UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

MITIGATING SOCIO-ECONOMIC CONSIDERATIONS OF RESOURCE SECTOR NATIONALISATION:

LESSONS FOR SOUTH AFRICA

By

MATHABO MOHWADUBA

12096629

Submitted in partial fulfilment of the requirements for the degree

MAGISTER LEGUM (LL.M) IN EXTRACTIVE INDUSTRIES LAW IN AFRICA

Prepared under the supervision of:

Advocate Leonardus J. Gerber

Department of Public Law

Faculty of Law

University of Pretoria

November 2018

UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

DECLARATION BY STUDENT

I, the undersigned, Mathabo Mohwaduba, hereby confirm that the attached dissertation is my own work and that any sources that are not of my own work are adequately acknowledged in the text and consequent bibliography.

____

Mathabo Mohwaduba

Date 02 November 2018

ABSTRACT

The year 2018 marks 63 years since the Freedom Charter, and 8 years since the 2010 position paper of the African National Congress Youth League (ANCYL) advocating for the nationalisation of mines. In 2016 the Economic Freedom Fighters (EFF) re-ignited furious fire from the embers of the Freedom Charter calling for the nationalisation of key industries, including mining, as a means of enabling the people in sharing in the country's wealth.

The British colonisation of South Africa and later the coming into force of Apartheid shared the common foundation of tactically architectured discrimination towards black persons. The black population of South Africa was purposely excluded from participating as key role players in the economy especially in major industries, such as mining, banking and insurance. Black people were strategically used as cheap labour to grow the colonial economic system through its "discovery" of mineral resources in Africa. The legacy of architectured black economic exclusion has unfortunately succeeded through the eras and the ugly stench of black economic injustice has permeated through the centuries and exists in present South Africa, crippling the economic emancipation and development of black people.

The need for accessible information has become ever more important especially with the possible amendment of S 25, the property clause, of the Constitution of the Republic of South Africa, which may indirectly permit the expropriation of mineral rights. Furthermore, with the echoing calls for the nationalisation of mines in South Africa as a means to economic freedom for the previously, and I argue presently, disadvantaged the need for objective, elementary and accessible information in the field of resource nationalisation has become ever more important.

This is what this paper aimed to accomplish, it aimed to reinforce the Constitutional right of access to information, as per S 32(1), in the scope of nationalisation as will be "required for the exercise or protection of…rights". This paper was conducted through the methodology of a literature review of existing literature in the sphere of nationalism and nationalisation. Moving from the premise that South Africa employs resource sector nationalisation in the short term, despite findings that have rendered it unaffordable, this paper has suggested various mitigating factors and or alternatives to particular socio-economic considerations of resource sector nationalisation. The socio-economic considerations explored have been limited to labour, capital and environmental affairs.

UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

ACKNOWLEDGEMENTS

I begin by thanking God and my Lord and saviour Jesus Christ for the privilege of life, an abundant life that has enabled me to make this humble contribution to greater discussions at large.

Secondly, I would like to thank my lecturer, course co-ordinator and supervisor Advocate LJ Gerber for the opportunity to write this paper and study the LLM in Extractive Industries Law. I honestly cannot begin to measure the impact you have had in my overall development as a human being.

Finally, I would like to thank my family but above all my mother, Sibongile Mohwaduba, for her unwavering support and prayers.

I would like to render a special thank you to Zamahlasela Gabela and Rindai Muzanechita for their selfless willingness in assisting me with the extensive Isizulu translation and graphics, respectively, for the annexed educational poster.

UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

TABLE OF CONTENTS

UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

LIST OF ACRONYMS

BBBEE	**Broad-Based Black Economic Empowerment**
ANCYL	**African National Congress Youth League**
EFF	**Economic Freedom Fighters**
SIMS	**State Intervention in Minerals Sector**
SAPS	**South African Police Service**
SOEs	**State-Owned Enterprises**
SME	**Small, Medium, Enterprise**
IPEME	**Institute for the Promotion of Micro, Small and Medium Enterprises**
PODE	**Project for Entrepreneurial Development**
MPRDA	**Mineral and Petroleum Resources Development Act**
NCOP	**National Council of Provinces**
FDI	**Foreign Direct Investment**
MNCs	**Multination Corporations**
PGMs	**Platinum Group Metals**
GDP	**Gross Domestic Product**
SMCs	**State Mineral Companies**
NEMA	**National Environmental Management Act**
BRICS	**Brazil, Russia, India, China and South Africa**
RRT	**Resource Rent Tax**
DMR	**Department of Mineral and Resources**
SWF	**Sovereign Wealth Fund**
BITs	**Bilateral Investment Treaties**

KEY WORDS

Economic empowerment

Socio-economics

Nationalisation

Environment

Nationalism

Colonialism

Apartheid

Linkages

Capital

Labour

Black

CHAPTER 1: INTRODUCTION

The Marikana Massacre (Marikana) of the 16th of August 2012 was premised on wage disputes, a dispute that eventually led to a deadlock between the Marikana mineworkers and the South African Police Service (SAPS). Regrettably, the dispute between the two parties resulted in the death of 34 mineworkers. Marikana remains a deep and painful scar in democratic South African and the South African mining industry as a whole, a disastrous calamity that should never occur again in any way or form.

The massacre speaks to deeply imbedded issues within the South African mining industry, issues that can be loosely categorised under the umbrella of "just and equitable wealth redistribution" between stakeholders. Marikana was a real incident of a real problem concerning real people, one that must provoke the South African mining industry to tackle the real issue of the lack of equitable wealth redistribution in the resource sector head on.

The introduction of the idea of the nationalisation of mines in South Africa is an idea, which aims to deal with equitable wealth redistribution through the revenue rents derived from the nationalised South African mining sector. Others have argued that the implementers of the draconian systems, of colonisation and Apartheid that deprived black people from economic participation are long dead. The aforementioned further argue that any consequent affirmative policy, such as resource nationalisation through the nationalisation of mines, unfairly deprives the present beneficiaries. Ramose answers that argument through an African proverb, which states that; "*Molato ga o bole*", a Sesotho term that can be translated to: Justice has no prescription.[1]

According to the Fraser Institute Economic Freedom Ranking 2016, South Africa is ranked 94 out of 162 states around the globe with one being the most economically free and 162 being the least free. Economic emancipation for all is a non-debatable need that must be urgently addressed as a part of South Africa's post-Apartheid economic redress. Consequently, the debate on economic freedom for all should not rest on the justification of the call but rather on the justification of the means.
This paper further aimed to investigate one of the means namely resource sector nationalisation.

1 MB Ramose 'An African perspective on Justice and Race' (2001) 3 *Polylog Forum for Intercultural Philosophy* para 7.

In case of the event that South Africa decides, within the short term, to move towards implementing resource sector nationalisation, it is exceptionally important that nationalisation is understood before it is undertaken. It is important that the owners of the resources namely the ordinary citizens of South Africa understand any policy pertaining to mineral resources.

When key challenges of nationalisation are not taken into regard we may once again find ourselves in the unfortunate position, where we have fostered fertile ground for another dispute premised on unjust and inequitable wealth redistribution, a Marikana of sort, or a creature far worse.

1.1. Background to the study

Resource nationalisation is a derivative of resource nationalism an age-old device dating back to the late 18th century industrial revolution.[2] Nationalism has been utilised for centuries as an instrument for states to take on the role for economic and infrastructural construction and development that would have constituted a natural monopoly in private hands.[3]

As a post-colonial approach to economic freedom, African countries have been embracing resource nationalisation and other derivatives of resource nationalism such as procuring extractive Foreign Direct Investment (FDI) through local content.[4] While labouring on the point of local content it is worth noting that, the successful Implementation of local content is preconditioned on the setting up of "deep and broad" local economic linkages to the host country's extractive industries.[5] The fostering of those capital-intensive linkages has proven a difficult task in some African countries like Tanzania.

Donor organisations have been supportive in the Tanzanian government's Small, Medium, Enterprise (SME) strategy as driven by the Institute for the Promotion of Micro, Small and Medium Enterprises

[2] Kahn M 'Natural resources, nationalism and nationalisation' (2013) 113 *The Journal of The Southern African* 8.

[3] Kahn (note 2 above) 8.

[4] MW Hansen, L Buur , AM Kjaer and O Therkildsen 'The economics and politics of Local Content in African Extractives: Lessons from Tanzania, Uganda and Mozambique' (2015) *Norwegian Institute of International Affairs* 201.

[5] Hansen (note 4 above) 202.

(IPEME).[6] However, when it comes to local content, supporting donor organisations are still largely focusing their resources on maintaining their own organisations and institutional linkages, such as those coming through the World Bank's Project for Entrepreneurial Development (PODE).[7]

Resource nationalisation as seen in 1960 Ghana was exceedingly popular in Africa during the 60s. The trend saw many African countries jumping onto the brisk bandwagon of resource nationalisation as an African post-colonial approach to ending black poverty, a road often marred with unsuccessful economic consequences. However, the African experience of the 60s should not be blindly utilised as a rubber stamp to categorise all nationalisation as wanting ideology.[8]

1.2. Aims and objectives

1.2.1. Aims

The study aimed to be an active participant in the enforcement of S 32(1)(b) of the Constitution of the Republic of South Africa; the right to information "required for the exercise and protection of rights".

Furthermore, the study aimed to contribute to community education specifically on the subject of resource nationalisation as a derivative of resource nationalism.

Generally, literature on the topic of resource nationalism and resource nationalisation is limited quantitatively and the available quantity is further limited to a specific audience; academics and industry experts, which is a problem for non-professionals who wish to be informed on the subject matter.

Many South African communities experience grave exploitation through political narratives channelled through the concerns within extractive industries. Communities experience exploitation mainly due to a deficiency in legal education and rights pertaining to extractive industries.

The moment communities are empowered in knowledge they will be better equipped to use available channels to protect their rights whether it is from mining companies or political spin.

6 Hansen (note 4 above) 214.

7 Hansen (note 4 above) 214.

8 H Ryggvik 'The Norwegian oil experience: A toolbox for managing resources?' (2010) 23 *Centre for Technology Innovation and Culture, University of Oslo* 5.

The most important point of the study was to create accessible community and political education that will serve as a means to the end, which is; informed community and political decision making in the area of extractive industries.

It is exceptionally important that all stakeholders be soundly and objectively educated as far as possible. Education among stakeholders within the extractive industries helps manage expectations from all parties and creates a space that balances interests between profit making, the protection of human rights and the realisation of just and equitable wealth redistribution.

1.2.2. Objectives

The objective was to investigate the socio-economic considerations of resource sector nationalisation as seen around the globe. The objectives specifically identified socio-economic considerations. Furthermore, the objectives provided solutions for the mitigation of the socio-economic consequences of resource sector nationalisation. The socio-economic considerations identified were strictly limited to labour, capital, markets and environmental affairs.

Equally, the mitigation of the socio-economic considerations were strictly limited to labour, capital, markets and environmental affairs.

1.3. Research questions

1.3.1. Primary Research question

The primary research question of the study is from the hypothetical premise that South Africa does in fact implement resource nationalisation in the short-term future. The question asked what the socio-economic considerations that must be taken into regard are and finally how South Africa can mitigate the identified socio-economic considerations of resource sector nationalisation.

1.3.2. Secondary Research questions

The study further asked the following secondary research question; it asked whether resource sector nationalisation is a sound transformative medium for post-colonial African economic freedom.

1.4. Research methodology

1.4.1. Methodology

The study was employed through a literature review. Therefore, the methodology utilised was through qualitative research. The research engaged literature focused on socio-economics, relevant legislation, policy-making and applicable case law.

