capital investment through education. Should this happen, there would be no need of imposing ownership control of already existing foreign owned businesses. Rather, government would place emphasis on equipping previously disadvantaged persons with the necessary business skills to start their own local investments which can ably compete with the already existing foreign investors.

¹⁹¹ (See 17 above)

¹⁹² Discussion Paper 7/2016, The Zambezi Protocol: Result of a Dialogue on Natural Resource Policy in Africa, Published in May 2016 by The Brenthurst Foundation, <www.thebrenthurstfoundation.org>

CHAPTER FIVE: CONCLUSION AND RECOMMENDATION

5.1 RECAP OF THE RESEARCH PROBLEM

Statistics have shown that the mining sector has historically been the main driver of economic growth in Namibia.¹⁹³ As aforementioned, statistics produced by the Namibia Statistics Agency show that the mining sector contributed 11.1% to (Gross Domestic Product) GDP in 2016 and recorded an overall contraction of 6% in real terms.¹⁹⁴

Benefits from minerals can only be realised if investment is made in the sector. With globalisation, countries should compete to attract this investment. Therefore, investment decisions regarding mineral resources are key determinants of the economic growth in any resource-rich country such as Namibia. The minerals sector contributes largely to the economic growth of the country as aforementioned – therefore in order for the country to achieve economic emancipation, at least partly through the growth of the minerals' industries, the host government must create an investment environment conducive to exploration and mining activities.

In terms of foreign direct investment (FDI) flows, investors tend to consider the prospectivity of an entire region, even though the mines they develop are in individual countries. Investment promotion campaigns are therefore better undertaken at the regional level based on a regional sense of expectation. Various harmonization initiatives have been introduced at a regional level, in SADC for the harmonization of policies within the mining sector. The initiatives seek to make explicit integration policies to enhance international competitiveness in the sector.

¹⁹³ Economic Contribution of Mining in Namibia. mining remains by far the largest sector of the Namibian economy. In 2009 for example, mineral products excluding cut and polished diamonds) contributed 54% of Namibia's total merchandise exports. See Chamber of Mines of Namibia: Update Report September 17 of 2012. <http://www.chamberofmines.org.na/files/8814/7014/7048/Chamber_Update_Report_September_17_-_2012.pdf> accessed on 25 May 2017.

¹⁹⁴ Namibia Statistics Agency: Preliminary Annual National accounts 2016. <http://cms.my.na/assets/documents/Preliminary_National_Accounts_20161.pdf> accessed on 26 May 2017.

It was against the backdrop of the above, that this study questioned whether the Namibian government created an enabling minerals' investment environment. Additionally, did the Namibian government put in place appropriate and effective laws, policies and strategies for purpose of attracting, absorbing and sustaining substantial in flow of FDI into that sector; In line with the SADC Mining harmonization framework?

5.2 FINDINGS AND CONCLUSIONS

Chapter two explored different theoretical perspectives on SADC regional integration as well as the determinants of FDI in a country. It has been laid out that SADC subscribes to the neo-liberal approach. Neo-liberal claim that states engage in international cooperation, to broaden their "conceptions of self-interest [and to] widen the scope of cooperation". According to the theory, developing states might consciously increase their dependence on investment and markets in developed cores, while at the same time enhancing their regional voice in the wider economic dialogue.

The Southern African Development Community mineral policy harmonization programme is anchored in the Protocol on Mining, adopted in 2000, which provides for a formal framework for cooperation and integration. The Protocol identifies specific areas for cooperation in the region's mineral industry, including harmonization of national policies, facilitation of the development of human and technological capacities, promotion of private sector participation, and the observance of international standards for health, safety and environmental protection.¹⁹⁵ The Protocol promotes the economic empowerment of previously disadvantaged persons.

The Protocol paved way for in-depth research and recommendations for the SADC region's harmonization landscape within the mining sector such as:

- SADC Mining Strategic Plan;
- Harmonization of Mining Policies, Standards, Legislative, And Regulatory Framework In Southern Africa & a subsequent Implementation Plan; and

¹⁹⁵ Minerals and Africa's Development The International Study Group Report on Africa's Mineral Regimes <http://www.eisourcebook.org/cms/files/attachments/other/Minerals%20and%20Africas%20Development.pdf>, accessed 28 October 2017.

➤ Regional Indicative Strategic Development Plan (RISDP)

In Namibia, the Government developed a fully articulated minerals policy that was adopted in 2003. The policy, has as an objective, the promotion and encouragement of local participation in exploration and mining. The policy has an explicit provision regarding empowerment, which says “Government will develop strategies to support Namibian participation in the mining sector to achieve sustainable development”.

The minerals policy led to policy and legislative enactments, both good and bad that influenced the overall Namibian mineral investment environment. It has been showcased that Namibia promulgated the ‘Namibia Investment Promotion Act’ (NIPA); established the Epangelo Mining Company, and formulated the ‘New Equitable Economic Empowerment Framework Bill’. This was done to *supposedly* encourage investors to provide meaningful empowerment opportunities to historically disadvantaged persons and communities.

The net effect of the NIPA is that investment requirements for foreign investors will now become a little somewhat more stringent with the reform of the country’s investment laws. Sadly, in a neoliberal economic environment, little attention might have been paid to the potential negative impact of an indigenisation driven investment regulation which on the face-of-it favours indigenous Namibians, in selected sectors of the country’s economy, over foreign investors.

Whilst the Government of Namibia is faced with a challenge of balancing between indigenisation and foreign investment protection, it has to be established as to which of the two devils is better suited for the country in global environment. The NIPA could produce unintended results which may further worsen the plight of the intended beneficiaries or simply benefit a well-connected few. Whilst an indigenisation driven promotion of investment legislation may be a plausible initiative, pursuance of such objectives must be sensitive to the undying need to maintain Namibia’s competitiveness in doing business.

The study confirms the hypothesis that The Namibian government has not created an enabling minerals’ investment environment, and put in place appropriate and effective

policies and strategies for purpose of attracting, absorbing and sustaining substantial inflow of FDI into the Namibian economy.

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