Resource nationalisation as a derivative of resource nationalism is an ideology and approach to extractive industries that would need the framework of law to be implemented. Thus, the approach to the research was directed from a legal perspective to socio-economics.

The literature study aimed to be an educational tool within the scope of resource nationalisation. Thus, the study is annexed with a one-page educational flyer on resource nationalisation. The flyer is in both English and on the reverse Isizulu. The distribution of the flyer will take place in and around the mining town of Emalahleni, Mpumalanga, South Africa.

1.4.2. Parameters

The socio-economic considerations engaged in the study are strictly within the scope of capital, labour and market related issues and environmental considerations.

1.4.3. Limitations

The study employed focuses on engaging a limited quantity of relevant literature reviews, legislative framework and case studies where applicable. Given the aforementioned, the study is not heterogeneous and draws conclusions primarily from a legal perspective on the specifically engaged socio-economic considerations.

1.5. Relevance of the study

The recent 2017/2018 call for the amendment of the Constitution of The Republic of South Africa's property clause, S 25, illustrated the power of the people.[9] Furthermore, it illustrated the power of politics to influence and champion ideas to communities and persons who would not otherwise ordinarily be participants and ambassadors of those ideas.

---

[9] The Constitution of the Republic of South Africa, 1996 S 25.

It is brilliant to witness a democracy in action where the people make the law and the law is in line with the sentiments and convictions of "we the people".[10] Policy can often be predicted through political narratives. Thus, after the resolution of the issues pertaining to S 25 of the Constitution, it is highly probable that the policy of nationalisation will soon be revisited with greater power and force.

Thus with so much power that politicians, municipalities and overall communities have it's become ever more important to emphasise the incumbent responsibility of academics to produce sound, objective and accessible information and education. Objective information and education should inform the decision-making of politicians and ordinary citizens, the very citizens that make up key constituencies. The Working Groups Reports encourage transformation through what they call the elementary medium of "information provision on constitutional rights and norms" of the formal legal system.[11]

The Reports go on further to state that, although deemed exceptional in some cases, they believe community education and awareness has long term effects in the evolution of systems, as education brings the competitive pressure of compliance, and human rights protection.[12]

10 The Constitution (note 9 above) preamble.

11 Making the Law Work for Everyone Volume 2 Working Group Reports (2008) *Commission on Legal Empowerment of the Poor* 43.

12 Making the Law Work for Everyone (note 11 above) 43.

1.6. Chapter overview

2. CONTEXTUALISING RESOURCE NATIONALISATION AS A FORM OF RESOURCE NATIONALISM

2.1. Introduction

2.2. What is resource nationalisation?

2.3. Why should South Africa nationalise its mineral resources?

2.4. Conclusion

3. POSSIBLE SOCIAL AND ECONOMIC CONSEQUENCES OF RESOURCE SECTOR NATIONALISATION

3.1. Introduction

3.2. Capital consideration

3.2.1. Expropriation

3.2.2. Nationalisation with compensation

- Sources for capital for initial purchase
- Sources of revenue to sustain the sector
- Resource nationalisation with compensation: precedents and models

3.3. Labour force considerations

3.3.1. Unskilled

- Can the state retain existing levels of employment?

3.3.2. Skilled

- Can the state afford to retain specialised skills?

3.4. Resource market considerations

3.5. Environmental considerations

3.5.1. How will environmental liability be allocated?

3.6. Conclusion

4. MITIGATION THE SOCIO-ECONOMIC IMPACTS OF RESOURCE NATIONALISATION OR THE PROVIDING OF ALTERNATIVES

4.1. Introduction

4.2. Accommodating Foreign Direct Investment and fiscal linkages

4.3. Increasing government bargaining power for a competitive host extractive industry

4.4. Sharing the resource market risk

4.5. Monitoring environmental considerations; the separating of powers

4.6. Conclusion

5. CONCLUSIONS

1.7 Conclusion

This chapter aimed to give a summarised overview of the overall study through a brief introduction to the study by stating the aim, objectives as well as the research methodology that will be employed. This chapter further ascertained parameters, limitations and the relevance of the study. Finally, the chapter ends with giving a chapter overview of the study.

The methodology employed for the study is a literature review that asked the primary question of how South Africa can mitigate socio-economic considerations of resource nationalisation, from the premise that resource nationalism is implemented in South Africa.

The secondary question asked whether resource nationalisation is a sound African approach to post-colonial and or post-Apartheid economic freedom, especially for previously disadvantaged groups.

CHAPTER 2: CONTEXTUALISING RESOURCE NATIONALISATION AS A FORM OF RESOURCE NATIONALISM

2.1 Introduction

Resource nationalisation is a derivative of resource nationalism, where resource nationalism is an aim by the state to increase state ownership and control of private sectors. Nationalisation entails taking private-owned companies and placing them in the state's hands, with or without compensation. Political and economic reasons are usually the motivations for resource sector nationalisation. The premise of persons advocating for resource nationalisation is that the transfer of assets from private ownership to public ownership ensures the state full democratic control and consequently the just and equitable redistribution of rents.

One may ask how state-ownership guarantees fair and equitable distribution of wealth derived from the resource sector. Coetzee answers that question by stating that public ownership is people-orientated as opposed to being orientated around profit making.[13]

In this chapter, I will contextualise resource nationalisation by asking the question as to what resource nationalisation is and delve into the claims supporting South Africa's move towards resource sector nationalisation.

2.2 What is resource nationalisation?

Resource nationalisation, which can be argued to be a subject on the high policy agenda in South African extraction, is a tributary of resource nationalism. Resource nationalism is a means employed by states to shift economic and political control over commodities from foreign and private interests to state controlled commodities and companies.[14] Resource nationalism can be implemented through means where the state transforms assets of foreign and Multination Corporations (MNCs) to state ownership or and holds the assets of MNCs in the host country as hostages.[15]

---

[13] C Coetzee 'The proposed nationalization of mines in South Africa – a critical assessment' (2010) *Province of Kwa Zulu Natal, Provincial Treasury IGR Unit*.

[14] I Bremmer and R Johnston 'The Rise and Fall of Resource Nationalism, Survival' (2009) 51(2) *DOI: 10.1080/00396330902860884* 149.

[15] V Vivoda 'Resource Nationalism,Bargaining and International Oil Companies: Challenges and change in the new millennium'(2009) 14(4) *New Political economy* 519.

As the power shift moves from foreign Multinational Companies to the state, the state's bargaining power increases. Consequently, with increased bargaining power states tend to start imposing greater conditions for the operation of MNCs in host states. Consequently, Imposing higher taxes for MNCs and sometimes getting to the point of asset expropriation.[16]

During the 1980s the presiding discourse under socialist governments at the time, as seen in France and the United States of America Reagan and Bush administration and the Thatcher administration of the United Kingdom, was the discourse of economic liberalism. The strategic moves of the aforementioned administrations at the time were towards privatisation, moves that set precedent for the developing world.[17] This period in history gave many western MNCs overwhelmingly favourable conditions to dominate resource commodity control in developing economies.

The establishment of joint ventures, mergers and calculated alliances increased western market control especially in the oil industry as seen in the 1980s and 1990s when International Oil Companies (IOCs) had little to no competition.[18] The nationalisation of oil has proven a popular trend as seen in the Latin American oil sector, this is because the exploitation of oil is generally epitomised by handsome rents and sunk costs.[19]

Therefore, resource nationalisation can perhaps be categorised as the most extreme form of resource nationalism, where private ownership is expelled or bought out and transferred to state ownership.

2.3 Why should we nationalise our mineral resources?

2.3.1 Distributional claim

Post-communism dawned with the institutional reform of the privatisation of corporate enterprises the world over, to the extent that it is argued that the institutional reform of privatisation has been one of the key forms of reform to emerge in the post-communist era.[20]

---

16 Vivoda (note 15 above) 519.

17 Vivoda (note 15 above) 519.

18 Vivoda (note 15 above) 519.

19 R Chang, C Hevia and N Loayza 'Privatization and nationalization cycles' (2009) *The World Bank* 36.

20 Chang and others (note 19 above) 2.

The consequent imposition of resource nationalisation, especially in developing economies, was perceived as a means to correct the overwhelming advantage that foreign multinational companies have in domestic extractive industries, and in the case of oil, the pursuit of resource nationalisation was a means to dilute the market dominance of IOCs.

In the African National Congress Youth League 2010 paper the Youth League emphasised that the argument for the nationalisation of mines is an aim "… to guarantee the flow of resources to critical sectors in our economy…not in order to maximise profit as the current holders of licenses do".[21]

Nationalisation as it seems, aims to attack what Chua describes in the review of the privatisation and nationalisation in developing countries as the "the rule of privilege for a few and destitution for the rest".[22] Nationalisation is deemed to have fiscal consequences in contributing to a country's microeconomics and overall improving public finances.[23]However, Chang and others have concluded from the study of Bolivian and Venezuelan nationalisation respectively that inequality is positively congruous with nationalisation.[24]

The idea of resource nationalisation seems to wax in direct correlation with high commodity prices and wane with low real prices resulting in privatisation.[25]

The Coase theorem, applicable in law and economics, addresses economic efficiency in the presence of externalities. Coase states that in the presence of competitive markets, with zero transaction costs if there are efficient inputs there is bound to be optimal distribution regardless of the property

[21] League ANC Youth 'Towards the transfer of mineral wealth to the ownership of the people as a whole: a perspective on nationalisation of mines' (2010) *African National Congress Youth League discussion document* SB24.

[22] AL Chua The Privatization-Nationalization Cycle: The Link between Markets and Ethnicity in Developing Countries' (1995) 95(2) *Columbia Law Review* 286.

[23] S Du Plessis 'Nationalising South African mines: Back to a prosperous future, or down a rabbit hole?' (2011) *In Presidential address to the Biennial Conference of the Economic Society of South Africa, Stellenbosch* 9.

[24] Chang and others (note 19 above) 3.

[25] Du Plessis (note 23 above) 9.

rights regime employed, thus, denouncing the need for the model of nationalisation for wealth distribution.[26]

The Coase theorem has been extensively criticised in legal and economic literature. It has been reiterated that the Coase theorem ideal is wanting in that there can never be an economic arrangement where the transaction costs amount to zero.

In Coase's later writings, he has clarified the interpretation of his theorem with great aggravation and frustration. Coase stated that the theorem emphasises the very point that there is no possible economic arrangement where the transaction costs are zero. Instead, states and private institutions should seek the best possible transactional arrangements that would come closest to "the unattainable ideal of the (mythical) world of zero transaction costs." [27]

South African Minister of Minerals Resources, Gwede Mantashe, is reported to have said the following concerning the South African Mining industry as per the Department of Mineral Resources annual report of 2017/18:

> "The mining industry remains a key contributor to the South African economy. Estimates further indicate that the country accounts for 94% of known global reserves of the platinum group metals (PGMs), 73.7% of chrome, 29% of manganese, 18.4% of vanadium and 10.5% of gold reserves. This indicates that the country will remain a critical investment destination for mining for the foreseeable future."

It appears from the above quote by Mantashe that there is a reasonable belief in the Ministry of Mineral Resources that South Africa maintains a competitive edge in the resource sector due to the known reserves within South Africa and their contribution to global demands. In order to maximise on the distribution claim it is important to identify key minerals and consequently use that knowledge to exploit prospective license or concession agreements. This implies that new prospectors should be on the horizon and seeking to invest in the host sector, which unfortunately is not the case in South Africa at present.

---

26 Du Plessis (note 23 above) 4.

27 TW Merrill, HE Smith *'Property: Principles and Policies' (2017) 3 University Casebook Series St. Paul: Foundation Press. ISBN 978-1-62810-102-7.*

Hypothetically, if resource sector nationalisation is employed in South Africa resulting in an increase in revenue inflow, the result may possibly make no difference for the man and woman on the ground. Perhaps the most important factor of the distribution claim is not the revenue rent inflow but rather the utilisation of the revenue inflow.

The Norwegian government pension fund is a Sovereign Wealth Fund (*Statens pensjonsfond - Utland)* known as the Petroleum Fund of Norway as of 2006. The fund invests surplus wealth principally derived from the Norwegian oil industry licensing agreements and taxes.[28]

The Petroleum Fund of Norway has played a great role in the greater, equitable and accountable distribution of oil rents.

2.3.2 Fiscal claim

Contemporary International practice has associated high risk with fiscal imprudence.[29] Resource nationalisation is ordinarily perceived as a fiscally imprudent model to employ in developing economies, which of course is a debatable stance. However, one of the many reasons nationalisation has sparked enthusiasm as an attractive form of post-colonial economic liberation approach is due to the often-associated resource rents that stem from the extractive industries.

The ANC Youth League's 2010 report (ANC YL) emphasised that government's sole reliance on taxes for the betterment of its people in education, healthcare, housing, safety and security and employment is an insufficient form of income.[30] The Youth League's paper of 2010 further argued that the control of key strategic sectors of the South African economy, as seen in Botswana and the Debswana joint venture would be to the undeniable benefit of all South Africans.[31]

It is important to note that arguments in favour of nationalisation have often emerged during the timeline of high commodity prices. The agenda consequently becomes the nationalisation of private companies perceived to enjoy grand financial benefits in windfall resulting from the commodity

[28] S Chesterman ' The turn to ethics: Disinvestment from multinational corporations for human rights violations-the case of Norway's sovereign wealth fund'(2007) 23 *American University. International Law Review* 582.

[29] Du Plessis (note 23 above) 2.

[30] League ANC Youth (note 21 above) S E para 47.

[31] League ANC Youth (note 21 above) SE a) 47.

boom.[32] Perhaps in states where the commodities account for a large portion of the state's economic activities, as seen in the Venezuelan state-oil company, *Petroleos de Venezuela S.A.* (PDVSA),whose revenues account for 50% of the governments revenue ,at the peak of high commodity prices it may seem a sound and justifiable act to resort to resource nationalisation.[33]

Perhaps the ANCYL's comparison of Botswana's De Beers and state joint venture (Debswana) with a state 50% ownership and control as an aggravating factor for the potential revenue rents from resource nationalisation, is a wanting one. Further, this study aims to iron out these very creased issues pertaining to nationalisation as opposed to resource nationalism.

What Botswana has employed through the joint venture of Debswana is not resource nationalisation but rather resource nationalism; where the state does not expel private ownership but rather imposes grater state participation within the resource sector.

Furthermore, the Policy Perception Index and investor confidence of South Africa and Botswana was and remains greatly different, as seen in the Frasier Institute reports of 2010 and 2017 respectively.[34]

Possible reasons pertaining to the poor policy perception and investor confidence of South African extractives is due to South Africa's mining regulatory framework, which is fragmented, uncertain and perplexing to say the least. National debates on further uncertainties such as land tenure and the possible revision of the South Africa Constitutional Property rights, as per S 25, are factors that fragment stakeholder relationships. Furthermore, other contributing factors are former Minister of Mineral Resources, Mosebenzi Zwane's, highly contested Mining Charter 3. To further aggravate matters the Draft Bill to amend the Mineral and Petroleum Resources Development Act (MPRDA)

---

32 Du Plessis (note 23 above) 9.

33 Unpublished: MA Pockock ' The Causes of the Rentier State: A Comparative Study of Bolivia and Venezuela' unpublished Masters'Dissertation, Erasmus University,Rotterdam,*2017* 63.

34 Fraser Institute 'Survey of mining companies' (2017) https://www.fraserinstitute.org/sites/default/files/survey-of-mining-companies-2017.pdf (accessed 09 July 2018).

presented to parliament in 2013 is still with the National Council of Provinces (NCOP) for consideration; "stuck in a legislative hiatus".[35]

Du Plessis assess in his paper the real costs of resource nationalisation in South Africa by assessing the three major gold mining role-players; AngloGold Ashanti, Goldfields and Harmony. Du Plessis' assessment is an elaboration of the findings of White and Keeton's general economic calculation on the overall conservative cost of resource nationalisation in South Africa. White and Keeton's 2011 economics paper concluded on the assumptions that government nationalises 60% of its mines, and maintains the standards of efficiency, overall government debt would be increased to R970 billion compared to the then government debt of R 820 billion as per the 2011 Budget Review.[36] Consequently, White and Keeton conservatively estimate, as per 2010 terms, that the cost of nationalisation would be an additional debt of R 46.6 billion.[37]

Du Plessis' 2011 analysis doesn't differ from that of White and Keetons, even in the year of high gold prices, he goes on to say there's a greater probability that the outcomes will be far grave than the unfavourable calculations.[38]

Coetzee does an economic assessment of the South African mining sector turnover. Coetzee's calculations, assess the rents from Gold NY, Gold R as per the rand dollar exchange compared to the PPI. It is evident from Coetzee's finding that generally there has been an upward trend in the South African mining turnover from the years starting from 2002 right up to and including 2008.[39] Most importantly, Coetzee emphasises the point that the upward trend is a result of increased world commodity prices and the rand's depreciation and not due to increased output from the mining sector.[40] He further goes on to explain that mining costs are increasing as the years progress and

---

35 P Leon 'Mining sector needs a strong dose of Ramaphosa's Eskom treatment' Business Day 05 FEB 2018.

36 Du Plessis (note 23 above) 15. See also Budget Review National Treasury of The Republic of South Africa 2011.

37 Du Plessis (note 23 above) 15.

38 Du Plessis (note 23 above) 16.

39 Coetzee (note 13 above) table 4.

40 Coetzee (note 13 above) 13.

that that affects turnover outcomes, and that turnover should not be assessed through lay perspectives but should be considered through an economic lens, for a true perspective.

Turnover from an economic perspective assists in not deriving a false sense of security in the South African sector due to a face value turnover assessment of a sector with many volatile variables and considerations.[41]

2.4 Conclusion

Resource nationalisation is a derivative of resource nationalism. Unlike resource nationalism, resource nationalisation aims to exclude private ownership in totality from domestic resource sector participation by transferring all private property to the state. One of the claims advocating for resource nationalisation is the claim for distribution as a form of post-Apartheid economic redress "… to guarantee the flow of resources to critical sectors in our economy…not in order to maximise profit as the current holders of licenses do" ,as noted by the ANC YL 2010 paper.

The stance fot nationalisation is also advocated from the point of the fiscal claims that the state can gain from the sector when the state becomes a full and key player in the market.

However, the success or failure of resource nationalisation in a country is dependent on many complex factors and economics where the equation does not always balance.

Consequently, Coetzee emphasises how we ought not to derive a false sense of security through claims based on volatile variables and considerations.

[41] Coetzee (note 13 above) 13.

CHAPTER 3: POSSIBLE SOCIAL AND ECONOMIC CONSIDERATIONS FOR RESOURCE SECTOR NATIONALISATION

3.1 Introduction

Nationalisation comes with a variety of social and economic consequences that ought to be engaged and carefully considered so their possible negative impacts are mitigated.

Thus, in this chapter I will engage a few of the possible socio-economic considerations that stem from resource nationalisation. I will engage the socio-economic consideration of resource nationalisation without compensation, resource nationalisation with compensation, the impact of resource nationalisation on the labour force as well as the impact of resource nationalisation on environmental matters and concerns.

3.2 Capital consideration

3.2.1 Expropriation

The taking of property from private ownership to state ownership without compensation is known as expropriation.[42] Mining lawyer, Peter Leon, goes as far as arguing that nationalisation that happens swiftly or by decree is akin to expropriation. Zambia is good example of nationalisation that took place in an exceedingly short time-period. However, after Zambian's turn to expropriation there was an even quicker reversal that was instituted moving towards privatisation consequently, denationalisation.

The Venezuelan expropriation experience was also executed by decree. Venezuela's swift oil nationalisation forced private companies into the renegotiation of contracts, contracts typically containing provisions excluding international arbitration or taking the matter into a foreign jurisdiction. Venezuela's renegotiated contracts mostly affected the agreements of companies operating along the Orinoco Belt.[43]

---

42 Nationalisation in South Africa Eco Partners (2010). https://www.ecopartners.co.za/docs/Nationalisation%20of%20South%20Africas%20Mining%20Sector.pdf (accessed 20 September 2018).

43 Nationalisation in South Africa (note 42 above) 2.

The Democratic Republic of Congo followed a similar trajectory to Venezuela in 2007/2008 with the cobalt, gold and copper producers.

To the contra Bolivia's nationalisation policy concerning their oil and gas reserves excluded expropriation as per the then president of Bolivia Morales' policy and agenda of equitable wealth sharing. The Bolivian nationalisation experience through compensation resulted initially in great revenue increases for the government. The consequent economic implications for Bolivia stemmed from institutional capacity constraints that resulted in considerable challenges. [44] Ward argues in her paper that resource nationalisation can never look the same in any country, what is important is to understand the economic culture and economic capacity of a country. The process of a country understanding its economic culture needs to be as transparent as the way of the Central Asians who have openly concluded corruption as a part of their economic culture.[45]

However, the focus is not Bolivia's de-privatisation but the policy and founded or unfounded fear of expropriation in the South African mining sector.

The Constitution of the Republic of South Africa does not permit expropriation, which is the transfer of private ownership into state hands without compensation. [46] The relevant section in the South African Constitution would be S25, the Property clause, which starts from S 25(1)- S 25(9).

S 25(1) -(4) reads as follows;

> "(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
>
> (2) Property may be expropriated only in terms of law of general application— (a) for a public purpose or in the public interest; and (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

---

44 Unpublished: H Ward 'Resource nationalism and sustainable development: a primer and key issues' Unpublished working Paper 18.

45 Ward (note 44 above) 18.

46 The Constitution (note 9 above) S 25(2).

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—

(a) the current use of the property;

(b) the history of the acquisition and use of the property;

(c) the market value of the property;

(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e) the purpose of the expropriation.

(4) For the purposes of this section—

(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and (b) property is not limited to land."

It is evident from S 25(2) that the idea of expropriation, understood in our context as inherently without compensation, is not permissible. However, at present S 25 of the Constitution is under review, after the Economic Freedom Fighters have called for the permissibility of the expropriation of land. The question as to how the review of S 25 will affect other property rights in mining is still not determinable at this point, especially given that property in the property clause, S 25, "is not limited to land".[47] The need for a sound review of S 25 becomes ever more important when one comes to realise that property itself touches on possibly every sector and category of property from intellectual property to shares and rights to but mention a few.

Optima's 2011 November report quoted Allan Gray; a South African investment management company, stating the investment company's findings. The findings stated that the majority of South Africa's shares are in the hands of foreign investors.[48] Allan Gray stated that it is unlikely that even in the case of the alteration and review of S 25,South Africa would ever get to a point where the

[47] The Constitution (Note 9 above) S 25.

[48] A Matshiqi 'Road to nowhere?' (2011) Optima Report 30.

obligation to compensate foreign investors becomes obsolete, this is due to South Africa's various bilateral agreements and bilateral investment treaties (BITs).[49]

Bilateral investment treaties are agreements between two countries governing the treatment of investments made in their respective territories.[50]

International investment law, through the channel of the International Centre for the settlement of Investment Disputes (ICSID) is increasingly seeing greater and more frequent cases of international arbitration due to breach of Bits, and other agreements.[51] International arbitration is typically exceedingly expensive and lengthy , where third parties cannot be joined and parallel proceedings cannot be consolidated.[52]

One may argue that the conversion of "old private" rights to "new order state" rights as per the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) was in effect a form of expropriation. Van der Vyver has written on the unconstitutionality of the MPRDA's transition provisions, which he concludes are in effect expropriation and not deprivation.[53]

Consequently, this brings to light the seemingly new distinction in South African property law between expropriation and deprivation. Perhaps the sentiments reiterated by Goldstone J in *Harkson v Lane* conclude on the above-stated distinction. Goldstone J had the following to say:

> "The distinction between expropriation (or compulsory acquisition as it is called in some other foreign jurisdictions) which involves acquisition of rights in property by a

49 Mashiqi Optima Report (note 48 above) 30.

50 J Wong 'Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treat Violations, and the Divide between Developing and Developed Countries in Foreign Investment Disputes' (2006) 14 *George Mason Law Review* 135.

51 Wong (note 50 above) 135.

52 L Mistelis 'International Arbitration—Corporate Attitudes and Practices—12 Perceptions Tested: Myths, Data and Analysis Research Report' (2004) 15 *American Review of International Arbitration* 542. See also DJ Branson and WM Tupman 'Selecting an arbitral forum: A guide to cost-effective international arbitration'(1983) 24 *Virginia Journal of International Law* 932.

53 JD Van der Vyver 'Nationalisation of Mineral rights in South Africa' (2012) De Jure 139.

> public authority for a public purpose and the deprivation of rights in property which falls short of compulsory acquisition has long been recognised in our law."[54]

One may ask what was the importance of distinguishing between expropriation and deprivation, Nkabinde J answers that in the *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* case. Nkabinde J states that the distinction is particularly important in order to enable the state to allow sound regulation of the use of property for public benefit and good, without the threat and inhibition of incurring liability to the owners of such affected property.[55]

Agri SA appeared to be a test case for mineral right expropriation, a case that could possibly open up an assortment of problems bringing rise to all sorts of claims regarding various right holders. However, the Constitutional Court came to a majority judgment stating that the state did not expropriate mineral rights from private mineral right holders as per the MPRDA's transitional provisions. The court concluded that the transitional provision was one of deprivation and not expropriation.[56]

3.2.2 Nationalisation with compensation

- Sources for capital for initial purchase

On the other end of the spectrum of expropriation is the taking of property from private ownership to state ownership with full compensation at market value, termed by academics as de-privatisation.[57]

The mining sector is exceedingly capital intensive and highly competitive.[58] In 2009, BG (producers of oil and gas) Chief Executive Frank Chapman was reported saying that governments need investments, which will bring in capital which is in demand and short supply the world over. He

54 *Harkson v Lane* NO 1998 1 SA 300 (CC) par 33.

55 *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC) par 63.

56 *Agri South Africa v Minister of Minerals and Energy (2010) (1) SA* para 53.

57 Nationalisation in South Africa (note 42 above) 2.

58 Ward (Note 44 above) 9.

further stated that with increasing global competition in the mining sector investors have prioritised host state stability and the upholding of the sanctity of contracts.[59]

The Optima report refers to the South African Business day 2010 September issue that quotes economists Keeton and White. The aforementioned economists stated that capital outflows would not only pertain to those required for compensation of foreign owned mining shares as part of compensated nationalisation but would also extend to capital outflows in other sectors and markets as shareholders exit.[60]

Keeton and white are further recorded to have said that;

> "Even if foreigners just stopped buying shares, investment levels must fall to our level of savings (15 per cent of GDP) … South Africa will be trapped in low GDP growth (perhaps two to three per cent a year) and soaring unemployment."[61]

It can be deducted that with further market exits from other sectors, the outflows of capital due to mining nationalisation will be far aggravated and far more expensive than what is anticipated with all things equal.[62]

Even at present, the issue of capital availability is a problem for state-owned mining companies, where the state has failed to provide the necessary capital injections when required.

One can even go as far to deduce that the reason of insufficient capital is the very reason state-owned entities as a whole and state-owned mining companies perform below par as compared to their private counterparts.[63]

The State Interventions in the Minerals Sector report (SIMS) of 2012 declares macroeconomic management relating to the financing of nationalisation a challenge, often taking much needed

---

59 Ed Crooks 'Resource nationalism on the wane' Energy editor, Financial Times, 5th February 2009. https://www.ft.com/content/4bafe3e4-f35f-11dd-9c4b-0000779fd2ac (29 September 2018).

60 Mashiqi Optima Report (note 48 above) 30.

61 Mashiqi Optima Report (note 48 above) 30.

62 Mashiqi Optima Report (note 48 above) 30.

63 Mashiqi Optima Report (note 48 above) 30.

funding from other departmental budgets.[64] The SIMS report does not entertain the question for the source of funding for nationalisation, because it has noted the findings of independent economic calculations that concluded nationalisation in South Africa as unaffordable in the short term.

It appears that the discussion regarding funding and the initial purchase of mineral rights as would be required for mineral sector nationalisation, remains an unresolved conundrum. It has however become apparent that in South Africa resource sector nationalisation will be exceptionally expensive for the initial purchase and consequent sector sustenance.

Nationalisation as a policy is a debt-financed buy out of private shareholders.[65] Du Plessis argues that the impact of nationalisation on government's fiscal position is determined by three key factors.[66]

The three factors are as follows; 1) the given government's cost of finance,2) the subsequent financial performance of the nationalised firms,3) Government's prospective enthusiasm in pursuing profit seeking investment, the second factor will be pivotally influenced by the third.[67]

- Sources of revenue to sustain the sector

Nationalisation with compensation would require a substantial amount of capital, not only for the initial compensation of shares, but also for the sustenance of the sector.

For mining operations to continue even after the exit of private capital, the government will need sources of capital, from somewhere, in order to continue with research, expansions of the reserves and the further development of the mines.[68] Furthermore, additional funds will be required to invest in key mining activities such as exploration, which sometimes may have uncertain geological outcomes.

---

64 State Intervention In the Minerals Sector (SIMS) 2012 27.

65 Du Plessis (note 23 above) 6.

66 Du Plessis (note 23 above) 6.

67 Du Plessis (note 23 above) 6.

68 M Nicol 'Nationalisation and the mines' in J Daniel, P Naidoo, D Pillay and R Southall (eds) *New South African Review-The second phase tragedy or farce* (2013) 122.

From the elementary explanation above it is evident that nationalisation, as confirmed by the SIMS report is both expensive for South Africa and unaffordable for South Africa in the short term.

The SIMS report looked into various forms of resource nationalism alongside nationalisation. The report concluded that even putting the argument of nationalisation aside and rendering a 51% state ownership in the South African mining sector would still be unaffordable.[69]

Thus, to answer the question as to where the revenue to sustain the sector will stem from, the answer is we do not know. The possibility of venturing into a 51% state ownership, a lighter option as opposed to nationalisation, will still most probably result in South Africa losing its fiscal sovereignty and consequently following dictates as per the Bretton Woods Institutions under a Structural Adjustment Programme (SAP).[70]

- Resource nationalisation with compensation: precedents and models

Chavez has shown great respect for the Norwegian oil experience from their policies to the running of Statoil.[71] Chavez's admiration of Norway is justified as Norway was an excellent example of a well-oiled national government with careful control over its oil activities. The Norwegian oil experience is a praiseworthy legacy for Norway. The example of Norway is a hope for many oil-rich countries like Colombia, Ecuador, Angola and Azerbaijan, that not all is lost, and that the insatiable beast of corruption is not as universal as often portrayed to be.

When representatives of a medium-sized American oil company approached Trygve in Oslo in the early 1960s, they seemed like they were ready to invade the Norwegian oil exploitation sector, ready to establish a monopoly in a very promising territory.[72]

However, Trygve made no promises. The Norwegian committee, under the headship of a lawyer Evensen, was assigned to elaborate a framework that would establish the granting of concessions.[73]

---

69 SIMS (note 64 above) 28.

70 SIMS (note 64 above) 28.

71 Ryggvik (note 8 above) 5.

72 Ryggvik (note 8 above) 9.

73 Ryggvik (note 8 above) 10.

Conceding to what Ryggvik writes, an important step that Norway took in the best interest of its people was the initial step of the careful consideration of the way forward.[74]

It is important to note that initially the Norwegian state had no technology or capital to exploit its oil reserves. Their approach to exploiting their benefits was based on utilising foreign interest while maintaining control over the developments. One can argue whether the successful Norwegian oil experience was due to strategic ownership and control or just pure luck or both.

When the British made the Brent field find in January 1971, Norway soundly suspected that the find would stretch across and into the Norwegian area. What was important for the state at that point of exceptionally competitive concessions, was to ensure that Statoil get the blocks, initially vying for 100%, but eventually acquiring 50%.[75] Perhaps it was luck or fate that the block acquired by Statoil was the one that contained the Statfjord field. Statoil's acquisition of Statfjord was a significant advantage in making it a competitive role player. The arrangement of Statoil competing alongside foreign companies was well thought out as it enabled an environment for domestic infrastructural development, such as strategic pipelines and technological development and the passing on of knowledge and expertise.

Because oil is a strategic resource, like water, it appears that is the reason the arrangement of Statoil's 50% ownership did not deter foreign company participation. Thus, the same strategy may not work for less strategic resources.

Even the much-exalted example of the nationalisation of oil in Norway did not utilise compensation to institute its nationalisation.

They structured their concession regimes in such a way that after 60years from initial activity all exploitation rights would be returned to the state without compensation.[76] Thus, it is evident that Norway's initials approach, which came into act after 60years was one of strategic expropriation.

74 Ryggvik (note 8 above) 10.

75 Ryggvik (note 8 above) 30.

76 Ryggvik (note 8 above) 15.

3.3 Labour force considerations

3.3.1 Unskilled

- Can the state retain existing levels of employment?

Unemployment in South Africa is an exceedingly grave issue. Forslund writes that the characteristic of the South African economy is a structural demand deficit that is constantly breeding mass unemployment.[77] Assuming all things equal, production, capital and labour produce two income streams namely one for the labour force and the other for the owners of capital.[78] South Africa's income distribution in the resource sector is both a legacy of colonialism and Apartheid and structural and conjunctural wage backlog created after 1994. The wage backlog has built up the frustration of labour, as seen in Impala Platinum Mining in 2012.[79] The built up frustration has resulted from increasing inequality and dire impoverishment.

The South African mining sector is exceedingly labour intensive. Thus, mining activity is regularly interrupted by strike action and in the consequent event of poor financial year performances, leading to retrenchments, and the increase in the unemployment rate.

S 3.12 of the Minerals sector Annual Report 2017/18 addresses matters of labour relations. From the period, starting from 01 April 2017 to 31 March 2018 it has noted zero strike actions.[80]

The report further goes on to table the training needs identified in the stated period and the progress in employing people in those identified need areas. The training and skills development undertaken during such a period are also noted along with the statistics pertaining to employment in line with gender transformative measures in the sector.

---

77 D Forslund 'Mass unemployment and the low-wage regime in South Africa' in Daniel, Naidoo, Pillay and Southall (note 68 above) 96.

78 D Forslund 'Mass unemployment and the low-wage regime in South Africa' in Daniel, Naidoo, Pillay and Southall (note 68 above) 97.

79 D Forslund 'Mass unemployment and the low-wage regime in South Africa' in Daniel, Naidoo, Pillay and Southall (note 68 above) 100.

80 Mineral sector annual report 2017/18 Table 3.12.6 p99 http://www.dmr.gov.za/resources (accessed 30 September 2018).

Working from the premise of nationalisation with compensation one must ask , with the extensive expenses incurred in rights acquisition and transfer from private to the state, will there be sufficient funds and productivity to maintain a quantity of employment that does not require retrenchments.

Brown and Nolan express that wage determination is a complex economics study, where the market is not necessarily the most important determinant in wages.[81] Brown and Nolan further investigate as central to their argument the relationship between wages and productivity.[82]

3.3.2 Skilled

- Can the state afford to retain specialised skills?

The South African mining industry as it stands has no new investors and explorations. Furthermore, the sector has not kept up with international competitors in the standard of work and policy considerations involved in seeking the best type of public private partnerships. The work of extraction requires exploration and unqualified as well as qualified expertise to work in remote areas for long periods. One can reason that the only way a reasonable man with internationally sought after expertise in a competitive sector, would resort to staying in a remote area, is due to good compensation.

In the case of South Africa from the premise that nationalisation is implemented the mere covering of basic production costs will be a guaranteed hurdle. Thus, one cannot even begin to engage the argument on whether the state would be able to retain specialised skill that is inclined to seek the most ideal spaces of employment that offer competitive remuneration.

The SIMS report correctly noted, "no-resource-based industrialisation has succeeded without developing technical skills and technology".[83] Consequently, in a sector that if nationalised will be running on a constant deficit, the capacity of skilled workers will be reduced if not diminished in totality.

---

81 W Brown and P Nolan 'Wages and Labour Productivity: The Contribution of Industrial; Relations Research to the Understanding of pay' (1988) 26(3) *British Journal of Industrial Relations* 339.

82 Brown and Nolan (note 81 above) 340.

83 SIMS (note 64 above) 22.

For optimal performance, it is imperative for every resource sector to invest in knowledge and development. If nationalisation, in the short term, is economically predicted to put the country in extreme debt and potentially tap into other departmental budgets (for initial compensation of the private sector) no room will be left for knowledge development and on-going training.

The South African Department of Education is at present facing challenges in providing standard resources in schools, from running water write up to lab instruments for subjects like Science and Mathematics, required for engineering and geology which are key fields in the resource sector.

In recent years, the idea of shale gas development has been explored. The idea saw the promulgation of the Fracking Regulations, which were later found by the court to be *ultra vires* of the powers granted to the Minister through the Mineral and Petroleum Resources Development Amendment Act, (MPRDA) 49 of 2008.[84] Therefore, the Fracking Regulations never came into force.

However, the initiative to draft and attempt to promulgate the Fracking Regulations predicts the possibility of hydraulic fracturing being pursued again in the near future. The field of hydraulic fracturing is new in South Africa, and requires a specialised knowledge base. If hydraulic fracturing is blindly pursued in South Africa, without the necessary expertise, the results will not only compromise the Karoo underground water supply but also the stability of the country's geology and the capital investments made.

Consequently, if the state it struggling to produce the necessary knowledge and development at primary level, they will undoubtedly be a shortage of knowledge and development in the tertiary level, resulting in a successive resource sector deadlock.

3.4 Resource market considerations

In the 1970s the world witnessed mineral price increases. For mineral producing countries, this increase was an opportunity to retain greater shares of rent, and that was accomplished through

[84] *John Douglas N.O. Stern v the Mineral of Mineral Resources* (2015) EC.

See S 107 of the Mineral and Petroleum Resources Development Act, 28 of 2002 (MPRDA). S 107(1)(a) of the MPRDA gave the Minister authority to pass regulations pertaining to environmental matters. S 107(1)(a) was amended in the Mineral and Petroleum Resources Development Amendment Act, 49 of 2008.

taxation and in other cases through resource sector nationalisation.[85] The common featured tax in these mineral producing countries was a specified rate of return tax; resource rent tax.[86]

In the latter 1990s there was a declining intensity of minerals in global GDP. Many Latin American and African countries felt the punch in consequent poor economic performance. Furthermore, the break-up of the Soviet Union further aggravated the confidence orientated around state ownership.[87]

The Freedom Charter advocates for the sharing of wealth through the extractives industry.[88] The question now becomes with fallible market conditions is nationalisation the low-risk approach to go about ?

In the years when the international resource sector witnessed depressed prices, countries started to pay greater attention and demonstrate greater concern to the types of mining taxes imposed by their competitors. Furthermore, countries resorted to transitioning governments from owner to one of regulator and investment promoter.

In order to attract private sector investment, to share in the market risks, countries reduced state participation in their domestic resource sector and sought a diversification of new arrangements with the private sector, such as private and SMC joint ventures.[89]

Malema, in his then capacity as the president of the ANC YL, stated in the 2011 'Mining for Change' documentary that the nationalisation of mines in South Africa will be pursued in order to return to the black majority the mineral rights stolen by white colonialists. [90]

When looking at the present market in the resource sector internationally we ought to gauge South Africa's ranking among its competitors. The Asian boom of the 2000s , caused by the rapid demand

85 SIMS (note 64 above) 36.

86 SIMS (note 64 above) 36.

87 SIMS (note 64 above) 11.

88 The Freedom Charter Kliptown, Johannesburg, 1955' The people shall share in the country's wealth' para 4.

89 SIMS (note 64 above) 11.

90 Reuters 'Mining for Change' 8 June 2011.

growth in India and China among other developing economies saw a rapid increase in commodity prices. The Asian boom caused many governments to assess on whether they are receiving a reasonable share of the increased profits.

Consequently, governments were adaptive and introduced windfall taxes, as seen in Zambia and Mongolia and super-profits resource rent as seen in Australia.

However, the advantage to be gained in times of commodity boom can only be proportional to the capacity created to adapt policy, to the benefit of the black South Africa majority, without collapse of the sector. The South African extractive industry has failed to grow and prosper in tandem with its international competitors.[91]

With greater and more competitive international participation in the resource sector and no new resource sector investments in South African mining, the market risks are high. High risk implies that there is a lot at stake and a possibility of equally potentially high losses, which permeate right down to the mineworker who is the sole breadwinner of his/her home and cannot afford retrenchment.

Thus, the ANC YL Malema must take into regard that in an uncertain market such as the resource sector the best risk is shared risk. The balanced co-existence of public and private ownership can sometimes do more for the benefit of the people then public ownership in isolation.

3.5 Environmental considerations

3.5.1 How will environmental liability be allocated?

South Africa's present environmental problems stem from an inherited legacy of Apartheid. The Apartheid government's isolation from the rest of the world played a major role in South Africa's detrimental environmental impacts. The impact was vast and grave fundamentally due to a lack of accountability and education innovation resources.

The increasingly unhealthy state of post-Apartheid South Africa is a result of the prolonged deterioration and neglect of the environment, pre 1994 neglect that took place over an extensive

[91] M Nicol 'Nationalisation and the mines' in Daniel, Naidoo,Pillay and R Southall (note 68 above)123.

period.[92] The rapid degradation, exasperated by mining, thus calls for urgent , new, adaptable and innovative strategies in global environmental law and governance.

The urgency required in response to environmental degradation births the introduction of Kotze's anthropocene approach to environmental law. The anthropocene provokes us to rethink and reimagine sustainable development with a human problem-human solution orientated approach.[93]

Mining has an exceedingly adverse effect on the environment. The question is hardly whether the effect is present or absent but rather how the effect can be mitigated during the mining operations as well as after mine closure.

Some of the negative impacts pertain to sinkholes, which compromise the stability of the geology, erosion leading to the loss of fauna and flora biodiversity, and ground and surface water contamination among others.[94]

Mining by its nature is exceedingly water intensive, which is a given problem in a water-scare country like South Africa with an approximate rainfall of 500mm per annum, conservatively rated as the 29th driest country in the world.[95]

It is estimated that by the year 2025, South Africa will be classified as a water scare country.[96] It is clear that the monitoring of environmental impact issues caused by mining need strict, continuous and meticulous regulation especially because coal mining has polluted many underground water sources in the province of Mpumalanga and acid mine drainage has also compromised geological stability and security.

When assessing what we would call global Best Practice the records for State Mineral Companies (SMCs) are wide and vast in results. The records illustrate catastrophic failures as well as sterling

92 P Steyn 'The lingering environment al impact of Repressive Governance: The Environmental; Legacy of the Apartheid Era for the New South Africa' (2003)2 *Routledge* 392.

93 LJ Kotze 'Rethinking Global Environmental Law and Governance in the Anthropocene' (2014) Journal of Energy and Natural Resources Law 121.

94 SIMS (note 64 above) 35.

95 SIMS (note 64 above) 24.

96 SIMS (note 64 above) 24.

successes.[97] However, the common thread in successful SMCs is the overall development level of the country.[98] From a global observation, successful SMCs have the common features of clear and precise distinctions between the state as a regulator and the state as an owner, clear communication system, separation between the company and treasury, full transparency, precise and transparent development goals and the listing of state-owned companies.[99] Thus, Global Best Practice must also be employed in the sphere of environment affairs.

The exclusion of Apartheid South Africa in the international community disabled the country from staying in touch with international development and innovation on environmental law. It is not surprising to note that the legislation and strategy that was eventually enforced was out-dated.[100]

The long term effects of coal mining in Mpumalanga on fresh water lakes as well as acid mine drainage are examples of the environmental legacies left by Apartheid. Legacies that need present monitoring, research technology development and training.

Nationalisation as proposed in the ANC YL 2010 paper is advocated for as a tool for economic emancipation especially for the previously and presently disadvantaged, which are the poor black majority.[101]

Cock reiterates the above sentiments and expresses that, "it is the poor and powerless" most affected by environmental degradation.[102]

S 24R of the National Environmental Management Act (NEMA) deals with mine closure on environmental authorisation.[103] S 24R (1) states the following;

> "Every holder, holder of an old order right and owner of works remain responsible for any environmental liability, pollution or ecological degradation, the pumping and treatment of

97 SIMS (note 64 above) 9.

98 SIMS (note 64 above) 24.

99 SIMS (note 64 above) 24.

100 Steyn (Note 92 above) 393.

101 League ANC Youth (note 21 above) S E para 47.

102 J Cock 'Ask for a camel when you expect to get a goat' in Daniel, Naidoo, Pillay and Southall (note 68 above)159.

103 National Environmental Management Act 107 of 1998 (NEMA), S 24R.

polluted or extraneous water, the management and sustainable closure thereof notwithstanding the issuing of a closure certificate by the Minister responsible for mineral resources in terms of the Mineral and Petroleum Resources Development Act, 2002, to the holder or owner concerned."

S 24R(1) allocates liability for environmental degradation accumulated through mining activities. The liability comes as part of the process of mine closure. To date in South Africa government has only effectively issued one mine with a closure certificate and consequent assigned liability as per S 24R of NEMA.

The lack of effective mine closures and assigned environmental liabilities in South Africa is problematic especially given in the event of nationalisation where the state will be the judge and jury in its own case. The approach is disingenuous and non-progressive. If anything, the default stance that the state becomes a judge in its own case would become a licence for further degradation, degradation that could compromise South Africa's very ability to supply presently scarce water to its citizens and its ability to produce its own food.

For environmental monitoring, evaluation and impact assessments, the state would need a specialised, separate and objective agency to do that, separate from the department of Environmental Affairs and Tourism.

3.6 Conclusion

Van der Vyver argues that nationalisation without compensation, effectively known as expropriation, has already taken place through the transitional requirements from the old order rights as provided by the MPRDA.

However, the Constitutional Court majority judgment has clarified the uncertainties in that regard, reiterating state suzerainty through *the Agri SA* judgment. The court stated that expropriation would have only taken place if the rights of private shareholders were transferred to the state and not as it were that the state became custodian of the rights and the people of South Africa the owners.

It appears given the above considerations that South Africa will not be able to afford nationalisation with compensation. Resource nationalisation in South Africa may potentially breed a sea of problems in terms of labour retrenchments and environmental regulation. Due to the growing competitiveness of the international extractive industries, South Africa's resource sector would most likely lose key skills and expertise to its competitors.

Furthermore, as South Africa tackles the disastrous legacy of coal mining in Mpumalanga and its impact on the environment, South Africa cannot afford environmental regulation that is vague. The state as well as the environment cannot afford to deal with blurred lines where the state is judge and jury.

CHAPTER 4: MITIGATING THE SOCIO-ECONOMIC IMPACTS OF RESOURCE NATIONALISATION OR PROVIDING ALTERNATIVES

4.1 Introduction

Moving from the stance that resource nationalisation is in fact implemented in South Africa, it is sound that the socio-economic considerations discussed in chapter 3 be mitigated or given absolute alternatives.

In this chapter, I will be engaging the alternatives or mitigating factors pertaining to resource nationalisation, which may, in some cases, switch resource nationalisation to resource nationalism. I will engage how Foreign Direct Investment can be accommodated through the employment of fiscal linkages. I will also engage ways in which the South African government can increase its bargaining power in the resource sector by being more competitive. I will also look into how market risk can be shared and how environmental issues can be soundly approached; especially pertaining to the allocation of environmental degradation liability.

4.2 Accommodating Foreign Direct Investment through mineral economic linkages

4.2.1 Understanding Foreign Direct Investment

In many countries, the capture of Foreign Direct Investment (FDI) is an important aspect of stimulating capital inflows and developing the local economy. FDI spillover is a concept that speaks of the transmission of skills from multinational enterprises to domestic firms.[104]The transmission pertains to factors of production, process, management and marketing skills as well as distribution technology.[105] Findings from the research of Arnold and Javorcick demonstrate that multinational companies tend to invest more in personnel training in host countries as oppose to the local firms.[106]

---

[104] MP Fountoura 'Determinannt factors of FDI Spillovers-What do we really know?' (2007) 35(3) *World Development* 410.

[105] M Blomstrom,A Kokko M and Zejan 'Host country competition, labour skills, and technology transfer by multinationals' (1994) Review of World Economics 247.

[106] J Arnold and B Javorcick 'Gifted kids of pushy parents? Foreign acquisition and plant performance in Indonesia' (2005) The World Bank.

The data available covering the productivity of economic spillovers is inconsistent and varies from country to country.[107]

This perhaps emphasises the conclusion of Banga, which states that the nationality of the foreign direct investor has a grave influence on the productivity of the FDI spillovers and the transfer of technology, skills and expertise.[108]

Consequently moving from the premise of Banga's findings what is equally important in generating FDI is the nationality of the foreign investor.

It is often argued that China's timing to invite South Africa into BRIC was a masterstroke strategically done to overtake Beijing in building a political capital in Africa.[109] Before South Africa joined, BRIC was an acronym that was coined in 2011 by Jim O'Neill; an economic analyst in Goldman Sachs.[110] In his 2011 paper 'Building Better Global Economic BRICS' he concluded that by the year 2050 Brazil, Russia, India and China would be the most dominant economies in the world, as together they composed 40% of the world's population,25% of the world's land coverage and a combined GDP,at the time, of US$18.486 trillion. However to reiterate the sentiments expressed by Naidu it is difficult to see the benefits of BRIC ,now BRICS, for South Africa which will never match the size and value of the contractual arrangements of India and China.[111]

If anything, it appears that South Africa's admission into BRICS is simply a strategic economic power penetration into Africa for the other member states, especially the Chinese. It has been evident on numerous occasions, across Africa, that having China as a foreign direct investor has led to little to no FDI spillovers, especially in the form of skills transfer and labour, as they opt to bring their own labour.

---

107 Fountoura (note 104 above) 411.

108 R Banga 'Do productivity spillovers from the Japanese and the US FDI differ?' (2003).

109 S Naidu 'South Africa and the BRIC: Punching above its weight' in Daniel, Naidoo, Pillay and Southall (note 68 above) 305.

110 S Naidu 'South Africa and the BRIC: Punching above its weight' in Daniel, Naidoo, Pillay and Southall (note 68 above) 300.

111 S Naidu 'South Africa and the BRIC: Punching above its weight' in Daniel, Naidoo, Pillay and Southall (note 68 above) 304.

Perhaps the state ought to urgently introspect on the value of South Africa's membership into BRICS and assess the foreign direct investors it invites to do business in South Africa.

However, the brief assessment of South Africa's admission into BRICS, the Chinese power invasion in Africa and its poor FDI spillover productivity emphasises the caution raised by Banga. Banga warns us to beware of the foreign nationality policies and styles of business entertained. China, with a reputation for poorer standards of operation, has a rapid growing presence in Africa.

Yet, our understanding of China's role in African sustainable development is yet to be established.[112] It would be a shame for post-colonial, post-Apartheid South Africa to transit from one form of economic servitude to another through economic neo-colonialism.

4.2.2 Creating mineral economic linkages

International best practice emphasises that mineral asset growth, employment potential and development can be realised through the maximisation of mineral economic linkages as seen in Brazil, China and Finland.[113] The Africa Mining Vision contains key strategies for the maximisation of mineral resource development. The African Mining Vision soundly emphasises the need for mining to be integrated into the rest of the domestic economy through mineral economic linkages.

All in all linkages pertain to the spillover of mineral extraction economic activity to domestic economic activities such as manufacturing, entrepreneurship and infrastructural development. Extractive industries go through various phases of production thus a perfect candidate sector to be utilised for domestic economic development through linkages. To reiterate the sentiments expressed by the Africa Mining Vision, economic linkages are exceptionally important in that they allow the economy to grow and function, even long after the demise of the mining sector in any chosen African state. Below I will elaborate on five different types of linkages expected from mineral economic activities.

[112] D Haglund 'Regulating FDI in weak African states: a case study of Chinese copper mining in Zambia' (2008) *The journal of modern African Studies* 548.

[113] African Mining Vision*:* In 2009 the African Union (AU).

- Fiscal Linkages

For a state like South Africa with gross historical economic injustice for the black majority, an injustice that has permeated into the present rent capture in the resource sector is exceptionally important. Sinner and Scherzer describe resource rent as the difference between the cost of extraction and the price at which the resource can be sold, inclusive of normal returns.[114]

The most elementary medium of capturing resource rents is through taxation. In the SIMS report a recommendation of a resource rent tax (RRT) of 50% on all mining was made.[115] The recommendation further justifies this amount by saying the tax will not affect low grade deposits as the tax will only trigger into action after normal returns on investments have been achieved.[116]

Another means of generating fiscal linkages is by introducing policies of local content, linking up to the local economy and supporting macro-economic growth. Local content prescribes for the involvement of the local economy in the different stages of the mine life cycle; from prospecting, feasibility studies, establishment, operations and decommissioning.[117] The commission on growth and development stated the following;

> "Growth is not an end in itself. But it makes it possible to achieve other important objectives of individuals and societies. It can spare people from poverty and drudgery. Nothing else ever has."

In summary the employment of fiscal linkages aims to facilitate growth. The need for development and growth in any sector can never be over emphasised. Growth in any sector is necessary to achieve respective state objectives whether of poverty eradication or a greater educational capacity.

---

114 J Sinner and J Scherzer 'The public interest in resource rent'(2014) https://www.researchgate.net/publication/252279129_The_public_interest_in_resource_rent (accessed 03 October 2018).

115 SIMS (note 64 above) 36.

116 SIMS (note 64 above) 36.

117 Hansen (note 4 above) 204.

The matter of fiscal linkages through additional forms of taxation and local procurement has been an on-going debate since the release of Mining Charter 3.[118] Zwane's Mining Chapter 3 proposes its aim to ensure mining town communities benefit through a proposed 5% carried interest for employees and host communities.

Much opposing commentary has been made on the ideas of free carried interests saying it will only pose as a repellent to foreign investment. In a lecture given by prominent mining lawyer Peter Leon, he emphasised how excessive forms of resource taxes can easily be a form of backdoor expropriation. In a consequent lecture given by Dr Willem J Jacobs of Randgold resources, at the University of Pretoria, July 2018, Dr Willem reiterated his disdain of Mining Charter 3's proposal of the carried interest.

The proposals made by the mining charter in the attempt of empowering local communities are honourable ones, especially for communities dealing with the direct consequences of extraction. However, even in the event of implementing fiscal policy considerations to provoke linkages to local economies, it remains exceptionally important that there remains a sound balancing of interests.

- Forward Linkages

Forward Linkages pertain to downstream mineral beneficiation. These downstream linkages are key linkages for labour absorption and should be optimised while South Africa still has competitive grades of mineral resources.[119] The mining sector in South Africa provides key feedstock into many labour-absorbing sectors such as manufacturing of steel from iron ore, base metals from zinc, nickel and copper and polymers from coal, oil and or gas.[120]

The second strategic sector permeated by mining is the power generation sector which utilises coal, as it predominantly stands in South Africa, as well as gas , uranium and limestone for the washing of emissions.[121]

The third sector is the sector of agriculture, which utilises gas for NPK-nitrogen, sulphur and limestone for the production of conditioners and potassium.

---

118 South African Mining Charter 3 (draft charter).

119 SIMS (note 64 above) 40.

120 SIMS (note 64 above) 40.

121 SIMS (note 64 above) 40.

The above-mentioned mineral feedstocks are mostly supplied to the South African economy at gravely exploitative prices. The states inability to set up forward or downstream linkages is overall crippling to South African economic growth and development.

Even worse than the failure of state to set up forward linkages, is the state's leisurely response to the urgent need for the creation of employment in South Africa. As it presently stands the unemployment in South Africa has reached unacceptable levels for any state that would deem itself democratic and progressive. What further aggravates matters is the largest group among the unemployed is the youth, who should be strategically positioned for the absorption of knowledge and development.[122] With a majority unemployed youth, any succession plan in FDI productivity spillover becomes an effort as good as none.

- Backward Linkages

Backward linkages speak to mining inputs or supplier industries. Backward linkages are integrated into the sector and mainly construe of services, consumables and the supply of capital goods. These are exceptionally important because they are economic linkages that can outlive the life of mines and contribute to sustainable development. The Norwegian oil experience is exemplary in its illustration of backward linkages where through its backward linkages it was able to independently continue to be a key and robust exporter and leader in efficient oil exploitation.[123] Mining is knowledge and technologically intensive. The investment of backward linkages through knowledge and technological advancement and exposure forms a sector that may even transit through lateral migration and into the improvement of other sectors beyond exploitation or extraction.

- Spatial Linkages

Spatial linkages refer to the sidestream collateral use of local economic development and mineral infrastructure. Mining and the mineral sector as a whole is capital-intensive requiring specified and advanced technological and infrastructural development. The infrastructure links to local, regional,

---

[122] Statistics South Africa 'formal employment declines in second quarter of 2008 http://www.statssa.gov.za/?p=11578 (accessed 31 October 2018).

[123] Ryggvik (note 8 above) 53.

provincial and national economies if strategically constructed.[124] Foreign mineral investment can easily catapult a countries infrastructural development, as the minerals sector by its nature requires power sources, transportation platforms, such as roads and railways as well as ports.

The development of the aforementioned infrastructure can create economic activity in formerly isolated areas and enhance economic activities in areas with existing low economic activity.[125]

The SIMS report tables a record of the type of spatial linkages established in various countries. What the data illustrates is a more coordinated approach to spatial development in the Nordic counties as compared to the tabled African counterparts, which show less coordinated and consistent spatial development.[126]

The above data on spatial linkages comparing the Nordic countries to the likes of Botswana, Zambia and Namibia shows the need for more structure and comprehensive policies that will provide for the realisation of spatial linkages.

Spatial linkages assist in increasing the number of exports in a country. A Human Science Research Council model indicated that a mere 30% increase in exports would result in the creation of approximately 280 000 jobs across South Africa.[127]

The strategic development of spatial linkages will benefit mining communities in that even after the decommissioning of mines the infrastructural development can be put to constructive use by other sectors beyond extraction, consequently maintaining sustainable economic activity and avoiding the mining ghost town trend of the last century.

- Knowledge Linkages

The resource sector or extractives industry requires specialised knowledge in order to develop and grow sustainably. The year 2018 marks the second anniversary of the tragedy of the collapse of Lily mine in Louieville, east of Barberton in the province of Mpumalanga. The collapse of the crown rock

124 SIMS (note 64 above) 22.

125 SIMS (note 64 above) 22.

126 SIMS (note 64 above) 23.

127 SIMS (note 64 above) 24.

due to a poor mine construction judgment by the engineers left three mineworkers; Pretty Nkambule, Yvonne Mnisi and Solomon Nyirenda trapped underground. Beyond the appalling inaction of then Minister Mosebenzi Zwane and his Department of Mineral and Resources team (DMR), the tragedy is a sore reminder of the need for investment in the expertise knowledge of extractive industries.[128]

Consequently, the only way for South Africa to realise effective and optimal fiscal, spatial, forward and backward linkages is through the strategic investment into specialised human and technological development in the sphere of knowledge linkages. The investment made into subjects like mathematics and science at a primary level through resource rent tax (RTT) will encourage the development of the necessary artisans, geologists and engineers necessary for extractive industry life cycles.[129]

4.3 Increasing government bargaining power for a competitive host extractive industry

In their paper Fosfuri, Motta and Ronde discuss FDI spillovers and its effect on labour. Labour that has previously worked for multinational enterprises (MNE) is exposed to experience, knowledge and technology that can eventually be utilised in domestic firms.[130]

The disadvantage, to the host state, that may arise is that MNEs have the financial capacity to attract the best workers from domestic firms by offering them higher wages.[131]

Therefore, for the host state to retain its best labour especially in the category of skilled labour, its bargaining power and competitiveness in the resource sector ought to be improved.

When MNEs are able to substitute for a host country's resources due to the high level of competition with other countries, the MNE's bargaining power increases while the host country's

---

128 D Makatile 'Bodies of 3 Lily mine workers till underground, families still not paid' 11 February 2018 https://www.iol.co.za/news/south-africa/mpumalanga/bodies-of-3-lily-mine-workers-still-underground-families-still-not-paid-13222721 (accessed 10 October 2018).

129 SIMS (note 64 above) 46.

130 A Fosfuri, M Motta and T Rønde 'Foreign direct investment and spillovers through workers' mobility' (2001) 53(1) *Journal of international economics* 214.

131 E Sinani,KE Meyer 'Spillovers of technology transfer from FDI: the case of Estonia'(2004) 32(3) *Journal of comparative economics* 446.

bargaining power decreases.[132] Tugwell illustrates the dynamics in bargaining power through the example of Venezuela and Russia. Tugwell, correctly states, that the high oil prices at the time were exceptionally instrumental in allowing the host states to receive more favourable conditions with the international oil companies.[133]

The type of regime or mining model employed by a host country can either increase or decrease its bargaining power.

Generally there are two types of regimes that a country can employ in the granting of mineral rights, first is the licence regime and secondly the concession regime. A license regime works as an ordinary licence requires. It merely requires compliance to the set out requirements and if the requirements are met the licence is granted, no discretion given. Secondly, there is a concession regime; this regime serves as a competitive resource tender where the best tender is initiated by the government.

The question then is how does a state choose which regime to follow in order to obtain the most optimal outcome of the utilisation of its mineral resources.

The answer to that is that states must look at the socio-economic history, political background as well as the current socio-economic needs of a country.

It is often best that known mineral deposits must have higher requirements for investors, and that can be accomplished through a competitive concession regime. Unfortunately, known unexploited deposits in South Africa were not granted by the MPRDA through concession but through a licencing regime.

However regardless of the regime employed going forth South Africa ought to employ international best practice in ensuring that legislation regulates resources in terms of ownership. In terms of ownership the South African Constitution, if amended ,must with the efforts of tackling one problem

132 Vivoda (note 15 above) 518.

133 F Tugwell '*The politics of oil in Venezuela*' (1975) Stanford University Press.

at a time, clearly distinguished land rights from other property rights, as "property is not limited to land".[134]

4.4 Sharing the resource market risk

Heightened commodity prices usually trigger higher taxation rates, while depressed prices lead to lower taxation rates. The SIMS report suggests the introduction of a Sovereign Wealth Fund (SWF), which is an increasingly popular concept around the world.

The report states that the investments of proceeds in a SWF will improve the strengthening of South African currency during commodity booms and possible decline in other sectors, also known as the Dutch Disease.[135] The market is unpredictable and the introduction of SWF will stabilise resource revenues during times of depressed prices and will assist in the long term in accumulating sufficient funds. The derivative funds can then be invested into fiscal stabilisation contingencies, or future funds for the access of future generations as seen in Norway.[136]

4.5 Monitoring environmental considerations, restructuring and separating powers

Thousands of people die per annum due to coal pollution in the Highveld resulting from coal mining.[137] Human death is one of the more aggravated effects of the environmental impacts from the Witbank coalfields but the impacts also permeate to more primary effects like deteriorated groundwater and air quality, spontaneous combustion and crownhole developments in the geology.[138] It is revolting when one begins to try comprehend the poor quality of life thousands of residents of the Highveld region need to bear with on a daily due to the far-reaching effects of coal extraction in the Highveld. Communities in the mining town of Witbank have had to be relocated due to the compromised geology and sink holes in the ground. All these impacts are ongoing and a result of inherited poor environmental management from the Apartheid government and a lack of urgent environmental reaction from the post 1994 government.

---

134 The Constitution (note 9 above) S 25 (4)(b).

135 SIMS (note 64 above) 37.

136 SIMS (note 64 above) 38.

137 FG Bell, SET Bullock, TFJ Hälbich and P Lindsay 'Environmental impacts associated with an abandoned mine in the Witbank Coalfield, South Africa' (2001) 45(2-3) *International Journal of Coal Geology* 195.

138 Bell and others (note 137 above) 195.

It is the residents of the Highveld that have accepted nose bleeds, sinusitis and eye irritation as expected issues, who can tell you the real price of poor environmental management.

Working from the premise that the state does nationalize, it will find itself as the one running the mining operations as well as the one regulating environmental compliance which in turn removes all forms of objectivity which will likely result in a complete irretrievable breakdown of the environment.

Cock writes that the South African government has no legislation requiring the reduction of emissions although aware of the seriousness of climate change among other environmental impacts.[139] The South African government's 2011 white paper response to national climate change dismally failed to engage the full impacts of climate change and environmental degradation.

It is evident that even in the present separated powers of actor and regulator the state is still failing to regulate environmental impacts and the assignment of liability, consequently provoking Cock's call for transnational civilian solidarity on environmental matters. It is clear that the state will have to choose between either the running of mining operations or the regulating of operations but it cannot be both. If the state opts for both owner and regulator, one will eventually be compromised.

4.6 Conclusion

Resource nationalisation has been evaluated and concluded to be unsustainable for the short term in the South African economy. If poverty alleviation and economic empowerment of the black majority is a real priority to the government nationalism, employed with the balancing of interests, should trump the possible policy of nationalisation. Mineral resource linkages to the domestic economy must be prioritised through fiscal linkages, forward linkages, backward linkages, spatial linkages and most importantly knowledge linkages and consequent FDI productivity spillovers.

For the sake of sustainable resource sector development, South Africa must strategically allocate its mining right regime depending on the knowledge possessed on the various deposits. Concession regimes, which are competitive resource tender, must be utilised for known deposits while licence

[139] J Cock 'Ask for a camel when you expect to get a goat' in Daniel, Naidoo, Pillay and Southall (note 113 above) 160.

regimes employed for uncertain of unknown deposits. The type of regimes used will have a great influence on South Africa's bargaining power and consequently its retention of specialised and expertise extractive industry labour.

South Africa has inherited more than just racial based economic inequality from Apartheid; it has also inherited the dilapidated legacy of poor environmental law, regulation and environmental liability allocation. It is imperative going forth that we understand that the past problems of colonialism and Apartheid did not dissolve in 1994, but are legacies that must be dealt with and tackled head on. If the approach in tackling these inherited injustices requires us to accommodate FDI then so be it, as long as it will be to the greater good and service of present and future South Africa and its sons and daughters.

CHAPTER 5: CONCLUDING REMARKS

The call for the amendment of the Constitution of The Republic of South Africa's property clause, S 25, has undoubtedly illustrated the power of the people.[140] The call also illustrated the power of politics in championing ideas to communities and persons who would not otherwise ordinarily be participants and ambassadors of those ideas. It is always a brilliant sight to witness a democracy in action where the law is in line with the sentiments and convictions of "we the people".[141]

The call for the amendment of S 25 is a possible prediction of the re-advocacy of consequent policy, namely; the nationalisation of key industries including mining.

The study aimed to be an active participant in the enforcement of S 32(1) (b) of the Constitution of the Republic of South Africa; the right to information "required for the exercise and protection of rights".

The study aimed to contribute to community education specifically on the subject of resource nationalisation as a derivative of resource nationalism. In the spirit of creating accessible information, the study was annexed with an English poster on the subject at hand, which was further translated into Isizulu on the reverse side. The poster will be made available for distribution among all stakeholders, in and around the mining community of Emalahleni, Mpumalanga, South Africa.

Many South African communities experience grave and on-going exploitation through political narratives channelled through the concerns within the extractive industries. Communities experience exploitation mainly due to a deficiency in legal education and their rights pertaining to extractive industries. The moment communities are empowered in knowledge they will be better equipped to use available channels to protect their rights whether it is from mining companies or political spin.

That was the most important point of the study to create accessible community and political education that will serve as a means to the end, which is the balance of expectations and informed community and political decision making in the area of extractive industries.

140 The Constitution (note 9 above) S 25.

141 The Constitution (note 9 above) preamble.

The objective was to investigate the socio-economic considerations of resource sector nationalisation as seen around the world. Thereafter, consequently identifying the relevant solutions for their mitigation or in the absence of solutions find alternatives. Chapter 3 and 4 specifically met the outlined objectives.

Chapter 2 contextualised resource nationalisation as a derivative of resource nationalism. Where, unlike resource nationalism, resource nationalisation excludes private ownership in totality from domestic resource sector participation by transferring all private property to the state. One of the claims advocating for resource nationalisation is the claim for distribution as a form of post-Apartheid economic redress "… to guarantee the flow of resources to critical sectors in our economy…not in order to maximise profit as the current holders of licenses do" ,as noted by the ANC YL 2010 paper.

The stance of nationalisation is also advocated for from the point of the fiscal claims that the state can gain from the sector when the state becomes a full role-player in the market. However, the findings stated that the success or failure of resource nationalisation in a country is dependent on various complex factors and economics. Consequently, Coetzee emphasises how advocates for resource sector nationalisation ought not to derive a false sense of security through claims based on volatile considerations and variables.

Chapter three identified specific socio-economic considerations namely capital, labour, market and environmental. Furthermore, the argument of Van der Vyver was explored. Van der Vyver argued that nationalisation without compensation, has already taken place through the transitional requirements from the old order rights to the new as provided by the MPRDA.

The Constitutional Court majority judgment consequently clarified the concerns raised by Van der Vyver. In the *Agri SA* judgment the court stated that expropriation would have only taken place if the rights of private shareholders were transferred to the state and not as it were that the state became custodian of the rights and the people of South Africa the owners.

The Primary question of the study was premised from the hypothetical premise that South Africa does in fact implement resource nationalisation in the short term. The primary questions asked how South Africa can mitigate socio-economic considerations of resource nationalisation.

Chapter 4 answered the primary research question where it concluded that resource nationalisation in South Africa would most likely breed a multiplier effect of problems in terms of labour retrenchments and environmental regulation among others.

If poverty alleviation and the economic empowerment of the black majority rest as a real priority to the government nationalism employed with the balancing of interests, should trump the possible policy of nationalisation. Mineral resource linkages to the domestic economy must be encouraged in legislation and prioritised through fiscal linkages, forward linkages, backward linkages, spatial linkages, most importantly knowledge linkages, and consequent FDI productivity spillovers.

South Africa has inherited more than just racial based economic inequality from Apartheid; it has also inherited the dilapidated legacy of poor environmental law, regulation and environmental liability allocation. It is imperative going forth that we understand that the past problems of colonialism and Apartheid did not dissolve in 1994. If the approach in tackling these inherited injustices requires us to accommodate FDI then so be it, as long as it will be to the greater good and service of present and future South Africa.

The secondary research question asked whether resource nationalisation is a sound transformative tool for African countries to utilise in order to alleviate black poverty. The above-research has illustrated that resource nationalisation will be unaffordable in South Africa for a very long time. If, despite the empirical data the state insist to employ it, the economy as a whole will see an outflow of capital and once again, it is the poor and marginalised that will feel the greatest impact through retrenchments, unemployment, poor environment regulation and poverty. Thus, it cannot be universally concluded if resource nationalisation is a sound transformative tool for African countries to utilise in order to alleviate black poverty. However, it can be specifically concluded that for South Africa in the short term, resource nationalisation is not a sound approach.

According to historical timelines, South African colonisation and Apartheid are recent events in history. To facilitate redress we need strategic means of exploiting the resources we have for the benefit of all, especially the presently marginalised and excluded black majority. Complete ownership is not always the most optimal way of accessing resource rents. Like the example of the Norwegian oil experience, taking into caution the lessons from Venezuela, the course to resource ownership and being key players can be done through public private partnership.

Popular ideologies do not feed a hungry stomach, but comprehensive and well-executed socio-economic strategies that retain revenue, whether through private or public ownership, and filter it down to the very communities they ought to serve can do so.

Before advocating for any sort of policy, especially in the resource sector, a significant player in the South African economy, may we provoke, investigate and interrogate before we initiate. May these be lessons for South Africa.

UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

ANNEXURE

BIBLIOGRAPHY

Books, book chapters and journal articles

Arnold, J. and Javorcick, B. 2005,"Gifted kids of pushy parents? Foreign acquisition and plant performance in Indonesia" The World Bank.

Banga, R. 2003, "Do productivity spillovers from the Japanese and the US FDI differ?".

Bell, F.G. Bullock, S.E.T. Hälbich, T.F.J. and Lindsay, P. 2001,volume: 45(2-3), "Environmental impacts associated with an abandoned mine in the Witbank Coalfield, South Africa" *International Journal of Coal Geology*.

Blomstrom, M. Kokko, A. and Zejan, M. 1994,"Host country competition, labour skills, and technology transfer by multinationals" Review of World Economics.

Branson, D.J. and Tupman, W.M. 1983,"Selecting an arbitral forum: A guide to cost-effective international arbitration" *Virginia Journal of International Law* 932.

Bremmer, I. and Johnston, R. 2009, "The Rise and Fall of Resource Nationalism, Survival" *DOI: 10.1080/00396330902860884*.

Brown, W. and Nolan, P. 1988,volume:26(3),"Wages and Labour Productivity: The Contribution of Industrial; Relations Research to the Understanding of pay"*British Journal of Industrial Relations* .

Chang, R. Hevia, C. and Loayza, N. 2009, "Privatization and nationalization cycles" *The World Bank*.

Chesterman, S. 2007,volume: 23," The turn to ethics: Disinvestment from multinational corporations for human rights violations-the case of Norway's sovereign wealth fund" *University. International Law Review* .

Chua, A.L. 1996, volume 95:2, " The Privatization-Nationalization Cycle: The Link between Markets and Ethnicity in Developing Countries" *Columbia Law Review*.

Cock, J. 2013, "Ask for a camel when you expect to get a goat' in J Daniel, P Naidoo, D Pillay and R Southall (eds) *New South African Review -The second phase tragedy or farce*" ,Wits University Press, Johannesburg.

Coetzee, C. 2010, "The proposed nationalization of mines in South Africa – a critical assessment" *Province of Kwa Zulu Natal, Provincial Treasury IGR Unit.*

Commission on Legal Empowerment of the Poor. 2008, " Making the Law Work for Everyone" Working Group Reports.

Du Plessis, S. 2011, "Nationalising South African mines: Back to a prosperous future, or down a rabbit hole?" *In Presidential address to the Biennial Conference of the Economic Society of South Africa, Stellenbosch*.

Eco Partners, 2010, "Nationalisation in South Africa" https://www.ecopartners.co.za/docs/Nationalisation%20of%20South%20Africas%20Mining%20Sector.pdf (accessed 20 September 2018).

Forslund, D. 2013, volume : 3," "Mass unemployment and the low-wage regime in South Africa" in J Daniel, P Naidoo, D Pillay and R Southall (eds) *New South African Review-The second phase tragedy or farce*, Wits University Press, Johannesburg.

Fosfuri, A. Motta, M. and Rønde, T. 2001,volume 53(1), "Foreign direct investment and spillovers through workers' mobility" *Journal of international economics*.

Fountoura, M.P. 2007,volume: 35(3), "Determinannt factors of FDI Spillovers-What do we really know?" *World Development* .

Haglund, D. 2008, " Regulating FDI in weak African states: a case study of Chinese copper mining in Zambia" *The journal of modern African Studies*.

Hansen, M.W. Buur, L. Kjær, A.M. and Therkildsen, O. 2016,volume 43:2, "The Economics of Local Content in African Extractives: lessons from Tanzania, Uganda and Mozambique" *Forum for Development Studies Routledge*.

Kahn, M. 2013 , "Natural resources, nationalism and nationalisation" *The Journal of The Southern African* .

Kotze, L.J. 2014, "Rethinking Global Environmental Law and Governance in the Anthropocene" Journal of Energy and Natural Resources Law.

Leon, P. 05 FEB 2018,"Mining sector needs a strong dose of Ramaphosa's Eskom treatment" Business Day.

Matshiqi, A. 2011,"Road to nowhere?" Optima Report 30.

Merrill, T.W. Smith, H.E. 2017,volume:3 " *Property: Principles and Policies " University Casebook Series St.Paul: Foundation Press. ISBN 978-1-62810-102-7.*

Mistelis, L. 2004,volume: 15, "International Arbitration—Corporate Attitudes and Practices—12 Perceptions Tested: Myths, Data and Analysis Research Report" *American Review of International Arbitration.*

Naidu, S. 2013, "South Africa and the BRIC: Punching above its weight" in J Daniel, P Naidoo, D Pillay and R Southall (eds) *New South African Review -The second phase tragedy or farce* ,Wits University Press, Johannesburg.

Nicol, M. 2013,volume : 3,"Nationalisation and the mines"in J Daniel, P Naidoo, D Pillay and R Southall (eds) *New South African Review-The second phase tragedy or farce*, Wits University Press, Johannesburg.

Ramose, M.B. 2001, volume:3 ,"An African perspective on Justice and Race" *Polylog Forum for Intercultural Philosophy.*

Ryggvik, H. 2010, "The Norwegian oil experience: A toolbox for managing resources?" *Centre for Technology Innovation and Culture, University of Oslo*.

Sinani, E. Meyer, K.E. 2004,volume: 32(3), "Spillovers of technology transfer from FDI: the case of Estonia" *Journal of comparative economics*.

Steyn, P. 2003,volume:2, "The lingering environment al impact of Repressive Governance: The Environmental; Legacy of the Apartheid Era for the New South Africa" *Routledge*.

Tugwell, F. 1975,"*The politics of oil in Venezuela*'" Stanford University Press.
Unpublished working Paper 18.

Van der Vyver, J.D. 2012, "Nationalisation of Mineral rights in South Africa" De Jure.

Vivoda, V . 2009, volume 14:4, "Resource Nationalism, Bargaining and International Oil Companies: Challenges and change in the new millennium" *New Political economy* .

Ward, H. "Resource nationalism and sustainable development: a primer and key issues"

Wong, J."Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treat Violations, and the Divide between Developing and Developed Countries in Foreign Investment Disputes" (2006) 14 *George Mason Law Review* 135.

Theses and dissertations

Pockock M.A. 2017, " The Causes of the Rentier State: A Comparative Study of Bolivia and Venezuela" unpublished Masters'Dissertation, Erasmus University,Rotterdam.

Reports, discussion papers and Charters

ANC Youth League. 2010,"Towards the transfer of mineral wealth to the ownership of the people as a whole: a perspective on nationalisation of mines" *African National Congress Youth League discussion document*.

Mineral sector annual report 2017/18 http://www.dmr.gov.za/resources (accessed 30 September 2018).

State Intervention In the Minerals Sector (SIMS) 2012.

Statistics South Africa 'formal employment declines in second quarter of 2008M http://www.statssa.gov.za/?p=11578 (accessed 31 October 2018).

The Freedom Charter, Kliptown, Johannesburg,1955.

Internet sources

Crooks ,E.D,2009, " Resource nationalism on the wane" Financial Times, 5th February

https://www.ft.com/content/4bafe3e4-f35f-11dd-9c4b-0000779fd2ac (29 September 2018).

Makatile, D. 11 February 2018 , "Bodies of 3 Lily mine workers till underground, families still not paid" https://www.iol.co.za/news/south-africa/mpumalanga/bodies-of-3-lily-mine-workers-still-underground-families-still-not-paid-13222721 (accessed 21 September 2018).

Sinner, J. and Scherzer, J.2014, "The public interest in resource rent" https://www.researchgate.net/publication/252279129_The_public_interest_in_resource_rent (accessed 03 October 2018).

Legislation

Broad Based Black Economic Empowerment Act 46 of 2013 (BBBEE).

Coloured Areas Act, Act No 31 of 1961.

Mineral and Petroleum Resources Development Act, 28 of 2002 (MPRDA).

National Environmental Management Act 107 of 1998 (NEMA).

Natives (Abolition of Passes and Co-ordination of Documents) Act 67 of 1952.

Separate Representation of Voters Act 46 of 1951.

The Constitution of the Republic of South Africa, 1996.

Cases

Agri South Africa v Minister of Minerals and Energy (2013) (4) SA 1 (CC).

Agri South Africa v Minister of Minerals and Energy (2010) (1) SA.

Harkson v Lane NO 1998 1 SA 300 (CC).

John Douglas N.O. Stern v the Mineral of Mineral Resources (2015) EC.

Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government 2009 6 SA 391 (CC).

International instrument

African Mining Vision*:* In 2009 the African Union (AU).

Fraser Institute . 2017, “Survey of mining companies”.

Fraser Institute. 2016, “ Economic Freedom Ranking”.

Documentaries

Reuters, 8 June 2011, “Mining for Change”.